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18 *Co-Lead Counsel for Direct Purchaser Plaintiffs*

19 **UNITED STATES DISTRICT COURT**  
**NORTHERN DISTRICT OF CALIFORNIA**  
 20 **OAKLAND DIVISION**

21 IN RE: LITHIUM ION BATTERIES  
 22 ANTITRUST LITIGATION

Case No. 13-md-02420-YGR  
 MDL No. 2420

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 24 This Document Relates to:  
 25 *All Direct Purchaser Actions*

**DECLARATION OF JOSEPH J.  
 TABACCO, JR. IN SUPPORT OF  
 MOTION FOR ORDER AUTHORIZING  
 DISTRIBUTION OF SETTLEMENT  
 FUNDS AND IN OPPOSITION TO  
 SPRINT COMMUNICATIONS, INC.'S  
 CROSS-MOTION**

Date: [Vacated]  
 Time: n/a  
 Judge: Hon. Yvonne Gonzalez Rogers  
 28 Courtroom: 1

1 I, Joseph J. Tabacco, Jr., declare:

2 1. I am a partner of Berman Tabacco. I submit this declaration in support of Direct  
3 Purchaser Plaintiffs' Motion for Order Authorizing Distribution of Settlement Funds and in  
4 opposition to the Sprint Communications, Inc.'s Cross-Motion.

5 2. I, or members of my firm, have been involved in almost every aspect of this case  
6 since its inception. On May 17, 2013, the Court appointed me and my firm as one of three  
7 Interim Co-Lead Counsel for the Direct Purchaser Plaintiff Class. ECF No. 194. I make this  
8 declaration of my own personal knowledge, and if called upon to do so, could and would testify  
9 competently to the facts contained herein.

10 3. On March 24, 2020, I spoke by phone with Patrick Jermyn, Deputy General  
11 Counsel of Kent Recovery Services regarding the claim of Sprint Communications, Inc. When I  
12 received the call from Mr. Jermyn, he introduced himself as general counsel for Kent and said he  
13 wanted to see if Sprint's disputed claim could be resolved. Thus, I understood our  
14 communication to be subject to Federal Rule of Evidence 408 as a privileged settlement  
15 communication. I am therefore disappointed to see that Mr. Jermyn not only purports to  
16 represent the substance of the privileged communications in his declaration (ECF No. 2597-1)  
17 ("Jermyn Decl.") but then proceeds to mischaracterize what was said.

18 4. In particular, at no time did I "acknowledge[] the error in disallowing the claims"  
19 as Mr. Jermyn asserts. Jermyn Decl. ¶ 11.

20 5. Indeed, this erroneous assertion contradicts other portions of Mr. Jermyn's  
21 declaration. Elsewhere, he accurately states that I informed him that Sprint's claim had been  
22 reduced because the business records that Sprint submitted to substantiate its claim showed on  
23 their face that a significant amount of purchases were not directly made from a Defendant or a  
24 Defendants' division, subsidiary, or affiliate, and hence were deemed ineligible by the  
25 Settlement Administrator. *See* Jermyn Decl. ¶ 9.

26 6. To be clear, if I was of the view that a substantive error had been made by the  
27 Settlement Administrator or Co-Lead Counsel, I would not have "suggested that there is nothing  
28 that Counsel or the Settlement Administrator could do," as Mr. Jermyn asserts. Jermyn Decl.

1 ¶ 11. There are obvious ways that Co-Lead Counsel could have asked the Court to modify the  
2 requested proposed order to distribute settlement funds had such relief been warranted.

3 7. What I did say in substance, to Mr. Jermyn, was that if Kent and Sprint still  
4 believed the Settlement Administrator made a mistake, their remedy was to bring the matter to  
5 the Court's attention. Consistent with this statement, Co-Lead Counsel did not oppose Sprint  
6 filing its administrative motion.

7 I declare under penalty of perjury that the foregoing is true and correct.

8 Executed on April 9, 2020 at San Francisco, California.

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*/s/ Joseph J. Tabacco, Jr.*  
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Joseph J. Tabacco, Jr.