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SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION

DOCKET NO. A-002649-23

CIVIL ACTION

ON APPEAL FROM:

SUPERIOR COURT OF NEW JERSEY LAW DIVISION – MIDDLESEX COUNTY, NO. MID-L-6360-23

Sat below:
HON. ANA C. VISCOMI, J.S.C.

CHALLENDER. TYSON COHRON, CINTIA CORSI, ANDI ELLIS, LAURIE FRANTZ, ASHLEY GARRISON, ANGELA GREEN, CARLOS GUTIERREZ, JAMES HOLLING, KAREN HUDSON, JERRY HUNT, JENNIFER HURTT, JOYCE JONES, LYNN KIRALY, MICHELLE LACUESTA, JASON MCCONVILLE, JOSE NICOT, SANDRA OSHIRO, LESLIE OWENS, JON SANTOS, TERRY SEXTON, KATHLEEN WRIGHT, PAMELA M. ALLEN, SAMANTHA ALBAITIS, CYDNI ARTERBURY, LISA BAKER, BRIANA BELL, CHRISTINE BELLAVIA, KIMBERLY BLAIR, LEANOR BLAND-MULLINS, CAROLINE BONHAM, TAMMY BURKE, ANNMARIE CALDWELL, SHAUNA CAVALLARO, SANTOS COLON, ERIKA CONLEY, KENDRA CONOVER, DYLAN CORBIN, LAURA CURRY, SHAKERA DYER, JANE FREY, RUSSELL FROM, ANGEL GAINES, ASHTIN GAMBLIN, ERICKA GARDNER, ANN GRAFF, JAMES HENSLEY, SAREL HINES, ALEXANDER KEELER, ADAM KELLER, BILLIE KENDRICK, KRISTA KIRBY, JAN LOMBARD, MARC LOWREY, JILL MAILHOIT, AARON MAXA, KELLY MOORE, LINDSEY MORAN, DAVID MOYERS, JENNIFER OCAMPO-NEUBAUER, KEISHA ODOM, ANGEL PACHECHO, HEATHER

RAY, SUSAN SCOTT, LORI SNYDER, MISTY SUTTON, KATHRYN TAYLOR, ANTHONY VALLECORSA, CLAIRE WHITE, KRISTOPHER WILLARD, ALVIN WILSON, and BRAD YOUNG, on behalf of themselves and all others similarly situated,

Plaintiffs/Cross-Appellees,

vs.

CELLCO PARTNERSHIP d/b/a VERIZON WIRELESS,

Defendant-Appellant.

AMENDED BRIEF OF DEFENDANT-APPELLANT

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Dated: October 23, 2024

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PRELIMINARY STATEMENT

Appellant Cellco Partnership ("Verizon") reached a $100 million class action Settlement Agreement with its customers, and the agreement had a prohibition on mass opt-outs to prevent abuse. Absent such a prohibition, class members can be solicited in bulk to become pawns in an attorney's shakedown scheme, which is exactly what happened here. Appellee Murphy Advocates Law Firm, LLC ("Murphy") used false advertising to solicit thousands of Verizon customers into a prohibited mass opt-out. The trial court ordered Murphy to stop those solicitations, but not before Murphy had misled about 11,000 Settlement Class members into becoming his "clients." The trial court should have enforced the Settlement Agreement as written by disallowing Murphy's mass opt-out, but it erred by instead excluding these people from the Settlement Class. The trial court also erred by not ordering corrective communications to the class members Murphy misled. This Court can and should correct both errors and thereby ensure that decisions by class members to participate in the settlement or opt out individually from the Settlement Class are informed decisions.

The trial court's orders approving the Settlement Agreement found the entire agreement, including its prohibition on mass opt-outs, to be fair and reasonable. Courts considering class action settlement agreements must accept or reject an agreement in toto; courts cannot modify agreements or selectively

ignore their terms. Once the trial court here expressly found that Murphy's actions amounted to a mass opt-out prohibited by the approved agreement, the trial court had no discretion to allow the mass opt-out. But it did so anyway.

The trial court stated on the record that it authorized Murphy's mass opt-out in an attempt to "honor the wishes" of the class members involved, but that, too, was error. Evidence abounded that the class members who filled out Murphy's online form did not understand that, by doing so, they were authorizing Murphy to opt them out of a certified class and giving up the right to receive monetary benefits from the settlement. For example, roughly half of them also completed the Settlement Administrator's online claim form to obtain a settlement payment. Those class members would not have attempted both to opt out from the settlement and also to obtain a settlement payment if they had understood—and been appropriately advised by Murphy, the attorney soliciting them—that opting out meant they could not also seek settlement benefits.

Murphy's scheme hurt more class members than just those who filled out the website form. Because Murphy never consulted with the people he solicited, but instead simply cut-and-pasted information they provided through his website without attempting to verify the information's completeness or accuracy, much of the information that Murphy transmitted in the mass opt-out was incomplete or wrong. This made it difficult and expensive for the Settlement Administrator

to determine if Murphy's clients were class members at all or had also filed claims for settlement benefits. Avoiding such wasteful expenses, which lessened the funds available for distribution to valid claimants, is exactly why settlement agreements typically require class members to opt out personally.

This Court should reverse the trial court's decision to allow Murphy's violative and abusive mass opt-out. It should direct the trial court to order appropriate corrective communications to the class members Murphy solicited, so that class members have accurate information before deciding to opt out of the Settlement Class. Finally, the Court should require that those of Murphy's clients who still wish to opt out after becoming better informed must follow the process for individually opting out set forth in the Settlement Agreement.

PROCEDURAL HISTORY

Murphy, who was not a party to this Esposito lawsuit or the Settlement Agreement resolving it, sought to intervene in the case to effect a mass opt-out of persons who filled out Murphy's online client intake form. Da321-22. Verizon and attorneys for the class moved to (1) enjoin Murphy from soliciting members of a provisionally certified settlement class with misleading advertisements and (2) require Murphy to send curative notices to the persons who filled out the online form. Da328; Da342-44. The trial court denied Murphy's motion to intervene. Da350-52. Though the trial court found Murphy's website and related

advertisements to class members to be "confusing" and ordered Murphy to discontinue his activities (Da379-80; Da358), and also found that the process by which Murphy solicited opt-outs violated the Settlement Agreement (Da367; Da381), the trial court neither invalidated the Murphy-generated opt-outs nor required Murphy to provide corrective notices. Da355-56; Da357-60.

FACTUAL BACKGROUND

Background of the Parties' Class Litigation and Decision to Settle

The claims resolved through this nationwide class action settlement concern Verizon's monthly "Administrative Charge," which ranged from $1.23 to $3.30 during the relevant period. Da3-4, Da52. Verizon disclosed this Administrative Charge in the service agreement that each customer accepted. See Da203-04. Some customers asserted that Verizon did not disclose the charge clearly enough, and they filed class action suits against Verizon in multiple courts, despite the service agreement's requirement for disputes to be arbitrated on an individual basis. Da200-03. The same counsel pursuing these class action cases also initiated mass arbitration demands on behalf of thousands of customers with the intention of challenging the service agreement's bellwether process for addressing a mass of coordinated arbitration demands. Da363-64.

In the class actions, decisions from the United States District Court for the Northern District of California, and from this Court, invalidated as

unconscionable the version of Verizon's arbitration agreement that existed at the time, including provisions requiring a small number of related cases to be tried as bellwethers before Verizon could be required to pay arbitration fees for a mass of similar claims. See MacClelland v. Cellco P'ship, 609 F. Supp. 3d 1024 (N.D. Cal. 2022); Achey v. Cellco P'ship, 475 N.J. Super. 446 (App. Div. 2023); see also Da201-02. Verizon believes the MacClelland and Achey decisions were wrong for many reasons, including that the agreements provided for arbitrators, not courts, to resolve enforceability disputes. See Da201-02.

After the New Jersey Supreme Court agreed to hear an interlocutory appeal from this Court's decision in Achey, and while an as-of-right appeal from MacClelland was pending before the Ninth Circuit, Verizon and Class Counsel agreed on a nationwide, $100 million settlement of Administrative Charge-related claims. See Da201-02. On November 10, 2023, pursuant to the parties' agreement, Class Counsel filed a new class action complaint in Middlesex County Superior Court to facilitate the settlement. See Da3; Da202. All arbitrations being pursued by Class Counsel were suspended in anticipation of those claimants filing claims in the class settlement. Da319. Pursuant to the settlement, each of over five million class members who filed claims for benefits will receive approximately $11.00. Da365-66. (This amount became fixed only once the number of valid claims was known.)

Murphy was not a party to the Settlement Agreement. See Da310. Before the settlement, separate from Class Counsel's own mass arbitration proceedings, Murphy solicited Verizon customers to assert claims about the Administrative Charge in another mass arbitration campaign. Da321-23. Unlike Class Counsel, however, which had not yet taken any arbitration cases to a decision on the merits by the time they reached the settlement with Verizon, Murphy had taken six consumers' bellwether disputes to decisions before separate AAA arbitrators. See T20:12-18.[1] All six found Verizon had done nothing wrong with its disclosures of the Administrative Charge and entered judgment for Verizon, rejecting Murphy's claims. See T20:8-18.

If Verizon were similarly successful in the class actions, class members would not be entitled to any recovery. See Da203-04. Alternatively, if Verizon succeeded just in its "voluntary payment" defense, class members' damages may have been limited to the first month's charge of $1.23 to $3.30, not the $11.00 they stand to receive in the settlement. See Da366.

The Trial Court Preliminarily Approved the Settlement Agreement, Ordered the Transmission of Notice, and Precluded Mass Opt-Outs

On December 15, 2023, the Hon. Ana C. Viscomi, J.S.C., issued a Preliminary Approval Order provisionally certifying the Settlement Class

[1] The transcript cited herein refers to the Transcript of Motion Hearing, held before Hon. Ana C. Viscomi, J.S.C. on February 16, 2024.

comprising "[a]ll current and former individual consumer account holders in the United States . . . who received postpaid wireless or data services from Verizon and who were charged and paid an Administrative Charge . . . between January 1, 2016 and November 8, 2023." Da312. The trial court's Preliminary Approval Order appointed Angeion Group, LLC ("Angeion") as Settlement Administrator and directed it to "implement the Notice program as set forth in the Settlement Agreement." Da314-15; see Da347. The Notice advised recipients of Plaintiffs' claims against Verizon, as well as Verizon's agreement to pay $100 million into a non-reversionary fund to resolve those claims. Da221-23; Da256-76.

The Notice also instructed recipients as to how they could opt out of the Settlement Class. Da223-24. To be valid, a request for exclusion sent to the Settlement Administrator had to include the class member's full name, Verizon telephone number, mailing address, and email address; as well as a clear statement that the class member wished to be excluded from the Settlement Class in this action, and the class member's original signature. Ibid.

Pursuant to the Settlement Agreement, the trial court's Preliminary Approval Order directed that opt-out requests "must be made on an individual basis" and that "'mass,' 'class,' or other purported group opt outs are not effective." Da315. The Order contained a provision standard in class actions that "[a]ny Settlement Class Member who does not submit a timely and valid request

for exclusion . . . shall be bound by all subsequent proceedings, orders and judgments in this Action, including, but not limited to, the Release as defined in the Settlement Agreement, regardless of whether the Settlement Class Member has any pending claims or causes of action against Verizon." Da316.

Murphy Set Up a Website To Effect a Prohibited Mass Opt-Out

After the Settlement Administrator emailed notices to the Settlement Class, Murphy set up a website, https://www.verizonhiddenfees.com (the "Murphy Website"), and began targeting Verizon customers with online ads entreating them to visit the website, where Murphy solicited them. See Da332. The website's home page (Da334) stated that "Verizon is attempting to bar any claims over these unlawful charges," without describing the $100 million compensation Verizon had agreed to provide in the settlement. The Murphy Website further claimed, "we think we can do better by pursuing your claim in arbitration," with an asterisked, small-print disclaimer at the bottom of the page stating "*We cannot guarantee the success of any claim." Ibid. Murphy did not disclose on the website the firm's zero-for-six track record in its arbitrations against Verizon. See T20:8-18; T26:8-12.

The screen on the home page of the Murphy Website entreated readers to "**Seek legal recourse**" and "PURSUE A CLAIM." Da334. The latter invitation was a button which, upon being clicked by website readers, directed them to the

screen that invited readers in large print to "**PURSUE YOUR CLAIM TODAY**." Da336. Immediately below that entreaty was a "Retainer and Fee Agreement" with Murphy. Ibid.

Murphy's retainer agreement contained no mention of the proposed settlement and no discussion of the implications of opting out of the Settlement Class. Da336-38. The last page had boxes for visitors to provide their names, mailing addresses, email addresses, and phone numbers. Da338. Below that, the website stated, "To view the settlement in Esposito et al. v. Cellco Partnership d/b/a/ Verizon Wireless click here." Ibid. Following that was the statement, "I wish to be excluded from the Settlement Class in Esposito et al. v. Cellco Partnership d/b/a Verizon Wireless," a box for the prospective client's electronic signature, and a "Submit" button. Ibid. But the Murphy Website did not inform readers about the court-approved process for opting out or instruct readers to follow that process if they wished to opt out. See ibid.

Once a person filled out this online form, Murphy—without consulting with each person, and without any attempt to verify the information submitted through the form—printed computer-generated opt-out letters and caused them to be mailed to the Settlement Administrator. See T33:17-24. Murphy transmitted purported opt-outs on behalf of people who did not include their full names, Verizon telephone numbers, or other required information. See Da315.

Verizon and Class Counsel Acted Quickly To Enjoin Murphy

Because Verizon believed that the Murphy Website contained false and misleading statements, that Murphy also was concealing material information from website visitors (including about his failure to win even a single arbitration he had brought about the Administrative Charge), and that Murphy was using the website to generate a mass opt-out in violation of the Settlement Agreement, Verizon moved the trial court on January 22, 2024, to enjoin Murphy from soliciting members of the Settlement Class through the Murphy Website. Da326-29. Verizon further asked the trial court to reject the mass opt-out Murphy sought to accomplish through his website-generated letters. See Da328.

