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12
 13 UNITED STATES DISTRICT COURT
 14 NORTHERN DISTRICT OF CALIFORNIA

16 PATRICK HENDRICKS, on behalf of himself
and all others similarly situated,

17 Plaintiff,

18 v.

19 AT&T MOBILITY, LLC,

20 Defendant.

Case No. C11-00409 CRB
Hon. Charles R. Breyer

**PLAINTIFF'S MOTION TO APPOINT
 CO-LEAD INTERIM CLASS COUNSEL
 PURSUANT TO FED.R.CIV.P. 23(G)(3);
 MEMORANDUM OF LAW IN
 SUPPORT; DECLARATIONS OF L.
 TIMOTHY FISHER AND BARRY L.
 DAVIS**

21 Date: March 25, 2011
22 Time: 10:00 a.m.
23 Courtroom 8

1 **MEMORANDUM OF LAW**

2 **I. INTRODUCTION AND PRELIMINARY STATEMENT**

3 Plaintiff Patrick Hendricks (hereafter “Plaintiff”), Bursor & Fisher, P.A. and Thornton,
4 Davis & Fein, P.A. move this Court for an order appointing interim class counsel pursuant to
5 FED.R.CIV.P. 23(g)(3).

6 This motion is brought on the grounds that appointment of co-lead interim class counsel is
7 necessary to protect the interests of the proposed class and progress toward class certification and
8 trial. Additionally, this motion is brought on the grounds that the appointment of interim class
9 counsel will create one unified voice for Plaintiff and all putative class plaintiffs, and in turn
10 promote efficiency and conserve judicial resources.

11 For all these reasons, and as detailed more fully below, Plaintiff respectfully requests that
12 the Court grant his motion and appoint Bursor & Fisher, P.A. and Thornton, Davis & Fein, P.A. co-
13 lead interim class counsel.

14 **II. FACTUAL BACKGROUND**

15 Plaintiff brings this action on behalf of himself and all others similarly situated against
16 defendant AT&T Mobility, LLC (“AT&T”). Complaint at 1. AT&T’s billing system for iPhone
17 and iPad data transactions is like a rigged gas pump that charges for a full gallon when it pumps
18 only nine-tenths of a gallon into your car’s tank. *Id.* ¶ 1. AT&T’s bills systematically overstate the
19 amount of data used on each data transaction involving an iPhone or iPad account. *Id.* This was
20 discovered by an independent consulting firm retained by Plaintiff’s counsel, which conducted a
21 two-month study of AT&T’s billing practices for data usage, and found that AT&T bills
22 systematically overstate web server traffic by 7% to 14%, and in some instances by over 300%. *Id.*

23 Not only does AT&T systematically overbill for every data transaction, it also bills for
24 phantom data traffic when there is no actual data usage initiated by the customer. *Id.* ¶ 2. This is
25 like the rigged gas pump charging you when you never even pulled your car into the station. *Id.*

26 Tests conducted by the same independent consulting firm also show that AT&T’s billing
27 system does not accurately record the time and date on which data usage occurs, which often
28 causes charges to be posted to the wrong billing cycle. *Id.* ¶ 3. Such untimely billing of data
transactions prevents customers from monitoring their data usage, and also prevents customers
from utilizing their full allotment of data within the billing cycle, and causes overcharges. *Id.*

Plaintiff is an AT&T iPhone subscriber with a usage-based data plan that provides a 200
MB monthly allowance of data usage for \$15 per month. *Id.* ¶ 10. Usage in excess of the 200 MB

1 allowance is billed at \$15 for each additional 200 MB, or fraction thereof. *Id.* AT&T’s rigged
2 billing system has systematically overstated Plaintiff’s data usage. *Id.* ¶ 11. Plaintiff suffered
3 economic losses as a result of AT&T’s rigged billing system because (a) he incurred and paid fees
4 to AT&T which he would not have incurred if his data usage had been accurately metered, and (b)
5 he curtailed his data usage to attempt to avoid incurring such fees, which prevented him from
6 making full, or nearly full, use of the 200 MB of data that he pays for every month. *Id.* ¶ 12.