Class Counsel filed a separate motion for a protective order and injunctive relief on the basis that Murphy was actively soliciting members of the conditionally certified class that the Preliminary Approval Order had formally appointed Class Counsel to represent. Da313-14; Da340-41; Da343. Class Counsel asked the trial court to find that the Murphy Website constituted unauthorized ex parte communications with members of a certified class, improperly solicited those class members, contained false and misleading statements, and generated a mass opt-out that did not comply with the Settlement Agreement's and Preliminary Approval Order's prohibition on mass or "group" opt outs. Da343. The motion sought to prevent further solicitations by Murphy,

to require Murphy to provide a list of clients retained through the Murphy Website, and to direct Murphy to distribute a curative notice to all class members who signed a retainer agreement through the Murphy Website. Da343-44.

The trial court heard oral argument on the parties' motions on February 26, 2024. T4:11-17. The trial court stated on the record that the Murphy Website confused class members and that the mass opt-out attempt generated by the Murphy Website violated the terms of the Settlement Agreement. T65:17-23; Da379-80; Da368-69. To cabin the damage, the trial court issued an order from the bench directing Murphy to take down the misleading Murphy Website immediately. See Da355-56; Da358-60.

The Trial Court Enjoined Murphy's Website, But Neither Ordered Corrective Communications Nor Enforced the Settlement Agreement's and Preliminary Approval Order's Prohibition on the Purported Mass Opt-Out Generated Through Murphy's Website

On March 20, 2024, the trial court entered written orders granting, in part, the motions for injunctive relief brought by Verizon and Class Counsel. Da353; Da357. The trial court memorialized its oral directive to take down the Murphy Website (with which Murphy already had complied). It ordered Murphy to cease soliciting class members and to provide evidence of a proper attorney-client relationship between Murphy and any class member Murphy purported to represent. Da355-56; Da358-59. But, despite having found the Murphy Website confusing, the trial court did not require Murphy to provide corrective

communications to ensure the class members Murphy solicited knew the consequences of having retained Murphy to opt them out of the Settlement Class. Da358. Further, despite acknowledging that Murphy's process for excluding Class Members was a mass opt-out that the Settlement Agreement prohibited, the trial court decided to "honor [Class Members' ostensible] wishes"—wishes expressed only by their having filled out the form on Murphy's confusing website—by permitting the mass opt-out. Da379-80.

The Trial Court's Orders as to Murphy Were Inconsistent

As noted above, even before Verizon and Class Counsel agreed to the class settlement in this matter, Murphy already purported to represent numerous potential arbitration clients, all of whom became members of the putative Settlement Class once the trial court entered the Preliminary Approval Order. Da321-23. Murphy could have counseled these clients to follow the process for opting out set forth the Preliminary Approval Order, but did not do so, and few of these Murphy clients followed the proper process on their own. Da347-48. Instead, Murphy sought to intervene in this case for the purpose of effecting a mass opt-out of these clients. Da321-23. Verizon and Class Counsel opposed Murphy's intervention motion. Da352.

On the same day that the trial court issued its order allowing Murphy's mass opt-out achieved through the Murphy Website, (Da356; Da360), the trial

court denied Murphy's intervention request and precluded Murphy from effecting a mass opt-out of his pre-settlement arbitration clients. Da352. The trial court did not explain why it authorized one mass opt-out but not the other, when both violated the Settlement Agreement. Da356; Da360; Da352. Murphy no longer is pursuing an appeal from the trial court's denial of the intervention motion or the rejection of this separate mass opt-out attempt. See Da413-15. Accordingly, only the clients Murphy solicited through the Murphy Website are at issue in this appeal.

Evidence Demonstrates That the Murphy Website Confused the Class Members Murphy Solicited, and the Half-Measures the Trial Court Adopted Did Not Cure That Confusion

The Settlement Administrator reported receiving 11,955 opt-out forms by the deadline to opt out (Da396), of which approximately 11,000 were auto-generated by Murphy on behalf of visitors to the Murphy Website. The Settlement Administrator advised the trial court that many of those forms either did not contain all the information the Order specified had to be included in a valid opt-out request or could not readily be matched to Verizon's customer records. Da397. Accordingly, the Settlement Administrator could not, without significant manual effort, determine whether the persons identified in Murphy-generated forms were members of the Settlement Class or if they were among the nearly five million people who filed claims for monetary benefits in the

settlement. Through expensive manual processes, however, the Settlement Administrator determined that approximately half the people involved in Murphy's mass opt-out seemed also to have filed claims. Da373-74. This meant the Settlement Administrator received conflicting instructions: it received benefits requests from those class members themselves but also opt-out requests on their behalf transmitted in bulk by Murphy, their purported counsel. Ibid.

The trial court directed the Settlement Administrator to contact these people and attempt to clarify their wishes. Da372-74. The trial court said that if a contacted person did not respond, the Settlement Administrator should process the claim for benefits and disregard the conflicting opt-out request. Da372. But the trial court did not invalidate the remainder of Murphy's mass opt-out forms or direct that any communications be sent to those Murphy solicited to ensure they understood what they had foregone by engaging Murphy. See Da359-60.

The Trial Court Stated Repeatedly That the Murphy Website's Process Amounted to a Prohibited Mass Opt-Out, But Allowed It Anyway

Though the trial court accepted Murphy's website-generated opt-outs, it did so after acknowledging repeatedly that Murphy's process for soliciting bulk opt-outs violated the Settlement Agreement and the Preliminary Approval Order. At the April 26, 2024, fairness hearing, the trial court responded to Murphy's statement that it had "approved" allowing those who filled out the website forms to be treated as valid opt-outs by stating, "Well, I approved it to honor your

respective clients' wishes. You shouldn't have done what you did. You created a further delay in the resolution of this matter. And it is clear that the Settlement Administrator is taking more time because of the confusing nature of a website that you should not have posted. The individuals should have followed the clear instructions and [opted out] on their own, and we would not be in the position we are in now." Da379-80.

Throughout the record, the trial court repeated its finding that the Murphy Website's mass opt-out process violated the Settlement Agreement and the Preliminary Approval Order: "[T]he Court finds certainly no basis to allow intervention . . . because of the mechanism that is before the Court in the opt-out provision." T65:19-23. The trial court nevertheless approved Murphy's mass opt-out because "the Court felt that it was important to honor the intent of Mr. Murphy's clients whether they [opted out] individually or through him, even though the procedures that are spelled out for opt-outs clearly indicated how one is supposed to opt out, which is on an individual basis." Da367. When the trial court approved the larger-than-expected fees being paid to the Settlement Administrator, it noted that the administrator incurred those fees because

> [C]ontrary to the [Settlement Agreement's] requirements, as expressed in the preliminary [approval] order . . . the Court permitted Mr. Murphy's clients ultimately to have their wishes to . . . opt out [by] go[ing] through their attorney even though that was not explicitly permitted, but the Court decided to honor their intent. And in so doing, [I] did not envision that

> this process would be lengthened by doing that. The Court appreciates the complexity of it, particularly where insufficient information has been provided to the settlement administrator to be able to determine what the intent is. [Da381.]

Notably, when the trial court issued its Final Approval Order, the trial court stated that those who opted out had done so by "submitting a request for exclusion in conformance with the terms of the Settlement Agreement and this Court's Preliminary Approval Order." Da384-85. In fact, substantially all the people whom the trial court treated as opt-outs had not opted out "in conformance" with the process that the parties agreed to and the trial court approved. See Da398. They had instead visited the Murphy Website.

Verizon Cross-Appealed From the Trial Court's Approval of Murphy's Mass Opt-Out, and Only This Cross-Appeal Remains Pending

On May 4, 2024, Murphy appealed the trial court's denial of the firm's motion to intervene. Da392. On May 20, 2024, Verizon filed a Notice of Cross Appeal from the trial court's March 20, 2024 Order on the parties' motions for injunctive relief to the extent the Order denied the requests to (1) invalidate the mass opt-outs procured through the Murphy Website for failure to comply with the Preliminary Approval Order and (2) order Murphy to provide a curative communication to class members who engaged the firm. Da401-03.

Murphy's appeal and Verizon's cross-appeal were consolidated with two earlier appeals filed by Murphy. Da412. On September 20, 2024, however,

Murphy stipulated to dismiss all three affirmative appeals. Da413-14. One of the appeals Murphy dropped was an appeal from the trial court's Final Approval Order, which had been the only impediment to the settlement's becoming final according to its terms. See Da409; Da206-07. Accordingly, when this Court issued its order on September 24, 2024, dismissing Murphy's appeal, the class settlement became final. Da415. Because of that finality, the Settlement Administrator will disburse the $100 million settlement fund to claimants according to the agreement's terms. See Da217.

At issue in this appeal, therefore, are the approximately 5,000 Verizon customers whom Murphy successfully solicited to become part of an improper mass opt-out and who, unlike the other half of the 11,000 clients who filled out the Murphy Website form, did not also file claims for monetary benefits with the Settlement Administrator. Verizon contends—and the trial court agreed—that Murphy's mass opt-out violated the Settlement Agreement and that Murphy's misleading advertisements failed to provide those customers accurate information about the settlement and Murphy's record in arbitration. If this Court were to direct the transmission to these Verizon customers of corrective communications, some or all of them may decide it is not in their interests to opt out and elect instead to file claims with the Settlement Administrator for the immediate $11.00 monetary benefit and agree to the settlement's release.

STANDARD OF REVIEW

Pursuant to N.J. Ct. R. 4:32-2(f), a court presiding over class litigation may issue appropriate orders: (1) "determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument" (N.J. Ct. R. 4:32-2(f)(1)); (2) "imposing conditions on the representative parties or on intervenors" (N.J. Ct. R. 4:32-2(f)(3)); and (3) "dealing with similar procedural matters," (N.J. Ct. R. 4:32-2(f)(5)). Such authority is analogous to the authority granted to federal courts to manage class action litigation found in Fed R. Civ. P. 23(d). See Strougo v. Ocean Shore Holding Co., 457 N.J. Super. 138, 158 (Ch. Div. 2017) ("The New Jersey rule parallels Rule 23 of the Federal Rules of Civil Procedure.").

In deciding whether to approve a class settlement, a trial court may not rewrite a settlement agreement or ignore its terms. The role of a trial court presented with a proposed class action settlement "is to approve or reject the proposed settlement in its entirety as written and the court may not revise or amend particular provisions." In the Matter of Township of Bordentown, 471 N.J. Super. 196, 217 (App. Div. 2022) (citing cases). See also, e.g., Sullivan v. DB Invs., Inc., 667 F.3d 273, 312 (3d Cir. 2011) (the "court is not a party to the settlement, nor may it modify the terms of a voluntary settlement agreement between parties"). It may determine a settlement is unfair to the class and

withhold approval on that basis, but it is clear error to approve a settlement as fair while failing to enforce material terms, including a prohibition on mass opt-outs. See Klier v. Elf Atochem N. Am., Inc., 658 F.3d 468, 475 (5th Cir. 2011) ("[O]nce approved its terms must be followed by the court and the parties alike.") (reversing a trial court's decision to allocate leftover class funds in a manner contrary to the settlement agreement).

It is critical for class members to receive accurate information about a proposed settlement, so in class litigation, courts have unquestioned authority to "restrict 'abusive' communications directed at class members." Fox v. Saginaw County, 35 F.4th 1042, 1047 (6th Cir. 2022) (quoting Gulf Oil Co. v. Bernard, 452 U.S. 89, 101-02 (1981)). Communications are abusive when they "pose a serious threat to the fairness of the litigation process, the adequacy of representation and the administration of justice generally." In re School Asbestos Litig., 842 F.2d 671, 680 (3d Cir. 1988); Fox, 35 F.4th at 1047. Examples of abusive communications include "sharing misleading information, misrepresenting the nature of the class action, or coercing prospective class members to opt out of a class." Fox, 35 F.4th at 1047 (citing 3 William B. Rubenstein, Newberg on Class Actions §§ 9.3, 9.10 (5th ed. Dec. 2021 update)).

In the class action context like any other, "a trial court's decision pertaining to injunctive relief is reviewed for an abuse of discretion," except

where "the disputed issue relating to the injunctive relief is a question of law," in which case this Court reviews the decision de novo. See N. Bergen Mun. Utils. Auth. v. I.B.T.C.W.H.A Local 125, 474 N.J. Super. 583, 590 (App. Div. 2023). This appeal presents a question of law because the trial court's factual finding that the Murphy Website was confusing is not challenged in this appeal. Da355; Da358; Da379-80; Da403. Neither has Murphy challenged the trial court's conclusion of law that Murphy had to stop the misleading solicitations. Ibid. Rather, Verizon challenges only the trial court's legal conclusion not to order corrective communications to abate the confusion caused to those Murphy already solicited. See ibid. The abuse-of-discretion standard should not apply here, but if it does, an abuse occurs when, as here, the decision not to order corrective communications was "made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis." US Bank Nat'l Ass'n v. Guillaume, 209 N.J. 449, 467 (2012).

ARGUMENT

In nearly all respects, the trial court performed superbly in shepherding a massive nationwide class action Settlement Agreement through each step of consideration and approval. While the trial court considered the settlement's fairness, Murphy filed multiple duplicative motions, raised frivolous objections, and threatened multiple appeals. Amidst all this disruption from Murphy, the

trial court admirably sought to find compromises that would avoid appeals and thus allow class members to receive the benefits the settlement provided upon final approval. When interloping attorneys pursue a mass opt-out that a class action Settlement Agreement and Preliminary Approval Order flatly prohibited, however, no such compromises can be found. The trial court should not have allowed Murphy's mass opt-out to succeed, resulting in confused class members making uninformed and sometimes conflicting choices.

The trial court committed two errors that this Court should correct. First, by ordering the parties and the Settlement Administrator to exclude from the Settlement Class persons who did not opt out using the method provided for in the Settlement Agreement and Preliminary Approval Order, the trial court exercised a power it did not have. See Da356; Da360. This Court should reverse that directive and determine that the people who filled out the Murphy Website form affected will remain in the class unless they opt out in the proper way. See Da403. Second, the trial court should have ordered corrective communications to the people Murphy solicited. See ibid. Only in that way can this Court prevent Murphy from repeating the misleading advertisements in a new attempt to cause the same people to not opt out by the means approved by the parties and reflected in the Preliminary Approval Order. By correcting these two errors, the Court can prevent prejudice to the persons affected, and to Verizon.