7 Plaintiff seeks to represent a class defined as all persons in the United States and its
8 territories with a usage-based data plan on an AT&T iPhone or iPad account for any time period
9 from June 29, 2007 to date (hereafter, the “Class”). *Id.* ¶ 13. He asserts five claims including a
10 Common Count for Money Had and Received (Count I), Breach of Contract (Count II), Unjust
11 Enrichment (Count III), for violation of 47 U.S.C. § 201(b) (Count IV), and for violation of the
12 fraudulent and deceptive, unlawful and unfair prongs of California’s Unfair Competition Law
13 (“UCL”) (Count V).

14 III. ARGUMENT

15 A. The Court Should Appoint Plaintiff’s Counsel as Co-Lead Interim Class Counsel

16 Under FED.R.CIV.P. 23(g)(3), a “court may designate interim counsel to act on behalf of the
17 putative class before determining whether to certify the action as a class action.” Although the rule
18 states the court “may” appoint an interim counsel, courts that have construed Rule 23(g)(3) have
19 relied on the Advisory Committee Notes (hereafter “Notes”) accompanying the rule to hold that
20 interim counsel should be appointed when necessary to protect the interests of the putative class.
21 *See, e.g., Parkinson v. Hyundai Motor Am.*, 2006 WL2289801 at *2 (C.D. Cal. Aug. 7, 2006).
22 Further, the Notes contemplate that “[t]ime may be needed to explore designation of class counsel
23 under Rule 23(g)” and recognize “that in many cases the need to progress toward the certification
24 determination may require designation of interim counsel.” FED.R.CIV.P. 23, Advisory Committee
25 Notes (2003).

26 While neither the federal rules nor the advisory committee notes expressly so state, it
27 appears to be generally accepted that the considerations set out in Rule 23(g)(1), which governs
28 appointment of class counsel once a class is certified, apply equally to the designation of interim
class counsel before certification. *In re Air Cargo Shipping Servs. Antitrust Litig.*, 240 F.R.D. 56,

1 57 (E.D.N.Y. 2006) (*citing Parkinson v. Hyundai Motor America*, No. 06-345, 2006 WL 2289801,
2 at *2; *Hill v. The Tribune Co.*, No. 05-2602, 2005 WL 3299144 at *3-4 (N.D. Ill. Oct. 13, 2005)).

3 Rule 23(g)(1) provides, in relevant part, that in appointing class counsel the Court:

4 (A) must consider:

- 5 (i) the work counsel has done in identifying or investigating
6 potential claims in the action;
- 7 (ii) counsel's experience in handling class actions, other complex
8 litigation, and the types of claims asserted in the action;
- 9 (iii) counsel's knowledge of the applicable law; and
- 10 (iv) the resources that counsel will commit to representing the class;

11 (B) may consider any other matter pertinent to counsel's ability to fairly
12 and adequately represent the interests of the class.

13 FED.R.CIV.P. 23(g)(1).

14 In general, a class is fairly and adequately represented where counsel is qualified,
15 experienced and generally capable of conducting class action litigation. *Jordan v. County of Los*
16 *Angeles*, 669 F.2d 1311 (9th Cir. 1980), *vacated on other grounds*, 459 U.S. 810, 103 S.Ct. 35, 74
17 L.Ed.2d 48 (1982). The considerations set forth below in detail support the designation of
18 Plaintiff's chosen counsel as Co-Lead Interim Class Counsel.

19 ***I. Plaintiff's Counsel's Identification and Investigation of the Claims***

20 While no one factor under FED.R.CIV.P. 23(g)(1) "should necessarily be determinative,"
21 Advisory Committee Notes (2003), the investigative and analytical efforts of counsel can be a
22 deciding factor:

23 In a case with a plaintiff class, the process of drafting the complaint
24 requires some investigatory and analytical effort, tasks that strangers
25 to the action most likely will not have undertaken. All other things
26 being equal, when an attorney has performed these or other
27 investigative and analytical tasks before making the application for
28 appointment, he or she is in a better position to represent the class
fairly and adequately than attorneys who did not undertake those
tasks.

MOORE'S FEDERAL PRACTICE § 23.120(3)(a) (3d. Ed. 2007) (emphasis added).

1 Undersigned counsel’s work to identify and investigate the claims in this case demonstrates
2 that they have and will continue to fairly and adequately represent the class. Proposed Co-Lead
3 Interim Class Counsel performed the following work to identify and investigate the claims against
4 defendant:

- 5 1) Proposed Co-Lead Interim Class Counsel conducted an extensive investigation of
6 potential claims arising from AT&T’s fraudulent billing scheme, including retaining an
7 independent expert to perform comprehensive studies and tests on various AT&T
8 devices, including the iPhone and iPad. These tests began in September 2010, and the
9 testing cost Plaintiff’s counsel \$46,253.11 in expert fees through year end 2010. This
10 does not include additional fees and expenses in January 2011 and beyond, which have
11 not yet been billed. Plaintiff’s counsel spent five months and assigned six attorneys to
12 gather and study the results of the expert’s tests prior to filing the Complaint. This
13 herculean effort represents the highest standard of professionalism, dedication and
14 creativity which have been marshaled to identify, develop and demonstrate the claims
15 alleged in the Complaint. These extraordinary measures are precisely the type of work
16 that the Advisory Committee Notes to Rule 23 state as what the Court should consider
17 in appointing Interim Class Counsel;
- 18 2) Proposed Co-Lead Interim Class Counsel communicated with three hundred forty-four
19 (344) AT&T customers regarding the overbilling described in the Complaint; and
- 20 3) Proposed Co-Lead Interim Class Counsel have reviewed thousands of pages of bills,
21 contracts and phone plans. Fisher Decl. ¶ 4; Davis Decl. ¶ 4.

22 The Advisory Committee Notes to Rule 23 also contemplate that the appointment of
23 interim class counsel may be necessary to conduct pre-certification discovery prior to a
24 determination to grant or deny certification pursuant to Rule 23(c)(1), inasmuch as “some
25 discovery is often necessary for that determination.” FED.R.CIV.P. 23, Advisory Committee Notes
26 (2003). The Notes further state that “[o]rdinarily such work is handled by the lawyer who filed the
27 action.” *Id.*

1 Here, a significant amount of discovery and related motion practice is expected to take
2 place prior to the determination of certification. *See id.* (noting that interim class counsel may be
3 necessary to “make or respond to motions before certification”). First, the class certification
4 motion has not yet been scheduled and some discovery likely will be required before a class
5 certification motion is filed. Second, discovery in this matter may be complicated and require
6 negotiations and motions prior to class certification. Finally, AT&T has yet to respond to the
7 Complaint in this action and may move to dismiss one or more of the causes of action. Plaintiff’s
8 counsel’s prior extensive investigation into the claims and their cooperation with retained experts
9 who have tested AT&T devices and exposed AT&T’s overbilling practices will enable them to
10 more than adequately handle this discovery and related motion practice.

11 **2. Plaintiff’s Counsel’s Experience in Handling Class Actions and Other Complex**
12 **Litigation**

13 Proposed Co-Lead Interim Class Counsel are experienced in class actions and complex
14 litigation of this nature.

15 Bursor & Fisher, P.A. focuses on complex commercial litigation and class actions. The
16 firm’s attorneys have represented both plaintiffs and defendants in more than 70 class action
17 lawsuits in state and federal courts throughout the country in a variety of fields, including
18 telecommunications, home appliances, pharmaceuticals and dietary supplements. Specifically, the
19 attorneys of Bursor & Fisher, P.A. have been appointed by courts to represent customers of
20 Verizon Wireless, AT&T Wireless, Cingular Wireless, Sprint and T-Mobile, as well as purchasers
21 of Avacor and Xenadrine products. Fisher Decl. ¶ 2 and Exh. A.