I. THE TRIAL COURT LACKED POWER TO DISREGARD THE SETTLEMENT AGREEMENT'S AND PRELIMINARY APPROVAL ORDER'S PROHIBITION ON MASS OPT-OUTS (T13:21-22:24).

The trial court approved a class action Settlement Agreement that barred mass opt-outs. Da224; Da315. Any class members who wished to opt out could do so quickly and readily by sending a letter to the Settlement Administrator with accurate identifying information, a clear statement that they wished to opt out, and a signature. Da223-24. The trial court correctly found that there was nothing wrong with the requirement for opt-outs to be individual or the prohibition on mass opt-outs. The trial court approved these provisions along with the rest of the Settlement Agreement and issued an order repeating the bar on mass opt-outs in its Preliminary Approval Order. Da315-16.

"[C]ourts long have recognized that 'opting out is an individual right' that 'must be exercised individually.'" In re TikTok Cons. Privacy Litig., 565 F. Supp. 3d 1076, 1092-93 (N.D. Ill. 2021) (quoting In re Diet Drugs Prods. Liab. Litig., 282 F.3d 220, 241 (3d Cir. 2002)). Courts typically require "class members [to] individually sign and return a paper opt-out form as vital to ensuring that the class member is individually consenting to opt out." Id. at 1093 (citation and internal quotation marks omitted). "[M]ass unsigned opt outs," by contrast, "are highly indicative of a conclusion that counsel did not spend very much time evaluating the merits of whether or not to opt out in light of the

individual circumstances of each of their clients and in consultation with them." Ibid. (citation omitted).

Murphy here spent no time with each client; his website automatically generated a letter using whatever (often false or incomplete) name and identifying information a website visitor inputted, with no attorney consultation at all and no vetting of the information submitted though the website. See T25:14-20. This is exactly the sort of activity the Settlement Agreement, drafted in typical form, sought to preclude, and which courts around the country routinely prohibit, as the trial court did here. See Da315-16.

Because the trial court lacked power to modify the Settlement Agreement's prohibition on mass opt-opts without "reject[ing] the proposed settlement in its entirety as written," Bordentown, 471 N.J. Super. at 217, the trial court properly rejected Murphy's attempt to exempt his pre-existing clients from the Settlement Class by means of a mass opt-out. Da350-52. But, without explanation, the trial court ignored the same prohibition when it allowed the mass opt-out of other Settlement Class members whom Murphy later solicited through the misleading Murphy Website. Da356; Da360.

The trial court's rewriting of a voluntary settlement agreement was clear error. The trial court should have disallowed both of Murphy's improper mass opt-out attempts, not just one of them. It should have required the class members

Murphy solicited who wished to opt out to do so using the procedures explained in the Settlement Agreement. Cf. Sharp Farms v. Speaks, 917 F.3d 276, 294 (4th Cir. 2019) (affirming trial court's denial of attempted mass opt-out barred by settlement agreement that prohibited mass opt-outs).

The trial court stated that it permitted Murphy's improper and contractually barred mass opt-out in an attempt to honor the wishes of the class members at issue. See Da379-80. That would have been error under any circumstances because the trial court had no power to modify the Settlement Agreement for any purpose. But it was an even clearer error here because—after having correctly found the Murphy Website to be misleading—the trial court should not have guessed what the better-informed wishes of these class members might have been. See ibid.; Da356; Da360.

The class members at issue undisputedly did not comply with the court-ordered procedure for opting out. T65:17-23; Da315-16; Da379-80. Establishing such procedures, and ensuring that they are followed, "protect[s] against unauthorized opt-out notices." Fed. R. Civ. P. 23, Advisory Comm. Note—2018 Amends. When class members receive clear instructions about how to opt out, but then are persuaded to follow a different set of instructions by a third party, this further suggests that the class member's decision to opt out was not informed. "Following mechanical rules is the only sure way to handle suits with

thousands of class members." Matter of Navistar MaxxForce Engines Mktg., Sales Pracs. & Prod. Liab. Litig., 990 F.3d 1048, 1053 (7th Cir. 2021). Any other approach threatens to overwhelm the settlement administrator, leaves open the "option of one-way intervention," id. at 1252-53, and exposes class members to third parties who seek to act on their behalf without procuring their informed consent, see In re Centurylink Sales Pracs. & Sec. Litig., No. CV 17-2832, 2020 WL 3512807, at *5 (D. Minn. June 29, 2020), Da421 (rejecting mass opt-outs that did not comply with the court's order on the basis that they would create "confusion and litigation regarding who is and is not in the class" and would decrease the "amount of the settlement funds available for consumers to recover" by "increasing the administrative costs").

Having found that "thousands of class members who excluded themselves from the class likely acted upon misleading information," it became "necessary to restore them to the class" by "void[ing] . . . those exclusion requests" and giving them "the opportunity to reaffirm their decision." See Georgine v. Amchem Prod., Inc., 160 F.R.D. 478, 502, 504 (E.D. Pa. 1995). The trial court offered no "rational explanation" for refusing to give those who opted out based on what it found to be misleading information an opportunity to make an informed decision. See US Bank Nat. Ass'n, 209 N.J. at 467.

It is not too late for this Court to order appropriate relief. Verizon and Class Counsel have agreed that if the Court invalidates Murphy's mass opt-out, Murphy's clients can file claims for monetary benefits in the settlement even though the deadline to do so already has passed. If the Settlement Administrator determines that they are members of the Settlement Class, they will receive the same payment that all other claimants received. Although the $100 million settlement fund has been distributed, there likely will be uncashed check funds available to pay these claims and, if that amount does not suffice, Verizon will deposit additional monies in the fund to pay these claimants. Those of Murphy's clients who, after receiving corrective communications, reaffirm in the proper way their desire to opt out by a new reasonable deadline set by this Court or by the trial court on remand, will be able to do so.

II. BECAUSE THE TRIAL COURT FOUND THE MURPHY WEBSITE TO BE ABUSIVE, IT SHOULD HAVE ORDERED CORRECTIVE COMMUNICATIONS (DA379-80).

Reversing the trial court's order and disallowing Murphy's improper mass opt-out of (confused) class members who filled out the form on the Murphy Website would solve part of the problem Murphy created, but not all of it. Giving those class members a second opportunity to choose between taking the settlement benefits or opting out of the settlement, but leaving Murphy a free hand to mislead these people a second time, would ensure continued confusion.

Only by requiring Murphy to provide corrective communications can the court ensure that the affected class members are able to make informed choices.

A. THE MURPHY WEBSITE WAS ABUSIVE.

Murphy's actions in this case were similar to those in Fox v. Saginaw County. There, too, after a court had preliminarily approved a settlement class, outside attorneys sent misleading advertisements entreating class members to opt out and engage those attorneys to pursue separate litigation. Fox, 35 F.4th at 1045-46. The Fox court found those solicitations to be abusive enough to require corrective communications, in that they were "misleading" and "distorted the facts surrounding the claims process." Id. at 1048.

The Murphy Website was even more abusive than the solicitations in Fox. The website falsely said that "Verizon is attempting to bar any claims over" charges Murphy claimed were "unlawful" and that website readers must "Seek legal recourse" and "PURSUE A CLAIM" to preserve their rights. Da334. No reasonable consumer could have read that website and understood that Verizon had agreed to a class action settlement of claims that entitled members of the Settlement Class to a share of $100 million in monetary compensation. See Da211-12. The Murphy Website included a hyperlink to the class settlement agreement, but only as part of a check-the-box form for readers accepting Murphy's retainer agreement above the words "I wish to be excluded from the

Settlement Class in Esposito et al. v. Cellco Partnership d/b/a Verizon Wireless." Da338. There was no explanation of what the settlement offered. See ibid.

By advertising to prospective clients an ability to "do better" for them, (Da334), Murphy had an obligation to explain the settlement's terms so that class members had an accurate basis for comparison. See Fox, 35 F.4th at 1048; Kleiner v. First Nat. Bank of Atlanta, 751 F.2d 1193, 1202 (11th Cir. 1985) ("[I]t is critical that the class receive accurate and impartial information regarding the status, purposes and effects of the class action [before opting out]."). But Murphy did not include any discussion of the settlement, its terms, or what class members could receive by filing a claim. See Da334-38. Nor did Murphy explain the consequences of opting out of the settlement, relative to the immediate benefits available to them if they did not opt out. See ibid.

Further, by expressing an opinion that Murphy could "do better" for class members by pursuing their claims in arbitration instead, Da334, Murphy obligated himself to contextualize that opinion. He should have explained what would be involved in pursuing a consumer arbitration, the time frame Murphy expected for arbitration to begin and end, the degree to which class members would have to participate (and provide discovery) in an arbitration, and the critical fact that Murphy had lost every arbitration about the Administrative Charge that the firm had taken to a decision in arbitration. Yet, Murphy provided

none of this context: not the settlement benefits class members could receive simply by filling out a claim form, not the burdens associated with opting out and arbitrating claims instead, and not his repeated prior failures to prove the claims he wanted the solicited class members to engage him to pursue.

B. THE TRIAL COURT AGREED THAT THE MURPHY WEBSITE WAS ABUSIVE.

The trial court correctly found that the Murphy Website was misleading and inappropriate. The court called the website "confusing" and said it "should not have [been] posted." Da379-80. Based on these unchallenged findings, the trial court ordered that the website be taken down. Da355; Da358. While that relief prevented further confusion, it did not help the Settlement Class members who already had completed Murphy's online form. See Da398.

C. ONCE THE TRIAL COURT FOUND THE MURPHY WEBSITE TO BE ABUSIVE, IT SHOULD HAVE ORDERED CORRECTIVE COMMUNICATIONS.

The critical flaw in the trial court's approach warranting reversal was this: once the trial court found that the Murphy Website was abusive enough to warrant an order to take it down, the trial court should have understood the harm that would be caused by accepting opt-outs Murphy solicited without giving those class members complete and accurate information about the choice Murphy misled them into making. Class members should be opted out of a class only with their "informed consent." Kleiner, 751 F.2d at 1203; Fox, 35 F.4th at

1048. Murphy's backdoor process for soliciting opt-outs violated the right to informed consent by providing "a one-sided presentation of the facts, without opportunity for rebuttal." Fox, 35 F.4th at 1048 (quoting Kleiner, 751 F.2d at 1203). Indeed, it is apparent that many who completed Murphy's online retainer agreement did not make an informed decision to forgo the settlement's benefits because roughly half of them subsequently filed a Claim Form and thus sought to receive those benefits. See Da373-74. It is hard to imagine a more persuasive indicator of the confusion that Murphy caused.

The need to protect class members from making their election based on incomplete and misleading information should have caused the trial court to require corrective communications to the class members affected. The trial court had a "duty . . . to 'present a fair recital of the subject matter of the suit and to inform all class members of their opportunity to be heard.'" Fox, 35 F.4th at 1048 (quoting In re Gypsum Antitrust Cases, 565 F.2d 1123, 1125 (9th Cir. 1977)). The best way to ensure that each class member solicited through the Murphy Website made an informed decision was to issue a "curative notice tell[ing] class members that they could rescind any agreement with [Murphy]" and giving those who opted out by the website "a choice: Stay with [Murphy] or pursue relief as part of the class instead." See Fox, 35 F.4th at 1046, 1050 (affirming a district court's decision to issue corrective communications to class

members who had received misleading solicitations after the class had been certified); Loomis v. Unum Grp. Corp., No. 1:20-cv-251, 2021 WL 1206417, at *5 (E.D. Tenn. Feb. 26, 2021), Da428-29 (ordering corrective notice by plaintiffs' counsel); In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig., No. 05-MD-1720, 2014 WL 4966072, at *34 (E.D.N.Y. Oct. 3, 2014), Da453 (policing solicitations to class members). Unfortunately, the trial court failed to craft a remedy that properly balanced "the need to protect class members against the restriction of a speaker's First Amendment rights." See id. at 1047 (citing Gulf Oil, 452 U.S. at 101-02).

D. MURPHY'S VIOLATION OF LAWYER ADVERTISING RULES ALSO REQUIRED A REMEDY.

Murphy participated in this case by soliciting opt-outs, challenging the preliminary approval of the settlement, and moving to intervene. In doing so, Murphy had to follow the New Jersey Rules of Professional Conduct. N.J. Rules Prof'l Conduct R. 8.5(a) ("A lawyer not admitted in this jurisdiction is subject also to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction."); see also Da357-58 (finding that Murphy "is subject to the New Jersey Rules of Professional Conduct" because "he has been admitted pro hac vice in this matter, has moved to intervene in this matter, and is actively soliciting members of the certified class in this matter to opt out of the preliminarily-approved settlement").

Murphy's solicitation of class members through a misleading website violated New Jersey's Rules of Professional Conduct in at least two ways. First, "[a] lawyer shall not make false or misleading communications about the lawyer, the lawyer's services, or any matter in which the lawyer has or seeks a professional involvement." N.J. Rules Prof'l Conduct R. 7.1(a). "A communication is false or misleading if," for example, it "(1) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading; [or] (2) is likely to create an unjustified expectation about results the lawyer can achieve." Ibid. As explained above, the Murphy Website violated both precepts: Murphy's statement that Verizon was seeking to "bar any claims over" the administrative charges neglected to mention the benefits Verizon offered the class members through the settlement. See Da334. Murphy's statement that the firm thought it could "do better by pursuing your claim in arbitration" neglected to mention the firm's failure to prove the asserted claim at any of six arbitrations taken to resolution. Ibid.; see also T20:8-18. Just as importantly, Murphy provided no basis for comparison of what "better" meant by truthfully stating what class members stood to receive by filing claims in the settlement. See Da334.