22 The attorneys of Bursor & Fisher, P.A. have been appointed lead or co-lead class counsel to
23 the largest, 2nd largest and 3rd largest classes ever certified. In addition, their attorneys have
24 negotiated and obtained court-approval for two landmark settlements in *Nguyen v. Verizon*
25 *Wireless* and *Zill v. Sprint Spectrum* (the largest and 2nd largest classes ever certified). These
26 settlements required Verizon and Sprint to open their wireless networks to third-party devices and
27 applications. *Id.*

1 The lawyers of Bursor & Fisher, P.A. also have an active civil trial practice, having won
2 multi-million verdicts or recoveries in four of four civil jury trials since 2008. Fisher Decl. ¶ 5 and
3 Exh. A. For example, while serving as lead trial counsel in *Thomas v. Global Vision Products,*
4 *Inc.*, Bursor & Fisher obtained a \$50 million jury verdict in favor of the plaintiff and class. *Id.* In
5 another example, in *Ayyad v. Sprint Spectrum, L.P.*, Mr. Bursor and Mr. Fisher obtained a \$299
6 million trial verdict for a class of Sprint customers on a common count for money had and
7 received, and on claims for unjust enrichment and UCL violations very similar to those asserted
8 here in Counts I, III and V. *Id.*

9 Thornton, Davis & Fein, P.A. focuses on complex commercial, construction, product
10 liability and class actions. Mr. Davis is an AV rated board certified civil trial lawyer who has been
11 practicing for more than thirty years. He has acted as lead counsel in more than fifty trials of
12 complex civil litigation matters including mass disaster litigation, construction litigation,
13 multidistrict product liability cases involving drugs and medical devices, quadriplegia and brain
14 damage cases, intellectual property, and insurance bad faith and fraud. He is repeatedly voted as a
15 “super lawyer” by his colleagues and has lectured and taught extensively on trial practice, both as
16 an adjunct professor and as a trial academy faculty member. *Id.*

17 With regard to class actions, Mr. Davis has been counsel in numerous class actions in
18 connection with claims alleging false advertising and unfair trade practices, including
19 telecommunications companies where billing practices were at issue. In addition, Mr. Davis
20 defended Andrx in a class action alleging price fixing and anti-trust violations associated with
21 Cardizem CD. He has also been lead counsel in multidistrict mass disaster litigation, including
22 aviation mass disaster cases involving Arrow Air and American Airlines. *Id.* Currently, Mr. Davis
23 is involved in telecommunications litigation against Sprint Nextel Corporation for double-billing or
24 overbilling customers with “unlimited” data plans by charging those customers an additional
25 “Premium Data Add-on” fee. The Sprint litigation is currently pending in the Northern District of
26 California and is currently the subject of pending MDL transfer motions.

27 Combined, the attorneys of Bursor & Fisher, P.A. and Thornton, Davis & Fein, P.A. have
28 litigated hundreds of complex civil matters and tried over 60 jury trials. Their experience in

1 handling class actions and complex litigation, and successes in doing so, will ensure that Plaintiff
2 and those similarly situated are fairly and adequately represented in this action.

3 **3. Plaintiff's Counsel's Knowledge of the Applicable Law**

4 Proposed Co-Lead Interim Class Counsel are knowledgeable about the law applicable to the
5 claims herein, as demonstrated by their experience litigating other multi-state class actions, and in
6 particular complex consumer fraud class actions. As set forth above, Mr. Davis is very familiar
7 litigating large-scale consumer and complex actions, both on behalf of the Plaintiff and Defendant,
8 and is also very familiar with this Court's rules and procedures. Mr. Fisher has similar extensive
9 experience in litigating multi-state consumer class actions, and is familiar with this Court's rules
10 and procedures.