Second, Murphy likely violated the rule on communicating with a represented party. Lawyers may not "communicate about the subject of the

representation with a person the lawyer knows, or by the exercise of reasonable diligence should know, to be represented by another lawyer in the matter." N.J. Rules Prof'l Conduct R. 4.2. "[A]s soon as a class is certified" "class counsel represents all class members" as to the subject of the class action, and this Rule applies. Kleiner, 751 F.2d at 1207 n.28; Gortat v. Capala Bros., Inc., No. 07-CV-3629, 2010 WL 1879922, at *2 (E.D.N.Y. May 10, 2010), Da458 ("In other words, class certification gives rise to an attorney-client relationship between potential class members and class counsel."); Cobell v. Norton, 212 F.R.D. 14, 21 (D.D.C. 2002) ("[T]here is ample authority to support the contention that knowing participation in the efforts of a defendant to engage in improper communications with members of a class action litigation constitutes a violation of attorney ethics rules."); Resnick v. Am. Dental Ass'n, 95 F.R.D. 372, 376 (N.D. Ill. 1982) ("Without question the unnamed class members, once the class has been certified, are 'represented by' the class counsel."); see also Federal Judicial Center, Manual for Complex Litigation (Fourth) § 21.33, available at 2004 WL 258812 ("Once a class has been certified, the rules governing communications apply as though each class member is a client of the class counsel."). "It follows that it is unethical for other attorneys to communicate with class members about the representation after the class has been certified." McWilliams v. Advanced Recovery Sys., Inc., 176 F. Supp. 3d 635, 642 (S.D.

Miss. 2016). Thus, Murphy's attempts to "poach members of a certified class" violated the Rules of Professional Conduct. Id. at 643.

Murphy could have gone about the process of soliciting opt-outs in an above-board way, being transparent with the Court and the parties and providing putative clients with complete and accurate information about the settlement and his belief that he could "do better" for them if they engaged him to arbitrate on their behalf. Instead, Murphy chose a deceptive course and sowed confusion among about 11,000 class members as a result. Given these violations of the Rules of Professional Conduct and the confusion the Murphy Website demonstrably caused, the trial court should have required corrective communications confirming that each class member who opted out through the Murphy Website was making an informed choice to do so and preferred to retain the services of Murphy rather than participate in the settlement.

In the trial court's defense, the parties could not cite New Jersey state court authority for this request because the situation appears not to have arisen in New Jersey courts before. But federal courts around the country have seen multiple instances of misleading communications to class members and required corrective communications when they occurred. See, e.g., Burford v. Cargill, Inc., No. 05-0283, 2007 WL 81667, at*2 (W.D. La. Jan. 9, 2007), Da464 (finding the use of a "general receipt and release . . . without notification of the pending

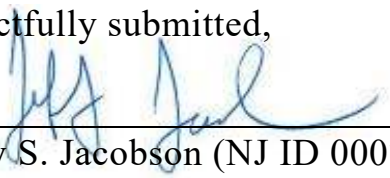
putative class action, is misleading as a matter of law" and that "such misleading communications are abusive and threaten the proper functioning of the instant litigation"); Haffer v. Temple Univ. of Commonwealth Sys. of Higher Educ., 115 F.R.D. 506, 511-13 (E.D. Pa. 1987) (finding a violation of the Code of Professional Responsibility and ordering "corrective notice" where defendants "improperly communicated with [plaintiffs]," "disseminated false and misleading information to plaintiffs," and "discouraged plaintiffs from meeting with class counsel"); see also Jones v. Casey's Gen. Stores, 517 F. Supp. 2d 1080, 1086 (S.D. Iowa 2007) (barring communications on the basis that the plaintiffs' "ex parte communications with the putative collective members either have crossed, or are at substantial risk of crossing, ethical rules against solicitation"). That is what should have happened here, too. The trial court's decision not to order corrective communications "inexplicably departed from [the] established policies" of courts across the country applying the rules governing class actions. US Bank Nat. Ass'n, 209 N.J. at 467.

CONCLUSION

This Court should not permit Murphy to mislead consumers into attorney retainer agreements and to take steps on their behalf, the import of which they likely do not understand. For the reasons set forth above, this Court should reverse the trial court's order to the extent the trial court (1) denied Verizon's

request to invalidate the opt-outs procured by Murphy through the Murphy Website and (2) denied Class Counsel's request to require Murphy to provide curative communications to the Settlement Class members who engaged him, and to opt out only those class members who confirm, after receiving full and accurate information, their desire to opt out of the Settlement Class.

Respectfully submitted,



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Dated: October 23, 2024

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-002649-23

DEAN ESPOSITO, JEFFREY ACHEY, MARILYN ACHEY, JUSTIN ANDERSON, DEIDRE ASBJORN, GREGORY BURLAK, CARLA CHIORAZZO, JUDITH CHIORAZZO, JOHN CONWAY, ADAM DEMARCO, JAMES FISHER, ALLISON GILLINGHAM, LORRAINE GILLINGHAM, DOREE GORDON, DONNA HARTMAN, PATRICIA JUSTICE, DAVID KELLY, CHRISTINA MANFREDO, JUDITH OELENSCHLAGER, DANIEL PATINO, JAMES PRATE, MICHAEL SCHEUFELE, RUSSELL SEWEKOW, DEBORAH STROYEK, LINDA TEER, CHRISTINE TRAPPE, BRENDA TRIPICCHIO, TERESA MACCLELLAND, KAREN UMBERGER, SCOTT WILLITS, MICHAEL BRANOM, MOLLY BROWN, MICHAEL CARNEY, TIM FRASCH, PATRICIA GAGAN, ANNA GUTIERREZ, LINDA JENKINS, AUGUSTUS JOHNSON, WILLIAM KAUPELIS, MARILYN KAYE, JANETTE LISNER, WILLIAM ERIC LOUGH, DAVID MASSARO, LOUISE MONSOUR, DARLEEN PEREZ, GABRIELLE POZZUOLI, VALERIE REED, BRUCE SCHRAMM, KERRY SHOWALTER, JOHN ST. JARRE, GLORIA STERN, EDNA TOY,

CIVIL ACTION

ON APPEAL FROM

SUPERIOR COURT, LAW DIVISION
MIDDLESEX COUNTY

Hon. Ana C. Viscomi, J.S.C.
Sat below.

TERESA TOY, VANESSA WEST, MARY BOWMAN, ART CAPRI, DEBRA CASEY, KARY CHALLENDER, TYSON COHRON, CINTIA CORSI, ANDI ELLIS, LAURIE FRANTZ, ASHLEY GARRISON, ANGELA GREEN, CARLOS GUTIERREZ, JAMES HOLLING, KAREN HUDSON, JERRY HUNT, JENNIFER HURTT, JOYCE JONES, LYNN KIRALY, MICHELLE LACUESTA, JASON MCCONVILLE, JOSE NICOT, SANDRA OSHIRO, LESLIE OWENS, JON SANTOS, TERRY SEXTON, KATHLEEN WRIGHT, PAMELA M. ALLEN, SAMANTHA ALBAITIS, CYDNI ARTERBURY, LISA BAKER, BRIANA BELL, CHRISTINE BELLAVIA, KIMBERLY BLAIR, LEANOR BLAND-MULLINS, CAROLINE BONHAM, TAMMY BURKE, ANNMARIE CALDWELL, SHAUNA CAVALLARO, SANTOS COLON, ERIKA CONLEY, KENDRA CONOVER, DYLAN CORBIN, LAURA CURRY, SHAKERA DYER, JANE FREY, RUSSELL FROM, ANGEL GAINES, ASHTIN GAMBLIN, ERICKA GARDNER, ANN GRAFF, JAMES HENSLEY, SAREL HINES, ALEXANDER KEELER, ADAM KELLER, BILLIE KENDRICK, KRISTA KIRBY, JAN LOMBARD, MARC LOWREY, JILL MAILHOIT, AARON MAXA, KELLY MOORE, LINDSEY MORAN, DAVID MOYERS,

JENNIFER OCAMPO-NEUBAUER, KEISHA ODOM, ANGEL PACHECHO, HEATHER RAY, SUSAN SCOTT, LORI SNYDER, MISTY SUTTON, KATHRYN TAYLOR, ANTHONY VALLECORSA, CLAIRE WHITE, KRISTOPHER WILLARD, ALVIN WILSON, and BRAD YOUNG, on behalf of themselves and all others similarly situated,

Respondents,

v.

CELLCO PARTNERSHIP d/b/a VERIZON WIRELESS,

Appellants.

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Dated: November 27, 2024

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PRELIMINARY STATEMENT

Defendant Appellant Cellco Partnership d/b/a Verizon Wireless ("Verizon") and Class Counsel (collectively the "Parties") obtained a final judgment approving a settlement (the "Settlement Agreement") in which 58 million Verizon customers released their claims, past and future, against Verizon regarding its junk administrative fees. In the Notice to persuade as many class members as possible to remain in the class and waive those claims, the Parties have prominently advertised in the class notice that "**YOU MAY BE ENTITLED TO A PAYMENT OF UP TO $100.00 IF YOU FILE A CLAIM**." But in filings with the trial Court, they quietly predicted that more than 90% of the class will get nothing at all (because they will not go to the bother of filing an online claim) and that those who *do* file a claim will receive an average of less than **$12**, with *no one* receiving more than **$19**. The Parties also undertook to make opting out of the class even more burdensome than filing a claim (which, again, they expect more than 90% of the class to forgo), by having to opt out through a paper form with an original signature, sent through the mail at the class member's expense.

The Parties moved in the trial court to restrict Mr. Murphy's First Amendment free speech rights to prevent Mr. Murphy from offering class members an alternative to this meager settlement and from assisting class members with complying with the unduly burdensome opt-out requirements. The trial court denied the Parties' requests

for such extreme and extraordinary relief, which would interfere with class members' ability to obtain independent advice and separate representation in this case and with Mr. Murphy's First Amendment right to offer those services to them through non-misleading advertisements that fully disclose the existence of the settlement alternative.

Verizon now appeals and in doing so misrepresents the material facts in the record below. Verizon claims the trial court ordered Mr. Murphy to take down his website "from the bench." This is false, Mr. Murphy took down his website because the opt-out period had closed, and did so months before the trial court issued any order. Verizon claims the trial court found that Mr. Murphy created a website to inform class members of their rights that was abusive. This is false, the trial court made no such finding. Verizon claims Mr. Murphy's clients did not submit complete opt-out forms, but this statement is also false and unsupported. Verizon's appeal is meritless, unsupported by the record, and should be denied.

STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

I. MR. MURPHY'S LONGSTANDING EFFORTS TO CHALLENGE VERIZON'S ADMINISTRATIVE FEES THROUGH ARBITRATION.

Verizon engages in massive advertising that prominently advertises flat per-line fees. (Da3.) However, Verizon either does not disclose or deceptively discloses

[1] Respondents are not parties to this action as their Motion to Intervene was denied. Accordingly, the statement of facts and procedural history are one and the same.

that those advertised rates are not the actual rates it charges for monthly services. (Da3-4.) Instead, Verizon charges the advertised rate plus an "administrative charge" that serves no purpose other than to inflate the fee for Verizon's basic service and historically does so without disclosing that amount in the advertised flat fee price. (Da4.) Those administrative charges are the basis of the claims brought by the Class Representatives in this Court and Mr. Murphy on behalf of his clients in arbitration. (Da3-4; *see also, generally*, Da 1-198.)

In October 2021, before Class Counsel filed their first action against Verizon, Mr. Murphy began advertising his availability to bring arbitration claims against the carrier for its junk administrative fees. (Ra32.) For the next two years, he pursued claims on behalf of thousands of clients against Verizon, both before the American Arbitration Association (AAA) and in collateral litigation before two federal district courts that was initiated by Verizon to compel bilateral arbitration, all at great expense. (Ra32-33.) During this time, Verizon prevented all but 10 of the cases from even reaching a merits arbitrator, pointing to Paragraph 6 of the relevant arbitration agreements, which required arbitrating the claims ten at a time, followed by mediation, for decades. (Ra33-34.) Mr. Murphy has challenged the applicability and validity of that provision before the AAA and in the trial court. (Ra33-34.)

II. THE PROPOSED SETTLEMENT, ONEROUS OPT-OUT PROVISIONS, AND MISLEADING CLASS NOTICE

During the same period, Class Counsel pursued a different strategy, filing class actions in state and federal court. Verizon initially defended those claims with vigor as well, pointing out that its contracts with its customers specifically preclude both litigation in court and class actions in particular. When two courts found the arbitration agreements unconscionable, Verizon appealed both that determination and the courts' failure to abide by the contracts' delegation of that question to arbitrators, not courts. *See MacClelland v. Cellco P'ship, dba Verizon Wireless*, No. 22-16020 (9th Cir.); *Achey v. Cellco P'ship*, 475 N.J. Super. 446 (App. Div.), *pet. for cert. granted*, 255 N.J. 286 (2023).

In November 2023, however, after insisting for years that both Verizon *and* its customers had a contractual right to resolve their claims only through arbitration, Verizon reversed course and asked the trial court to certify a nationwide class action that would release all existing and future claims relating to Verizon's administrative fees. (Ra1; *see also, generally*, Da 1-198.) The class was defined to include all of Mr. Murphy's longstanding clients, requiring them to opt out of the settlement to preserve their existing attorney-client relationship with him and their chosen strategy

of pursuing their claims through arbitration.[2] (Da209). The Parties furthermore admittedly designed the opt-out procedure to make it difficult for Mr. Murphy to maintain that relationship. (Ra5-6.) While class members could file a claim online, they could opt out only by printing out a form, securing postage and an envelope, and physically mailing the request to the Claims Administrator. (Da223-225.) Verizon expected to dispose of the bulk of Mr. Murphy's pending arbitrations in this way, taking advantage of the inevitable inertia that attends small-value claims to effectively transfer his clients to more amenable counsel. (The Parties informed the trial court that even though class members are entitled to file claims online, they expect less than 9% of the class to do so.) (Ra30.)

The Parties also seriously misled the putative class. Just as they kept the trial court in the dark about the ongoing mass arbitrations, the Parties failed to disclose this alternative to the settlement to class members. Instead, Parties touted in the Class Notice and in other communications with the class that "**YOU MAY BE ENTITLED TO A PAYMENT OF UP TO $100.00 IF YOU FILE A CLAIM**." (Da257; *see also* Da261, Da271, Da272, and Da278.) The Parties knew – both from the beginning and definitively as of January 22 – that it was impossible that anyone

[2] Mr. Murphy attended a settlement conference with Verizon and Class Counsel where he declined to participate in the class settlement. Mr. Murphy declined for two reasons: 1.) The terms of what was being discussed appeared facially unfair to the class; and 2.) participation required Mr. Murphy to assign his clients to class counsel, which he could not do consistent with the Rules of Professional Conduct.

would receive $100. (*Compare* Ra10-11 *with* Da332 (acknowledging 3.2 million claims to date)).

It was clear from the outset that the $100 maximum would never be paid to anyone. The Settlement allocates class members only whatever portion of the $100 million fund is left over after administrative expenses and the $33 million in requested attorney's fees, a residual amount the Parties informed the trial court will be approximately $59 million. (Ra30.) Payments are determined by a formula in the Settlement Agreement, with any leftover funds to be given away to some third party in a cy pres award. (Da218.) The class includes over 58 million customers (Ra10-11), meaning no consumer would be paid the $100 minimum unless the claim rate were so abysmal as to indicate a constitutionally inadequate class notice, i.e., 1-3% as indicated in a footnote to Class Counsel's own certification. (Ra11; *see also* Ra35-36 (explaining $100 maximum is unattainable unless the claim rate is less than 1.5%.))

Indeed, by no later than January 22, 2024, the Parties knew that enough class members had filed claims to make a $100 payment impossible. On that date, Verizon certified to the trial court that "nearly 3.2 million people have filed claims in the proposed settlement," meaning the maximum payment could not exceed **$30**. (Da332; Ra36.) Yet, the Parties continued to falsely advertise the potential $100

maximum award to millions of class members then deciding whether to opt out. (Ra42.)

The *only* purpose of setting a maximum award in the Settlement Agreement was to allow the Parties to make the misleading claim that consumers may receive "up to $100." The maximum did not protect Verizon. Its liability is capped by the amount of the settlement fund. (Da212-13.) Nor did the maximum offer Verizon the possibility of getting some of the fund back if a small number of class members file claims and are limited to $100 a piece—the fund is expressly non-reversionary. (Da211-12 & Da218.) And Class Counsel had no legitimate reason to cap their clients' awards.

III. MR. MURPHY'S TRUTHFUL EFFORTS TO PROVIDE PUTATIVE CLASS MEMBERS AN ALTERNATIVE TO THE PROPOSED SETTLEMENT

Mr. Murphy had long believed and continues to believe that he could (and in fact he did) do better by pursuing claims in arbitration. Verizon had made itself vulnerable in arbitration by insisting that each claim be arbitrated individually while also agreeing to pay most of the arbitration fees in order to protect against unconscionability challenges. (Ra36-37.) Verizon's counsel stated on the record that Mr. Murphy's clients were all but certain to be offered more in arbitration than they stood to receive from the settlement:

> And let me address the settlement point for a minute. Verizon's very consumer-friendly arbitration agreement has a provision in there that says that if Verizon doesn't

> make a settlement offer prior to a claim coming over here, then regardless of what amount the arbitrator awards, if the claimant prevails, claimant is entitled to a minimum of $5,000 and attorneys fees. So Verizon, coming up on these hearings, made a settlement offer, the same one, to all of Mr. Murphy's clients.
>
> [T46:2-12.]

None of Mr. Murphy's clients received settlement offers of less than $11.80. In fact, by Verizon's own analysis, each arbitration filed could receive a settlement offer of around $400. [T36:5-7.] Therefore, while some of Mr. Murphy's arbitration clients later recovered nothing, Mr. Murphy correctly believed that class members had a reasonable expectation that they could do better than the $11.80 being offered to the class.

Given this, Mr. Murphy sought to protect his clients from being swept into this meager settlement by seeking to intervene in the trial court to assert his clients rights to compel arbitration. He also offered his services to other members of the putative class who may have been led to believe that there is no real alternative to accepting the class settlement. He did so through advertisements on social media that lead consumers to a website that contained all of the information the trial court previously determined were necessary to make an informed opt-out decision and an offer of representation in arbitration. (Da334 & Da336-38.) Mr. Murphy's website stated in relevant part:

> **Verizon Adds Administrative And Other Charges to Monthly Bills**
>
> Verizon collects millions from wireless customers in excess administrative and other fees without proper disclosure. Verizon is attempting to bar any claims over these unlawful charges. (To view the settlement in Esposito et al. v. Cellco Partnership d/b/a/ Verizon Wireless click here.) But we think we can do better by pursuing your claims in arbitration.*
> **Seek legal recourse.**
>
> **PURSUE A CLAIM**
>
> [Da334.]

The "click here" link leads to the Settlement Agreement. Clicking on the "PURSUE A CLAIM" button leads to a retainer agreement. The footnote at the bottom of the page provides: "* We cannot guarantee the success of any claim." The retainer agreement includes, among other things, an express "Disclaimer of Guarantee" that provides "Nothing in this Retainer and nothing in our statements to you will be construed as a promise or guarantee about the outcome of this Claim(s)" and that there "can be no assurance that you will recover any sum or sums in this matter." (Da337.)

After affirming that she has "read and understood the foregoing terms and conditions and agree to each of them by signing this agreement," the client provides her name, address, email address, and Verizon phone number. *Ibid*. Above the signature link is the text: "To view the settlement in Esposito et al. v. Cellco

Partnership d/b/a Verizon Wireless click here," which brings up the Claims Administration website with links to the long-form notice and all other information the trial court deemed necessary and sufficient for class members to make an informed opt-out decision. (Da338.) Below that is the text, "I wish to be excluded from the Settlement Class in Esposito et al. v. Cellco Partnership d/b/a Verizon Wireless," with a check-box for "Yes." (*Ibid*.) Clicking the "yes" check-box results in an individual opt-out notice being generated with all of the of the information required by the Settlement Agreement's opt-out provisions. (Ra48.) Mr. Murphy had arranged for the notice to be printed, placed in individual envelopes with the client's return address, and individually mailed to the Claims Administrator, as required by the Court's opt-out rules. (*Ibid*.)

Because Mr. Murphy was *not* misleading the class in the same way the Class Notice was, Mr. Murphy took down his website before the expiration of the opt-out period. (T33:16-25.) Doing so ensured Mr. Murphy could process and individually transmit all of the individually requested opt-outs within the required time period. (*Ibid*.)

IV. THE PARTIES' EFFORTS TO SILENCE MR. MURPHY

On January 17, 2024, Mr. Murphy and 9,970 of his existing arbitration clients with pending arbitrations filed a Motion to Intervene for purposes of compelling Verizon to bilateral arbitration of their claims under Section 4 of the FAA and NJAA

7(g). (Da350.) On January 22, 2024, the Parties filed motions to silence Mr. Murphy and preclude him from assisting any additional class members in opting out of the settlement. (Da326 & Da340.)

Consistent with Verizon's general strategy to transfer as many of Mr. Murphy's clients as possible to the more cooperative opposing counsel, the Parties asked the Court to invalidate the new Murphy client opt-outs, terminate the opt-outs' attorney-client relationship with Mr. Murphy, and authorize a fishing expedition into Mr. Murphy's relationship with *all* of his clients, based on nothing more than their complaints about his solicitation of opt-outs here and Class Counsel's unsupported innuendo in a prior letter to the Court that Mr. Murphy fully rebutted. (Da326.)

On February 16, 2024, the trial court heard the Parties' motion together with Mr. Murphy's Motion to Intervene. The trial court denied Mr. Murphy's motion to intervene. (Da350.) Contrary to Verizon's representations to this Court in its appeal brief, the trial court did not issue *any* rulings, findings or orders "from the bench," (Verizon Br. at 11), on the Parties' motion to silence Mr. Murphy and invalidate his opt-outs.[3] Rather, a month later, on March 20, 2024, the trial court issued two orders

[3] Verizon's brief contains numerous unsupported assertions. For example, Verizon claims without evidence that Mr. Murphy's clients submitted incomplete opt-outs (Br. at 9), but the record citation only describes the opt-out procedure itself. Verizon claims that nearly 92% of all opt-outs were by Mr. Murphy's clients but does not include any record citation for this bald assertion. (Br. at 13.) And Verizon misrepresents the trial court's rulings, describing the court's reasoning on the Motion to Intervene to compel arbitration as related to Verizon's motion to invalidate the opt-outs. (Br. at 15.)

expressly rejecting the Parties' proposed order that Mr. Murphy's website was misleading:

> 2. The Court further finds that the online solicitation and opt out campaign by Evan C. Murphy, Esq. and Murphy Advocates, including the website . . . verizonhiddenfees.com, which seeks to recruit members of the certified settlement class in the above-captioned matter to opt out of the class settlement:
>
> ~~a. Contains multiple false and misleading statements, material misrepresentations and omissions, and improper comparisons, and moreover creates an unjustified expectation about the potential results of his services, in violation of New Jersey Professional Conduct Rule 7.1~~ DENIED;
>
> ~~b. Constitutes unauthorized ex parte communication with the certified class members, who are represented by Class Counsel in this matter, about the subject of this litigation in violation of New Jersey Professional Conduct Rule 4.2~~ DENIED;
>
> ~~c. Constitutes the improper solicitation of members of a certified class~~ DENIED; and
>
> ~~d. Invites exclusions and new claims in this matter in a manner that contravenes this Court's preliminary approval order~~ DENIED.
>
> [Da358.]

The trial court's order further stated that Mr. Murphy's clients' individual opt-outs were permitted:

> by permitting the opt-outs of verifiable Murphy Advocates LLC [sic], the court is providing those

> individuals their respective due process rights to timely opt-out of this proposed class action settlement.
>
> [Da356 & Da360.]

V. VERIZON VIOLATES THE TRIAL COURT'S ORDER IN AN ATTEMPT TO INVALIDATE MR. MURPHY'S OPT-OUTS.

Having been unsuccessful at invalidating Mr. Murphy's clients' opt-outs directly, Verizon instead sought to invalidate them through subterfuge. The evening before the Fairness Hearing was held on March 22, 2024, Class Counsel filed a declaration by the Settlement Administrator quantifying the number of opt-outs. (Ra50.) The Settlement Administrator represented that of the 10,380 opt-outs, 1,615 of them had more than one point of information, e.g., both name and email address, in common with a claimant. (Ra51.) An addition "3,721 exclusion requests received that may be a potential match to an individual who submitted a Claim Form based" on a single point of contact, e.g., the same name or same address, both of which would be expected for common names, like Michael Smith, or different accounts in the same household. (*Ibid.*) Of those, 2,919 were Mr. Murphy's clients, most of whom had common names, such as Michael Smith, Mary Smith, Richard Smith, David White, Carol Jones, and Michael Evans, clients of Mr. Murphy who share a name with a settlement claimant but *no* other identifying information—they did not have the overlapping addresses, mailing addresses, or emails. (Ra56.)

The Parties disclosed none of this in the Fairness Hearing. On the basis of this misleading presentation, and over Mr. Murphy's objection, the Parties proposed and the trial court approved a Consent Order, directing the Settlement Administrator to "communicate" with opt-outs "*who share multiple touchpoints of information*" to:

> 1. advise them that they must choose between opting out of the Settlement Class and seeking monetary benefits in the settlement;
>
> 2. request that they make their election within fourteen (14) days of receiving the message from the Settlement Administrator; and
>
> 3. advise them that, if recipients do not respond, the Settlement Administrator will process their claim for monetary benefits and reject their separate request to opt out of the Settlement Class.
>
> [Da370.]

Despite the clear language of the Consent Order, the Settlement Administrator, at one or both of the Parties' direction, contacted individuals who had opted out (2,919 of which were Mr. Murphy's clients) and instructed them to choose again whether to opt-out. (Ra56.)

Mr. Murphy again moved to intervene to assert his clients' rights to have their valid and proper opt-outs recognized. (Ra53.) The Parties did not dispute that the Consent Order permitted the Settlement Administrator to contact *only* individuals who shared multiple touchpoints of information with a potential claimant. The Parties also did not dispute that the Settlement Administrator instead contacted 2,919

of Mr. Murphy's clients who shared only one piece of information with a potential claimant, e.g., a common name. Nonetheless, the trial court denied Mr. Murphy's Motion to Intervene to protect his clients' due process rights to opt out of the settlement. (Ra56.)

The trial court granted final approve of the class action settlement, which is now fully funded. The settlement proceeds are to be disbursed on or before January 6, 2025. Verizon now appeals the trial court's denial of their motion to invalidate Mr. Murphy's clients' individual opt-outs.

STANDARD

While courts have an obligation to protect absent class members, *see, e.g.*, *In re School Asbestos Litig*., 842 F.2d 671, 680 (3d Cir. 1988), orders "regulating communications . . . pose a grave threat to first amendment freedom of speech." *Ibid*. The Supreme Court has repeatedly held that attorney efforts to solicit, advise, and assist potential clients are constitutionally protected. *See, e.g.*, *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 472 (1988); *Zaudrerer v. Off. of Disciplinary Couns. of Supreme Ct. of Ohio*, 471 U.S. 626, 629 (1985). Accordingly, because court orders limiting communications with class members "involve 'serious restraints on expression,'" they can only be "justified by a likelihood of *serious* abuses," such as attempts to seriously mislead class members on important matters. *In re Community Bank of N. Va.*, 418 F.3d 277, 312 (3d Cir. 2005) (quoting *Gulf Oil Co. v. Bernard*,

452 U.S. 89, 104 (1981)) (emphasis added); *see also Ibanez v. Fla. Dep't of Bus. & Prof. Regul., Bd. of Acct.*, 512 U.S. 136, 145 (1994) (a "concern about the *possibility* of deception in *hypothetical* cases is not sufficient") (emphasis added, citation omitted)). Moreover, any restraints must be founded on "a clear record and specific findings" and any remedy must be "carefully drawn" to "limit[] speech as little as possible." *Gulf Oil*, 452 U.S. at 101-02, 104.

Indeed, restraints on attorney speech are especially suspect when they limit class members' access to advice about whether to accept a settlement offer. After all, the Third Circuit has noted, "the 'best notice' provision" in the class actions rules "affords class members the right to contact their own attorneys to determine whether joining a proposed class-wide settlement is in their best interests." *In re Community Bank*, 418 F.3d at 312-13 (footnote omitted). For that reason, courts may not restrict class members to only the court-approved class notice or otherwise issue blanket restrictions on communications with the class. *Gulf Oil*, 452 U.S. at 104; *In Re Community Bank*, 418 F.3d at 312. Instead, any restriction must be based on a clear record and specific findings of a serious risk of significant deception or other abuse. *Gulf Oil*, 452 U.S. at 104; *In Re Community Bank*, 418 F.3d at 312.