11 **4. Resources that Plaintiff's Counsel will Commit to Representing the Class**

12 Plaintiff's counsel have already demonstrated their willingness and ability to commit
13 resources to assure a strong and well-supported case on behalf of the class members by having
14 spent nearly \$50,000 in expert testing and analysis of the allegations in the Complaint. Further,
15 Plaintiff's counsel have staffed and will continue to staff this case with experienced lawyers to
16 prepare pleadings, write memoranda, conduct discovery and assist in trial preparation.

17 As Co-Lead Interim Class Counsel, Plaintiff's counsel will continue to commit the same
18 resources and effort to this case as they have committed to their other, successful litigations.

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1 **IV. CONCLUSION**

2 In the interest of judicial economy and for the reasons set forth above, Plaintiff respectfully
3 requests that the Court appoint Bursor & Fisher, P.A. and Thornton, Davis & Fein, P.A. as Co-
4 Lead Interim Class Counsel.

5 Dated: February 17, 2011

BURSOR & FISHER, P.A.

7
8 By: _____ /s/
9 L. Timothy Fisher

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26 adavis@tdflaw.com

27 Attorneys for Plaintiff
28

DECLARATION OF L. TIMOTHY FISHER

I, L. Timothy Fisher, declare as follows:

1. I am an attorney at law licensed to practice in the State of California, I am a member of the bar of this Court, and I am a partner in Bursor & Fisher, P.A., co-counsel of record for Plaintiff. I have personal knowledge of the facts set forth in this declaration, and, if called as a witness, could and would competently testify thereto under oath.

2. Attached as Exhibit A is a true and correct copy of the Firm Resume of my law firm, Bursor & Fisher, P.A. The members of my law firm have represented both plaintiffs and defendants in more than 70 class action lawsuits in state and federal courts throughout the country in a variety of fields, including telecommunications, home appliances, pharmaceuticals and dietary supplements. More specifically, we have been court-appointed to represent customers of Verizon Wireless, AT&T Wireless, Cingular Wireless, Sprint and T-Mobile, as well as purchasers of Avacor and Xenadrine products.

3. My office is located in Walnut Creek, California. I am very familiar with this Court's rules and procedures having litigated and appeared before this Court numerous times over the past fourteen years.

4. My law firm has conducted an extensive investigation into the claims arising from AT&T's overbilling scheme, including retaining an independent expert to perform comprehensive studies and tests on various AT&T devices, including the iPhone and iPad, having communicated with three hundred forty-four (344) AT&T customers regarding the overbilling described in the Complaint and having reviewed thousands of pages of bills, contracts and phone plans.

5. The lawyers of Bursor & Fisher, P.A. have an active civil trial practice, having won multi-million dollar verdicts or recoveries in four of four civil jury trials since 2008. For example, while serving as lead trial counsel in *Thomas v. Global Vision Products, Inc.*, Mr. Bursor and I obtained a \$50 million jury verdict in favor of the plaintiff and class. In another example, in *Ayyad v. Sprint Spectrum, L.P.*, Mr. Bursor and I obtained a \$299 million trial verdict for a class of Sprint customers on a common count for money had and received, and on claims for unjust enrichment and UCL violations very similar to those asserted here in Counts I, III and V.

1 **DECLARATION OF BARRY L. DAVIS**

2 I, Barry L. Davis, declare as follows:

3 1. I am an attorney at law licensed to practice in the State of Florida and am a partner
4 in Thornton, Davis & Fein, P.A., co-counsel of record for Plaintiffs. I have personal knowledge of
5 the facts set forth in this declaration, and, if called as a witness, could and would competently
6 testify thereto under oath.

7 2. Attached as Exhibit B is a true and correct copy of the Firm Resume of Thornton,
8 Davis & Fein, P.A. In addition to the information contained therein, my firm and I have the
9 following qualifications.

10 a. My firm focuses on complex commercial, construction, product
11 liability, and class actions. I have represented both plaintiffs and defendants in more than 10 class
12 action lawsuits in state and federal courts.

13 b. I am an AV rated board certified civil trial lawyer and have been
14 practicing for more than thirty years. I acted as lead counsel in more than fifty trials of complex
15 civil litigation matters including mass disaster litigation, construction litigation, multidistrict
16 product liability cases involving drugs and medical devices, quadriplegia and brain damage cases,
17 intellectual property, and insurance bad faith and fraud. I have been repeatedly voted as a “super
18 lawyer” by my colleagues and have lectured and taught extensively on trial practice, both as an
19 adjunct professor and as a trial academy faculty member.

20 c. With regard to class actions, I have been counsel in several class actions in
21 connection with claims alleging false advertising and unfair trade practices, including
22 telecommunications companies where billing practices were at issue. In addition, I defended
23 Andrx in a class action alleging price fixing and anti-trust violations associated with Cardizem CD.
24 I have also been lead counsel in multidistrict litigation involving mass disasters and product
25 liability lawsuits, including aviation mass disaster cases involving Arrow Air and American
26 Airlines. *Id.* Currently, I am involved in telecommunications litigation against Sprint Nextel
27 Corporation for double-billing or overbilling customers with “unlimited” data plans by charging
28 those customers an additional “Premium Data Add-on” fee. The Sprint litigation is currently

1 pending in the Northern District of California and is currently the subject of pending MDL transfer
2 motions.

3 3. My law firm is located in Miami-Dade County, Florida and has experience in a full
4 spectrum of complex litigation, represents national corporations, and has had handled cases in
5 many parts of the country.

6 4. My law firm has conducted an extensive investigation into the claims arising from
7 AT&T's overbilling scheme, including retaining an independent expert to perform comprehensive
8 studies and tests on various AT&T devices, including the iPhone and iPad, having communicated
9 with three hundred forty-four (344) AT&T customers regarding the overbilling described in the
10 Complaint and having reviewed thousands of pages of bills, contracts, and phone plans.

11 I declare under penalty of perjury under the laws of the United States that the foregoing is
12 true and correct.

13 Executed on February 17, 2011, at Miami, Florida.

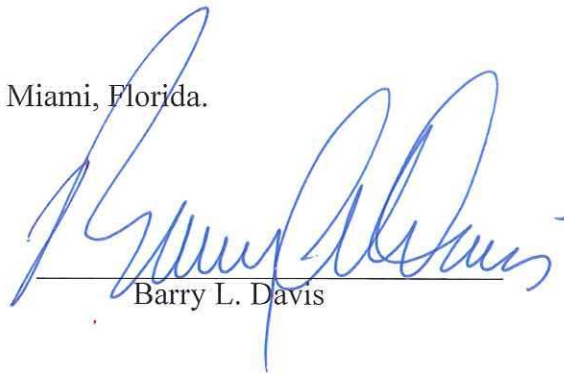
14
15
16 
17 Barry L. Davis

EXHIBIT A

BURSOR & FISHER, P.A.

FIRM RESUME

BURSOR & FISHER lawyers have represented both plaintiffs and defendants in more than 70 lawsuits in state and federal courts throughout the country, primarily in the fields of telecommunications, pharmaceuticals, and dietary supplements.

The lawyers at our firm have an active civil trial practice, having won multi-million dollar verdicts or recoveries in four of four civil jury trials since 2008. In our most recent trial in *Thomas v. Global Vision Products, Inc. (II)*, we obtained a \$50 million jury verdict in favor of our clients.

The lawyers at our firm have an active class action practice and have won numerous appointments as class counsel to represent millions of class members, including customers of Verizon Wireless, AT&T Wireless, Cingular Wireless, Sprint, and T-Mobile, as well as purchasers of Avacor™ and Xenadrine™ products.

The firm has offices in New York, Florida and California.

SCOTT A. BURSOR

Mr. Bursor has an active civil trial practice, having won multi-million verdicts or recoveries in four of four civil jury trials since 2008. In Mr. Bursor's most recent trial in *Thomas v. Global Vision Products, Inc. (II)*, the jury returned a \$50 million verdict in favor of the plaintiff and class represented by Mr. Bursor. The legal trade publication VerdictSearch reported that this was the second largest jury verdict in California in 2009.