ARGUMENT

I. TRIAL COURT CORRECTLY ALLOWED THE MURPHY CLIENT OPT-OUTS WHICH WERE INDIVIDUAL OPT-OUTS NOT MASS OPT-OUTS.

The trial court correctly permitted the Murphy clients' individual opt-outs, which complied with the Settlement Agreements terms. As an initial matter, there was no "mass," "class" or other purported group opt out. Instead, Mr. Murphy's clients individually engaged Mr. Murphy as counsel and individually completed all of the information required to opt-out and Mr. Murphy.

The Settlement Agreement stated that a valid opt-out must include:

> (1) the Settlement Class Member's full name, telephone number, mailing address, and email address; (2) a clear statement that the Settlement Class Member wishes to be excluded from the Settlement Class; (3) the name of this Action: "Esposito et al. v. Cellco Partnership d/b/a Verizon Wireless"; and (4) the Settlement Class Member's original signature.
>
> [Da223-24.]

The individual opt-outs submitted by Mr. Murphy's clients comply in all material respects with these requirements. The trial court agreed.

Like its factual misrepresentations, Verizon's legal arguments are disingenuous. Verizon relies on *In re Tik Tok Cons. Privacy Litig.*, which did not invalidate any opt-outs and instead approved, as is the case here, procedures "ensuring that the class member is individually consenting to opt out." 565 F. Supp. 3d 1076, 1092-93 (N.D. Ill. 2021) (internal quotation marks omitted). The *TikTok*

court recognized "mass" opt outs as "*en masse* by means of a single unsigned, electronic filing from their lawyers." *Id.* That did not occur here.

Verizon fails to disclose to this Court that a subsequent decision a year later in the *In re TikTok Cons. Privacy Litig.* confirms the propriety of the process Mr. Murphy used here. 617 F. Supp. 3d 904, 931-32 (N.D. Ill. 2022). Like the Settlement Agreement here, the *TikTok* class settlement prohibited "mass opt-outs" and "required prospective opt-outs to individually fill out an opt-out form that set forth" essentially the same information as required in this case. *See id.* at 931-32. "Rather than individually submitting their opt-out forms," a group of putative class members "retained counsel who combined the opt-out forms and submitted them en masse." *Id.* at 931. The claims administrator "refused to accept the opt-out requests on the grounds that they were 'mass opt-outs.'" *Ibid.* Judge Lee reversed that decision, explaining that the mass-opt out prohibition was directed at attempts by a law firm to file "a single, unsigned opt-out form on behalf of a large group of class members." *Ibid.* That prohibition did not apply where, as in this case, the submissions provided "proof of individualized consent from every client." *Id.* at 932.

Judge Lee also rejected the defendant's complaint that "counsel for the Opt-Out Movants improperly 'solicited' opt-outs using deceptive advertising." *Id.* at 932 n.22. He noted that, as in this case, "neither the Settlement Notice nor the Settlement Agreement makes any reference to prohibiting solicitation of opt-outs." *Ibid.* And,

as in this case, the defendant failed to provide "any evidence that these advertisements actually caused confusion among class members." *Ibid.*

Similarly, in *Sharp Farms v. Speaks*, also relied on by Verizon, class representatives of a class sought to opt-out as a group the entire class they represented. 917 F.3d 276, 298-99 (4th Cir. 2019). The Court of Appeals rejected this group or mass opt-out. *Id.* Again, that is simply not what happened here, as each and every opt-out was an individual opt-out, individually consented to, and individually transmitted.

Mr. Murphy undertook to eliminate unnecessary barriers while both complying with all the requirements of the Settlement Agreement and maintaining the informed, individualized consent the trial court required. At the same time, he has removed another substantial impediment to opting out for those dissatisfied with the settlement by providing a real alternative to acquiescing to the settlement. Accordingly, all of Mr. Murphy's clients' opt-outs are valid, and the trial court's order denying Verizon's attempt to invalidate them should be affirmed.

II. MR. MURPHY'S EFFORTS TO PROVIDE PUTATIVE CLASS MEMBERS AN ALTERNATIVE TO THIS SETTLEMENT, AND TO ASSIST THEM IN COMPLYING WITH THE SETTLEMENT'S ONEROUS OPT-OUT REQUIREMENTS, WERE ENTIRELY PROPER AND CONSTITUTIONALLY PROTECTED.

A. The Trial Court Correctly Found That Mr. Murphy's Communications Were Not Misleading.

There is no basis for reversal of the trial court's finding that Mr. Murphy's website was *not* misleading or abusive. The only thing misleading in this appeal is Verizon's misrepresentation to this Court that the trial court "agreed that the Murphy website was abusive."[4] (Verizon Br. at 29.) Verizon argues that Mr. Murphy's communications are misleading in a variety of ways, but none of its allegations withstand scrutiny.

First, Verizon argued that the advertisements are misleading because they do not adequately describe the proposed settlement. According to Verizon, no reasonable consumer reviewing the webpage would understand they may be entitled to payment if the trial court granted final approval to the class settlement. (Verizon Br. 27.) Nonsense.

Mr. Murphy repeatedly notified readers of the existence of the settlement and provided two different links that provided all of the information the Parties allege is missing from the advertisement. The landing page prominently invites viewers to "view the settlement in Esposito et al v. Cellco Partnership d/b/a Verizon Wireless."

[4] Ignoring the trial court's Order, Verizon cites instead an out-of-context excerpt from the final Fairness Hearing a month later concerning the Parties' and Settlement Administrator's direct violation of the Consent Order.

(Da334.) It then provides a hyperlink to the Settlement Agreement and invites the reader to "click here." (*Ibid.*) It is only then that the advertisement offers readers the opportunity to sign up with Mr. Murphy to pursue a claim. (*Ibid.*) Clicking on that button leads to a retainer agreement. (Da336-38.) Immediately after entering their contact information, the user is again informed of the settlement and provided a link to the full settlement website. *Ibid*. And right above the final signature block is the affirmation that "I wish to be excluded from the Settlement Class in Esposito et al. v. Cellco Partnership d/b/a/ Verizon Wireless." *Ibid*.

Without a hint of irony, Verizon insists that providing this information via hyperlinks is insufficient, even though it has founded its entire defense of its administrative fees on the claim that consumers were adequately informed about those charges because Verizon included links to that information on the signup pages of its marketing websites. Similarly, Class Counsel's website advertises the Settlement by relying on hyperlinks to provide the information they accuse Mr. Murphy of omitting.[5] The class notice and the settlement website also are thick with hyperlinks a consumer must follow to determine, among other things: (1) how to file a claim; (2) how to file objections; (3) how to opt out; (4) the claims to be released; (5) the detailed caveats to the promise of a payment "up to $100.00"; and (6) the

[5] DeNittis | Osefchen | Prince, P.C., *Learn more about the $100 Million Verizon Class Action Settlement from DeNittis, Osefchen, Prince, P.C. You may be entitled to payment!* (last visited Dec. 2, 2024). (Ra60-66.)

amounts class counsel will be requesting in fees (which decreases the amount of class members' recovery dollar-for-dollar).[6]

If hyperlinks are good enough for the Parties and the trial court, they surely are sufficient for Mr. Murphy. *See, e.g.*, *In re Uponor, Inc., F1807 Plumbing Fittings Prod. Liab. Litig.*, 716 F.3d 1057, 1065 (8th Cir. 2013) (class members provided sufficient notice of scope of claims released when scope was described in settlement agreement and class notice "provided a link to the settlement website"); *Meyer v. Uber Techs., Inc.*, 868 F.3d 66, 79-80 (2d Cir. 2017) (consumers can agree to arbitration by agreeing to terms of service hyperlinked on registration page).

In addition, *every* Verizon customer who reads Mr. Murphy's advertisement has *already* received the court-ordered notice of the settlement on *multiple* occasions, by email and/or mailed postcards. (Ra89 (advertisements began to run after class notice sent out)).[7] The Parties represented to the trial court, and the trial court found, that this notice was sufficient to apprise class members of every fact they needed to know in order to make an informed opt-out decision. (Da314.) Verizon's claim that readers of Mr. Murphy's ads will nonetheless fail to understand

[6] *See* Settlement Administrator, Class Settlement Homepage (Ra67 (as archived by the Internet Archive a/k/a Wayback Machine (web.archive.org) on Feb. 1, 2024); *see also* Class Action Email Notice (Da257-59); and Postcard Notice (Da261-Da263).

[7] The Settlement has also received extensive media coverage. *See, e.g.*, Elizabeth Napolitano, *Some Verizon customers can claim part of $100 million settlement. Here's how.*, CBS News (Jan. 8, 2024), cbsnews.com/news/verizon-settlement-how-to-file-a-claim/; Emily Schmall, *How to Claim a Share of Verizon's $100 Million Proposed Settlement*, New York Times (Jan. 4, 2024), nytimes.com/2024/01/04/us/verizon-lawsuit-settlement-claim.html.

their settlement opportunities can only be true if the court-ordered notice has been utterly ineffective. And if the Parties were able to persuade the Court of that position, then this Court would be compelled to reverse final approval of the settlement for lack of adequate notice.

Second, Verizon also argues it is misleading for Mr. Murphy to tell consumers that Verizon is attempting to bar any claims over Verizon's unlawful charges. But the Parties cannot dispute this statement is true—the settlement will release all class members' claims regarding Verizon's administrative fees for the class period thereby forever barring those claims. (Da226.) Instead, Verizon implies that the statement is misleading because readers might not realize that the bar is in exchange for a potential settlement payment. But that much is evident from the *very next sentence*, which states "(To view the settlement in Esposito et al. v. Cellco Partnership d/b/a/ Verizon Wireless click here.)." (Da334.) Reasonable viewers would thus understand that the bar arises from the settlement. And if there were any doubt, Mr. Murphy makes clear that to avoid the bar, it is necessary to opt-out of the settlement. (Da336-38.) And all of this, again, is against the backdrop of the court-ordered notice, which stresses that "[i]f you do not exclude yourself, and the Court approves the settlement, you will be bound by the Court's orders and judgments and will release your claims relating to this lawsuit." (Da258.)

Third, Verizon claims it is misleading for Mr. Murphy to state, "We think we can do better." That claim has no factual or legal merit either. First, Mr. Murphy has done better, recovering (as of the date of this filing) on average $112.51 per claimant compared to the $11.80 that this settlement paid to claimants. Second, Verizon's counsel stated on the record that Mr. Murphy's clients were all but certain to be offered more in arbitration than they stood to receive from the settlement:

> And let me address the settlement point for a minute. Verizon's very consumer-friendly arbitration agreement has a provision in there that says that if Verizon doesn't make a settlement offer prior to a claim coming over here, then regardless of what amount the arbitrator awards, if the claimant prevails, claimant is entitled to a minimum of $5,000 and attorneys fees. So Verizon, coming up on these hearings, made a settlement offer, the same one, to all of Mr. Murphy's clients.
>
> [T46:2-12.]

None of Mr. Murphy's clients received settlement offers of less than $11.80. In fact, by Verizon's own analysis, each arbitration filed could receive a settlement offer of around $400. [T36:5-7.] Thus, Mr. Murphy and his arbitration clients had a reasonable expectation that they could do better than $11.80.

To start, Verizon does not go so far as to claim that Mr. Murphy *promised* he could do better. They acknowledge that he expressly told potential clients that he could not guarantee the success of any claim. The retainer agreement further included an express "Disclaimer of Guarantee" emphasizing that there "can be no

assurance that you will recover any sum or sums in this matter." (Da337.) And the website invited potential clients to seek further information if they had any questions. (Da334 (explaining that "Free background information is available upon request" and providing contact information); (Da336-38.)

Verizon also presents no evidence that Mr. Murphy does not actually *believe* that he can do better. It is not hard to imagine a lawyer thinking he could obtain better than an average of less than $12 per claim (and no more than $19). And, indeed, Mr. Murphy explains in his affidavit that he believes that the settlement value here was substantially diminished by the strategy of seeking to litigate the claims as a class action in court and that clients will have far more settlement leverage in arbitration. (Ra87-88.) Verizon may disagree with this assessment, but surely Mr. Murphy is entitled to his opinion and to share it with potential clients.

Indeed, as the Third Circuit has noted, the class action rules expressly afford "class members the right to contact their own attorneys to determine whether joining a proposed class-wide settlement is in their best interests." *In re Community Bank of Northern Virginia*, 418 F.3d 277, 312-13 (3d Cir. 2005); *see* R. 4:32-2(b)(2)(D) (class notice must inform class members that they "may enter an appearance through counsel if the member so desires"). The principal question class members will have for those outside counsel is whether that lawyer believes the class member is better off joining the class or pursuing her own claims independently. Verizon cites no case

in which any court has ever undertaken to evaluate whether that advice is well-founded, much less enjoined a lawyer from providing that advice because of a disagreement with the lawyer's assessment.

Instead, Verizon argues that Mr. Murphy's advice was misleading by omission because it failed to disclose his win-loss record in the handful of arbitrations that have been litigated to judgment. But again no case or ethics decision ever required such disclosure. Moreover, Class Counsel here made representations about their view of the potential clients' chances of success. But Class Counsel did not disclose that they had yet to win a penny for any client in any arbitration or court case. That is because nothing in the law or rules of Professional Conduct require disclosure of a win-loss record or even an average recovery (where Mr. Murphy's average recovery exceeds what the Class received).

To the extent Verizon argues that Mr. Murphy had a special disclosure duty here because of his track record in his first few arbitrations, that argument is baseless as well. To start, it lacks any factual basis. Verizon emphasizes that arbitrators have ruled against Mr. Murphy in the first few of his several thousand cases pending before the AAA, with the remaining bellwethers were still pending. Verizon fails to disclose, however, that it settled another of the bellwethers for over $400. (Ra84-85.) This average recovery of greater than $66 per claim (as of the trial court's decision, and which average has since increased) is more than 5 times the average

recovery Class Counsel has secured for the small percentage of class members who actually submitted a claim (90% of class members will get nothing at all). (Ra80.) And, this is better than Class Counsel's record of zero recoveries for any client at the time they were soliciting clients for their arbitrations and litigations. To be sure, some of Mr. Murphy's clients lost their cases and received nothing. But a one-in-six shot at more than $400 is still worth more than a 100% chance at receiving even the maximum recovery of $18.99 (the expected value of the gamble being $66).