Mr. Bursor graduated from the University of Texas Law School in 1996. He was on the Editorial Board of the Law Review, and was a member of the Board of Advocates and Order of the Coif. Prior to starting his own practice, Mr. Bursor was associated with Cravath, Swaine & Moore (1996-2000) and Chadbourne & Parke LLP (2001), where he represented large telecommunications, pharmaceutical, and technology companies in commercial litigation.

Mr. Bursor is a member of New York and Florida bars, as well as the bars of the United States Court of Appeals for the Second Circuit, United States Court of Appeals for the Third Circuit, United States Court of Appeals for the Eleventh Circuit, United States District Court for the Southern District of New York, and the United States District Court for the Eastern District of New York.

Representative Cases

Mr. Bursor was appointed lead or co-lead class counsel to the largest, 2nd largest, and 3rd largest classes ever certified. Mr. Bursor has represented classes including more than 160 million class members, roughly 1 of every 2 Americans. Listed below are recent cases that are representative of Mr. Bursor's practice:

- Mr. Bursor negotiated and obtained court-approval for two landmark settlements in *Nguyen v. Verizon Wireless* and *Zill v. Sprint Spectrum* (the largest and 2nd largest classes ever certified). These settlements require Verizon and Sprint to open their wireless networks to third-party devices and applications. These settlements are believed to be the most significant legal development affecting the telecommunications industry since 1968, when the FCC's Carterfone decision similarly opened up AT&T's wireline telephone network.
- Mr. Bursor was the lead trial lawyer in *Ayyad v. Sprint Spectrum, L.P.* Mr. Bursor represented a class of approximately 1.9 million California consumers who were charged an early termination fee under a Sprint cellphone contract, asserting claims that such fees were unlawful liquidated damages under the California Civil Code, as well as other statutory and common law claims. After a five-week combined bench-and-jury trial, the jury returned a verdict in June 2008 and the Court issued a Statement of Decision in December 2008 awarding the plaintiffs \$299 million.
- Mr. Bursor was the lead trial lawyer in *White v. Cellco Partnership d/b/a Verizon Wireless*. Mr. Bursor represented a class of approximately 1.4 million California consumers who were charged an early termination fee under a Verizon cellphone contract, asserting claims that such fees were unlawful liquidated damages under the California Civil Code, as well as other statutory and common law claims. In July 2008, after Mr. Bursor presented plaintiffs' case-in-chief, rested, then cross-examined Verizon's principal trial witness, Verizon agreed to settle the case for a \$21 million cash payment and agreed to an injunction restricting Verizon's ability to impose early termination fees in future subscriber agreements.
- Mr. Bursor was the lead trial lawyer in *Thomas v. Global Visions Products Inc.* Mr. Bursor represented a class of approximately 150,000 California consumers who had purchased the Avacor® hair regrowth system. In January 2008, after a four-week combined bench-and-jury trial. Mr. Bursor obtained a \$37 million verdict for the class, which the Court later increased to \$40 million.
- Mr. Bursor was appointed class counsel and was elected chair of the Official Creditors' Committee in *In re Nutraquest Inc.*, a Chapter 11 bankruptcy case before Chief Judge Garrett E. Brown, Jr. (D.N.J.) involving 390 ephedra-related personal injury and/or wrongful death claims, two consumer class actions, four enforcement actions by governmental agencies, and multiple adversary proceedings related to the Chapter 11 case. Working closely with counsel for all parties, and with two mediators, Judge Nicholas Politan (Ret.) and Judge Marina Corodemus (Ret.), the committee chaired by Mr. Bursor was able to settle or otherwise resolve every claim and reach a fully consensual Chapter 11 plan of reorganization which Chief Judge Brown approved in late 2006. This settlement included a \$12.8 million recovery to a nationwide class of consumers who alleged they were defrauded in connection with the purchase of Xenadrine® dietary supplement products.