If all of this deep analysis of the results of six cases in a multi-thousand case inventory seems silly, that's because it is. The sample size is too small to be informative, and initial results fail to account for the likelihood that the presentation of the cases will evolve as the parties learn from the results of the initial cases. Mr. Murphy and Verizon had not even completed the ten-case bellwether process Verizon purportedly designed in order to give the parties a basis for informed negotiations. In its current contracts, Verizon has expanded that process to 50 cases, presumably on the view that a larger sample provides a better basis for assessing the strength of the claims. (Ra84.) Verizon's argument also fails to account for the settlement pressure that will be brought to bear on Verizon if the AAA or a court invalidates Verizon's mass arbitration bar, consistent with the decisions of a prior AAA process arbitration and two courts. (Ra87-88.)

The argument also lacks a legal basis. Verizon cites no case or ethics opinion ever going down this rabbit hole to assess whether an attorney's initial track record is so poor as to require disclosure. They do cite New Jersey Rule of Professional Conduct 7.1(a)(2), which prohibits communications "likely to create an unjustified expectation about results the lawyer can achieve." N.J. RPC 7.1(a)(2). But no reasonable person would view Mr. Murphy's statement that "We think we can do better" as promising any particular result, especially when accompanied by the disclaimer that he could *not* "guarantee the success of any claim." *See* Murphy Webpage, *supra*. And even if a reader came away from the ad expecting to do better than the current settlement (*i.e.*, better than an average of less than $12 per claimant, with more than 90% of class members expected to get nothing) the Parties provide no basis to find that such an expectation would be unjustified.

B. Mr. Murphy's Fully Complied With New Jersey's Rules of Professional Conduct.

For the reasons already discussed, Mr. Murphy has not violated the New Jersey Rules of Profession Conduct's proscription against false or misleading communications in Rule 7.1(a)(1) or its ban on communications likely to create an unjustified expectation about results in Rule 7.1(a)(2). Verizon also claims that Mr. Murphy has violated Rule 4.2's limitation on communications with represented parties. Again, Verizon misrepresents the law by failing to disclose to this Court that the authority they rely on applies only when a class has been finally certified.

(Verizon Br. at 33 *citing cases*.) But at the time Mr. Murphy's clients engaged him this class had not been finally certified, it had only been *provisionally* certified and class members were expressly responsible for evaluating whether to release their claims by remaining in the class or retain their claims and opt out of the class.

Verizon not only misrepresents the authority they rely on, but fails to disclose that the Third Circuit and American Bar Association (ABA) have directly rejected Class Counsel's position. In a case Verizon cited in the trial court but omits in its brief here, the Third Circuit directly confronted the question whether putative class members are considered represented parties during the opt-out period. *In re: Community Bank*, 418 F.3d at 283, like this case, involved a "'settlement-only' class action" in which a defendant facing multiple lawsuits sought to settle with one amenable law firm and sweep into the settlement the clients of the less compliant lawyers. During the opt-out period, some of those lawyers directly contacted class members and urged them to opt out. The district court responded by invalidating the opt-outs and enjoining the outside lawyers from communicating with putative class members without prior court approval. *Id*. at 310.

The Third Circuit reversed. *Id*. at 312-13. Most pertinent here, it rejected the view that such communications violate the lawyers' "ethical duty to refrain from communicating about the substance of the settlement with class members represented by another lawyer," *i.e.*, class counsel. *Id*. at 313 (quoting *Georgine v.,*

Amchem Prods., Inc., 160 F.R.D. 478, 495 n.26 (E.D. Pa. 1995)). The Third Circuit explained that "courts have recognized that class counsel do not possess a traditional attorney-client relationship with absent class members." *Ibid*. "While lead counsel owes a generalized duty to unnamed class members, the existence of such a fiduciary duty does not create an inviolate attorney-client relationship" of the sort that rendered class members trying to decide whether to opt out "walled off from any effort at solicitation." *Ibid*. (quoting *In re McKesson HBOC, Inc. Sec. Litig*., 126 F. Supp. 2d 1239, 1245 (N.D. Cal. 2000) and citing *Morisky v. Pub. Serv. Elec. & Gas Co.*, 191 F.R.D. 419, 424 (D.N.J. 2000) (no attorney-client privilege between putative class members and class counsel)). Indeed, the Third Circuit explained that the federal class action rules, in provisions mirrored by the New Jersey rules, "explicitly provide[] 'that a class member may enter an appearance through counsel if the member so desires.'" *Ibid*. (quoting Fed. R. Civ. P. 23(c)(2)(B)). "To accept the District Court's determination that a communication between outside counsel and an absent class member would be a violation of an attorney's ethical duty would essentially eviscerate this right." *Ibid*.

The ABA has taken the same view of its model rule, upon which New Jersey PRC 4.2 is based. In Formal Opinion 07-445, the ABA's Standing Committee on Ethics and Professional Responsibility has explained that "putative class members are not represented parties for purposes of the Model Rules prior to certification of

the class *and the expiration of the opt-out period*." (Ra95-100.); *see also ibid*. ("A client-lawyer relationship with a potential member of the class does not begin until the class has been certified and the time for opting out by a potential member of the class has expired.").

Accordingly, as a leading treatise has explained, the "majority rule is that while named plaintiffs are clients of Class Counsel precertification, absent class members have no attorney-client relationship with Class Counsel prior to class certification *and the expiration of any opt-out period*, and thus neither the ethical rules governing communications with represented parties nor the attorney-client privilege, are applicable precertification." 2 McLaughlin on Class Actions § 11:1 (20th ed.) (emphasis added) (collecting citations); *see also, e.g.*, Michigan Ethics Opinion No. RI-219 (Sep. 6, 1994) ("[A] putative member of a certified class who has not yet exercised an option to opt out of the class action, and has not specifically sought representation by the class representative's lawyer or another lawyer, is not 'known to be represented in the matter'" within the meaning of the represented parties rule). (Ra75-77, *available at* michbar.org/opinions/ethics/numbered_opinions?OpinionID=1089&Type=4)

This interpretation of the rule is particularly appropriate where, as here, a court had only *preliminarily* approved class certification and *tentatively* appointed class

counsel on the basis of a joint submission never subject to any adversarial process.[8] And the principal concern of the rule—that a represented party may be subject to coercion by an *adverse party*—does not apply where an attorney seeks to provide representation to a class member trying to decide whether to throw her lot in with the class or go her own way. *See* Michels & Hockenjos, New Jersey Attorney Ethics § 32:1, at 544 (GANN 2024) (noting "the rule is grounded in the notion that a represented client needs some protection from opposing counsel"). Finally, here, the communication takes the form of a passive advertisement to which class members must respond in order to initiate any further communications, minimizing the risk of coercion.

[8] This is case thus triply distinguishable from *Kleiner v. First National Bank of Atlanta*, 751 F.2d 1193 (11th Cir. 1985), in which the Eleventh Circuit considered efforts (1) by the *defendant* bank to solicit opt-outs from (2) a class previously certified for *litigation* through an *adversarial* class certification motion (3) in a context "rife with potential for coercion" because the class "consisted of Bank borrowers, many of whom were dependent on the Bank for future financing." *Id*. at 1202. The district court decision in *McWilliams v. Advanced Recovery Systems, Inc*., 176 F. Supp. 3d 635 (S.D. Miss. 2016), likewise did not involve a settlement class or merely preliminary class certification, nor did it address the authority discussed above.

CONCLUSION

For the foregoing reasons, Verizon's appeal should be denied the trial court's orders affirmed.

Dated: December 4, 2024

Respectfully submitted,
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SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION

DOCKET NO. A-002649-23

CIVIL ACTION

ON APPEAL FROM:

SUPERIOR COURT OF NEW JERSEY LAW DIVISION – MIDDLESEX COUNTY, NO. MID-L-6360-23

Sat below:
HON. ANA C. VISCOMI, J.S.C.

CHALLENDER. TYSON COHRON, CINTIA CORSI, ANDI ELLIS, LAURIE FRANTZ, ASHLEY GARRISON, ANGELA GREEN, CARLOS GUTIERREZ, JAMES HOLLING, KAREN HUDSON, JERRY HUNT, JENNIFER HURTT, JOYCE JONES, LYNN KIRALY, MICHELLE LACUESTA, JASON MCCONVILLE, JOSE NICOT, SANDRA OSHIRO, LESLIE OWENS, JON SANTOS, TERRY SEXTON, KATHLEEN WRIGHT, PAMELA M. ALLEN, SAMANTHA ALBAITIS, CYDNI ARTERBURY, LISA BAKER, BRIANA BELL, CHRISTINE BELLAVIA, KIMBERLY BLAIR, LEANOR BLAND-MULLINS, CAROLINE BONHAM, TAMMY BURKE, ANNMARIE CALDWELL, SHAUNA CAVALLARO, SANTOS COLON, ERIKA CONLEY, KENDRA CONOVER, DYLAN CORBIN, LAURA CURRY, SHAKERA DYER, JANE FREY, RUSSELL FROM, ANGEL GAINES, ASHTIN GAMBLIN, ERICKA GARDNER, ANN GRAFF, JAMES HENSLEY, SAREL HINES, ALEXANDER KEELER, ADAM KELLER, BILLIE KENDRICK, KRISTA KIRBY, JAN LOMBARD, MARC LOWREY, JILL MAILHOIT, AARON MAXA, KELLY MOORE, LINDSEY MORAN, DAVID MOYERS, JENNIFER OCAMPO-NEUBAUER, KEISHA ODOM, ANGEL PACHECHO, HEATHER

RAY, SUSAN SCOTT, LORI SNYDER, MISTY SUTTON, KATHRYN TAYLOR, ANTHONY VALLECORSA, CLAIRE WHITE, KRISTOPHER WILLARD, ALVIN WILSON, and BRAD YOUNG, on behalf of themselves and all others similarly situated,

Plaintiffs/Cross-Appellees,

vs.

CELLCO PARTNERSHIP d/b/a VERIZON WIRELESS,

Defendant-Appellant.

REPLY BRIEF OF DEFENDANT-APPELLANT

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Dated: December 17, 2024

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PRELIMINARY STATEMENT

The two issues of law presented by this appeal are straightforward.

First: The trial court, having approved a Settlement Agreement prohibiting "mass opt-outs," and having correctly found that Murphy Advocates Law Firm ("Murphy") solicited a mass opt-out, had no authority to validate the mass opt-out. The law is clear, and Murphy's brief did not dispute, that a trial court cannot unilaterally modify a class action settlement agreement. A trial court must approve or reject a settlement agreement in toto. Here, the trial court approved the settlement agreement, including its prohibition on mass opt-outs. For this reason, the trial court's correct finding that Murphy's website efforts amounted to a prohibited mass opt-out compels this Court to conclude that the trial court erred by validating the mass opt-out.

To avoid this inevitable conclusion that the trial court erred by validating a prohibited mass opt-out, Murphy's brief challenged the trial court's labeling of his website-generated opt-out letters as a "mass opt-out" because each letter bore an electronic signature. The argument fails, however, because Murphy's purported clients did not sign those letters. Murphy collected signatures for retainer letters, then transposed those signatures onto auto-generated purported opt-out letters he never let his "clients" see. These letters do not reflect a knowing, informed choice by each class member to opt out, as the law requires.

Second: The trial court, having correctly found that the Murphy Website confused members of the settlement class, erred by not requiring corrective communications to those class members. Although Verizon seeks a ruling that Murphy's actions amounted to a prohibited mass opt-out, Verizon is not seeking to prevent the class members Murphy solicited from opting out if they still wish to do so. Thousands of those who filled out Murphy's website form also sought benefits in the settlement, demonstrating that they did not understand the import of Murphy's form. Verizon seeks only to ensure that those to whom Murphy gave incomplete or misleading information make choices that are knowing and informed, and not the product of what the trial court correctly found to have been Murphy-caused confusion. Verizon's opening brief cited, and Murphy's brief ignored, multiple cases in which courts ordered corrective communications in similar circumstances. Murphy cited nothing to suggest a court can hold that class members were confused but choose not to correct it.

Verizon therefore respectfully requests that this Court remand the case to the trial court with instructions to (1) oversee transmission of corrective notices to the class members Murphy solicited through the Murphy Website; and (2) treat as valid opt-outs only those people who confirm, in response to corrective communications, that they wish to opt out of the settlement class.

PROCEDURAL HISTORY

Verizon incorporates by reference the Procedural History set forth in its opening brief. Dab3-4.

FACTUAL BACKGROUND

Verizon also incorporates this from its opening brief. Dab4-17.

ARGUMENT[1]

I. THE TRIAL COURT ERRED BY VALIDATING MURPHY'S MASS OPT-OUT, WHICH VIOLATED THE SETTLEMENT AGREEMENT (T65:3-23; Da356).

Murphy's efforts through his website constituted a mass opt-out, which the Settlement Agreement prohibited. See T65:19-23; Da367; Da379-80. Murphy's brief did not and could not dispute that if his website efforts amounted to a mass opt-out—which the trial court correctly found they did (Da356; Da360)—validating them was beyond the trial court's purview. To avoid this inevitable conclusion, Murphy's brief instead disputed the trial court's holding that his website efforts actually were a mass opt-out, contending that the presence of an electronic signature on each purported "opt-out letter" should have negated that conclusion. See Rab17-18. This argument elevates form over substance, which even the sole case on which Murphy relied says courts must not do when examining lawyer-generated mass opt-outs.

[1] Verizon will not address in this brief Murphy's baseless attacks on the class settlement. See Rab4-7, 21-23. The class settlement is not at issue in this appeal.

A. Murphy's Efforts Constituted a Mass Opt-Out.

Among the many reasons why courts routinely approve class action settlement agreements with prohibitions on mass opt-outs is to prevent interloping attorneys from submitting purported opt-outs that may or may not reflect each "client's express consent" to opt out. In re Centurylink Sales Pracs. & Secs. Litig., 2020 WL 3512807, at *3 (D. Minn. June 29, 2020); Da419. Murphy's brief contends that because each purported opt-out letter his website generated bore an individual electronic signature, he has demonstrated each client's express consent. See Rab17-19. This is not true, and the sole case on which he relies—In re TikTok Consumer Privacy Litig., 617 F. Supp. 3d 904, 931-32 (N.D. Ill. 2022)—does not support Murphy's argument.

In TikTok, each class member who opted out through counsel individually signed an opt-out letter they personally reviewed. 617 F. Supp. 3d at 931-32. Their counsel simply "combined the opt-out forms and submitted them" in one package, which the applicable settlement agreement did not prohibit. Id. at 931-32. The TikTok court found this process sufficient to demonstrate "proof of individualized consent from every client," which was necessary to avoid "violating the due process rights of individual class members . . . to personally decide whether to participate in the settlement." Id. at 932, citing Centurylink, 2020 WL 3512807, at *3-4; Da419-20.

Murphy's website efforts here do not come close to meeting the tests in TikTok, which that court expressly distinguished from "permitting lawyers to submit mass opt-outs on behalf of their clients without proof of individualized consent from every client." TikTok, 617 F. Supp. 3d at 931. It is not the mere presence of a signature on a letter that matters; Murphy's burden is to show "that the class member is individually consenting to opt out," and that Murphy is not just a "lawyer representing that [he has] that class member's authority, without the class member making an informed, individual decision." Centurylink, 2020 WL 3512807, at *3; Da419. Here, there is no record evidence that Murphy had attorney-client communications with the class members on whose behalf he sent the website opt-out letters. Nor did those people see or sign the letters Murphy submitted. Instead, Murphy obtained personal identifying information through the Murphy Website, generated opt-out letters that included this information, collected signatures for retainer letters, then transposed the signatures onto purported opt-out letters the "signers" never saw. See T25:14-20; Da336-38. This is not what the attorneys did in TikTok, and it is far closer to the process the Centurylink court properly rejected.

Murphy's sole basis for arguing that visitors to the Murphy Website made an informed decision to opt out, and that it therefore was permissible for him to transpose their retainer signatures onto opt-out letters, was the statement on the

Murphy Website, near the space where Murphy captured electronic signatures, stating "I wish to be excluded from the Settlement Class in Esposito et al v. Cellco Partnership d/b/a Verizon Wireless." Da338. This does not suffice to establish that the 5,517 class members who allegedly retained Murphy were making an informed choice to forego monetary benefits. Indeed, as is evident from the record, Murphy made no effort to determine if information transmitted through his website came from a real person or a "bot," or to counsel anyone about the pros and cons of opting out of the class. See Dab9; T33:17-24.

The difference between TikTok and Centurylink is between, on the one hand, class members receiving accurate information about a settlement and deciding individually to opt out of it and, on the other, class members being manipulated by lawyers who "did not spend very much time evaluating the merits of whether or not to opt-out in light of the individual circumstances of each of their clients and in consultation with them." Centurylink, 2020 WL 3512807, at *3; Da419. The trial court was correct to conclude that Murphy's website efforts constituted a mass opt-out prohibited by the Settlement Agreement. That should have been the end of the matter.

B. The Trial Court Erred by Ordering the Settlement Administrator To Accept Murphy's Mass Opt-Outs.

Because, as the trial court found, the website-generated letters constituted a prohibited mass opt-out, the trial court erred by ordering the Settlement

Administrator to accept them. See Da356; Da360. As Verizon explained in its opening brief, once a court approves a class action settlement agreement, the court is bound to enforce that agreement in its entirety. See Dab 18-19, 23 (citing, e.g., In the Matter of Township of Bordentown, 471 N.J. Super. 196, 217 (App. Div. 2022)). Murphy's brief did not dispute this.

It is "clearly within [a] court's discretion to turn away attempts by lawyers to opt out class members en masse." In re Diet Drugs, 282 F.3d 220, 241 (3d Cir. 2002). It is equally within courts' purview to spurn attempts by counsel to solicit mass opt outs. See Larson v. AT&T Mobility LLC, No. 07 Civ. 5325, 2009 WL 10689759, at *3 (D.N.J. Jan. 16, 2009) (denying request to share class member contact information with attorney proposing to solicit opt-outs); Dra2. Shorn of the false contention that class members reviewed and knowingly signed individual opt-out letters, Murphy's brief offers no defense at all to the trial court's ultra vires approval of his mass opt-out efforts. Therefore, if this Court agrees with the trial court's conclusion that Murphy's website efforts amounted to a mass opt-out prohibited by the Settlement Agreement, this Court must find that the trial court erred by validating the mass opt-out.

II. THE TRIAL COURT CORRECTLY FOUND THAT THE MURPHY WEBSITE WAS CONFUSING (Da379-80).

Rejecting Murphy's mass opt-out should not mean that the 5,517 class members affected lose their prospective ability to make an informed choice.

Verizon asks this Court to direct the trial court to give the affected persons a reasonable amount of time to decide whether they wish to receive the monetary benefit provided for by the settlement or, instead, to opt out of the class. To ensure that the choices these class members make are informed choices, however, this Court also should direct the trial court to provide corrective communications to the affected class members. Otherwise, their decisions will continue to be infected by the Murphy Website's misstatements and omissions.

As Verizon demonstrated in its opening brief, Murphy violated the due process rights of the class members on whose behalf Murphy submitted purported opt-out letters. Dab22-26. Murphy omitted material information about the settlement from his website solicitations, including basic information about what it meant to opt out. Da334-39. Murphy could have told the persons he solicited that the settlement offered monetary benefits and that they should review the court-authorized settlement notice to understand their options. Yet, though he describes himself as having a fiduciary attorney-client relationship with these people (see Rab17), he provided them with none of this important advice (see T25:14-20; T33:17-34:22).

When Verizon and Class Counsel brought the Murphy Website to the trial court's attention, the court issued orders on March 20, 2024, directing "Murphy Advocates, LLC and Evan Murphy [to] cease their solicitation efforts of class

members" (Da355), to "take down the online solicitation and opt out advertising campaign, specifically including the website www.verizonhiddenfees.com, and [to] refrain from soliciting class members in the future," (Da358). Taking down the website, however, did not address the damage already caused.[2] When the trial court declined to require corrective communications, the trial court did not know—because the parties did not yet know—the extent to which Murphy's website had generated junk requests. The trial court heard the parties' motions on February 16, 2024, and decided them on March 20, 2024, but the Settlement Administrator did not submit its declaration describing its handling of Murphy Website opt-out forms until April 22. See Da373. At a second hearing on April 26, 2024, the trial court referred to "the confusing nature of [the Murphy] website that [Murphy] should not have posted." Da380. But the trial court still did not order corrective communications. That was error.

When counsel seek to solicit class members, these "attorneys may not communicate misleading or inaccurate statements . . . about the terms of a settlement to induce them to file objections or to opt-out." Federal Judicial Center, Manual for Complex Litigation § 21.33 (4th ed. 2004). "Misrepresentations about [a] suit to class members gives rise to an 'obvious

[2] Murphy's brief contended that he discontinued the Murphy Website voluntarily and asserted that the trial court did not order its removal. See Rab 2, 11. That is obviously not true.

potential for confusion and/or adversely affecting the administration of justice' in class proceedings." Mullen v. GLV, Inc., 334 F.R.D. 656, 661 (N.D. Ill. 2020), quoting Gulf Oil Co. v. Bernard, 452 U.S. 89, 100 n.12 (1981). "Communications that are potentially coercive by encouraging individuals to opt out can affect a class member's decision to participate in the suit, undermining [the Rules'] policy of ensuring that this is an informed choice based on unbiased information." Id. at 661-62.

As the Third Circuit stated in a case Murphy cited, "[m]isleading communications to class members concerning the litigation pose a serious threat to the fairness of the litigation process, the adequacy of representation and the administration of justice generally." In re School Asbestos Litig., 842 F.2d 671, 680 (3d Cir. 1988) (cited at Rab15). In School Asbestos, defendants distributed a booklet seeking "to convince as many members of the plaintiff class as they can to forego the removal of asbestos in their buildings," thus "reduc[ing] the defendants' liability in the class action." Id. at 681. Although the Third Circuit limited lower courts' ability to police indirect communications that might only reach class members tangentially, the court saw no constitutional issues with "an affirmative disclosure requirement limited to direct communications to members of the plaintiff class." Id. at 684. Murphy's advertisements were expressly targeted to class members. That is why the trial court was right to order Murphy

to stop his confusing solicitations of class members but wrong not to order corrective communications to those Murphy already solicited.

In a case similar to this one, "[a] law firm that hitherto had played no role whatsoever in th[e] case posted a misleading online solicitation about the settlement." In re Facebook Biometric Information Privacy Litig., 522 F. Supp. 3d 617, 623 (N.D. Cal. 2021). Like the Murphy Website, "[t]he post deceptively invited people to 'sign up for a claim' when the law firm actually was trying to recruit opt-outs." Ibid. After a hearing, the court directed the law firm to "take down the posts and to send a curative notice to approximately 3,724 class members who had responded to the misleading solicitation." Ibid.

Verizon's opening brief cited and discussed Fox, Kleiner, and Loomis v. Unum Grp. Corp., No. 1:20-cv-251, 2021 WL 1206417, at *5 (E.D. Tenn. Feb. 26, 2021), Da428-29—all cases in which courts ordered corrective notices to class members who had been misled by solicitations from interloping counsel like Murphy. Dab29-31. Murphy's brief ignored these cases, and Murphy did not and could not dispute that this Court can order corrective communications to the class members he solicited through the Murphy Website.

Murphy's only argument against corrective communications relies on the TikTok case from Illinois. See Rab18-19, citing TikTok, 617 F. Supp. 3d at 931-32. As Murphy's brief admitted, however, the court in TikTok declined

corrective communications solely because the defendants "failed to provide 'any evidence that these advertisements actually caused confusion among class members.'" Rab18-19, quoting TikTok, 617 F. Supp. 3d at 932 n.22. Here, by contrast, Verizon submitted detailed evidence that Murphy confused class members. Dab13-14. Indeed, the trial court addressed "the confusing nature of [the Murphy] website" and said Murphy "should not have posted [it]." Da380.

The strongest evidence of confusion is that 2,371 of the people who filled out Murphy's website form also completed the Settlement Administrator's online form to seek monetary benefits from the settlement. See Da397. They would not have done this had they individually filled out a separate opt-out form and understood that providing information on the Murphy Website precluded them from also seeking benefits in the settlement. Out of more than 58 million members of the Settlement class to whom the Settlement Administrator sent notices (see Da347), more than five million filed claims for monetary benefits (see Da365), but only 505 people submitted valid opt-outs by means other than the Murphy Website (see Da398). This speaks to widespread satisfaction with the settlement. In contrast to those 505 valid opt-outs from class members who made an informed choice, Murphy's website captured and transmitted to the Settlement Administrator over 11,000 purported opt-out letters. Of that total, 1,694 came from non-class members, 341 contained incomplete information,

and 1,552 were duplicative. See Da397. Adding the 2,371 people who both completed Murphy's form and submitted a claim for benefits, more than half the website letters were problematic in one way or another.[3] See ibid. The administrator validated only 5,517 of them as class members who did not appear also to have filed a claim for settlement benefits. See Da398.

As further evidence that visitors to the Murphy Website were confused and did not realize they were opting out of a settlement class, the administrator identified a group of letters that came from people who appeared to have both submitted opt-out forms and completed settlement claim forms. Da373-74. Nearly all—97%—of the people who took these inconsistent actions "submitted opt-out forms generated by the website . . . Murphy used to solicit opt-outs." Da374. In other words, other than the people Murphy solicited through his website, almost no one else took these two inconsistent steps.

The administrator, at the trial court's direction (see Da372), advised these apparently confused class members that they had to choose between receiving monetary benefits and opting out (Da374). The trial court did not authorize providing any corrective information to these class members—just to put the

[3] Though Murphy's brief, in a footnote (Rab11 n.3), disputed that opt-out letters generated through the Murphy Website accounted for nearly all the opt out requests the Settlement Administrator received, the Administrator's declarations explained these facts in detail, using the term "bulk exclusions" to refer to the Murphy Website-generated opt-out letters. See Da373-76, 395-98.

binary choice to them. See Da372. Even without corrective information, 76% of respondents (456 out of 601) said they did not want to opt out. See Da374. This overwhelming response in favor of seeking monetary benefits, rather than opting out, is additional record evidence strongly showing that these class members did not intend to opt out or did not understand the consequences of opting out.

The 5,517 people who filled out the Murphy Website form but did not submit claims for monetary benefits in the settlement should receive corrective communications. See Da397-98. They should be advised that they can receive approximately $11.89 by advising the Settlement Administrator that they wish to participate in the class settlement. The corrective communications also can advise them about what would be involved in pursuing an arbitration brought on their behalf by Murphy, and (if the trial court so directs) the fact that Murphy had not been successful in any of seven matters decided by arbitrators.

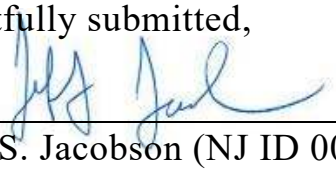
Although Murphy refers to the 5,517 Verizon customers at issue in this appeal as his "clients" (Rab19), there is no evidence he has communicated with any of them after they clicked accept on his online retainer agreement, (see T25:14-20; T33:17-24). Murphy thus is not in a position to state that any of them understood the consequences of the letters he sent on their behalf—letters which, it bears repeating, Murphy never let them see—opting them out of the Settlement Class. As Murphy admitted in his brief, these Verizon customers are nothing

more to him that a cudgel to use because "Verizon had made itself vulnerable" to his mass arbitration attack. Rab7. It is up to this Court to ensure that these people receive the information they need to make an informed decision that is right for each of them, without regard to what may be in Murphy's financial interests, or Verizon's.

CONCLUSION

For the reasons stated herein, and in Verizon's opening brief, this Court should remand this matter to the trial court with instructions to (1) strike from the final list of valid opt-outs all persons who participated in Murphy's mass opt-out; (2) direct appropriate corrective communications to these class members; and (3) set an appropriate deadline by which each of them can make an informed and final decision whether to opt out of the Settlement Class or to receive the same monetary benefits that some five million other Verizon customers chose to receive in the settlement.

Respectfully submitted,



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