L. TIMOTHY FISHER

Mr. Fisher has an active practice in consumer class actions and complex business litigation and has also successfully handled a large number of civil appeals. Prior to founding Bursor & Fisher, P.A. in 2011, Mr. Fisher was an associate with Bramson, Plutzik, Mahler & Birkhaeuser, LLP in Walnut Creek, California for 13 years. During his career, he has been actively involved in numerous cases that resulted in multi-million dollar recoveries for consumers and investors. Mr. Fisher has handled cases involving a wide range of issues including nutritional labeling, health care, telecommunications, corporate governance, unfair business practices and consumer fraud. With his partner Scott A. Bursor, Mr. Fisher has handled four class action jury trials, all of which produced successful results. In the initial phase of *Thomas v. Global Vision Products*, the jury awarded the plaintiff class more than \$36 million plus punitive damages, while the Court awarded a \$40 million recovery on separate legal claims. In a subsequent phase of the trial against individual defendants, Mr. Fisher and Mr. Bursor obtained a jury award of \$50,024,611 -- the largest consumer class action award in California in 2009 and the second-largest jury award of any kind.

Mr. Fisher was admitted to the State Bar of California in 1997. He is also a member of the bars of the United States Court of Appeals for the Ninth Circuit and the United States District Courts for the Northern, Central, Southern and Eastern Districts of California. Mr. Fisher taught appellate advocacy at John F. Kennedy University School of Law in 2003 and 2004. Recently, Mr. Fisher contributed jury instructions, a verdict form and comments to the consumer protection chapter of Justice Elizabeth A. Baron's *California Civil Jury Instruction Companion Handbook* (West 2010).

Mr. Fisher received his Juris Doctorate from Boalt Hall at the University of California at Berkeley in 1997. While in law school, he was an active member of the Moot Court Board and participated in moot court competitions throughout the United States. In 1994, Mr. Fisher received an award for Best Oral Argument in the first year moot court competition. In 1992, Mr. Fisher graduated with highest honors from the University of California at Berkeley and received a degree in political science. Prior to graduation, he authored an honors thesis for Professor Bruce Cain entitled "The Role of Minorities on the Los Angeles City Council." He is also a member of Phi Beta Kappa.

Representative Cases

- *Thomas v. Global Vision Products, Inc.* (Alameda County Superior Court) - Mr. Fisher litigated claims against Global Vision Products, Inc. and other individuals in connection with the sale and marketing of a purported hair loss remedy known as Avacor. The case lasted more than seven years and involved two trials. The first trial resulted in a verdict for plaintiff and the class in the amount of \$40,000,000. The second trial resulted in a jury verdict of \$50,024,611, which led to a \$30 million settlement for the class.

- *In re Cellphone Termination Fee Cases - Handset Locking Actions* (Alameda County Superior Court). Mr. Fisher actively worked on five coordinated cases challenging the secret locking of cell phone handsets by major wireless carriers to prevent consumers from activating them on competitive carriers' systems. Settlements have been approved in all five cases on terms that require the cell phone carriers to disclose their handset locks to consumers and to provide unlocking codes nationwide on reasonable terms and conditions. The settlements fundamentally changed the landscape for cell phone consumers regarding the locking and unlocking of cell phone handsets.
- *In re Cellphone Termination Fee Cases - Early Termination Fee Cases* (Alameda County Superior Court and Federal Communications Commission). In separate cases that are a part of the same coordinated litigation as the Handset Locking Cases, Mr. Fisher actively worked on claims challenging the validity under California law of early termination fees imposed by national cell phone carriers. In one of those cases, against Verizon Wireless, a nationwide settlement was reached after three weeks of trial in the amount of \$21 million. In a second case, which was tried to verdict, the Court held after trial that the \$73 million of flat early termination fees that Sprint had collected from California consumers over an eight-year period were void and unenforceable.
- *Guyette v. Viacom, Inc.* (Alameda County Superior Court) - Mr. Fisher was co-counsel for a class of cable television subscribers who alleged that the defendant had improperly failed to share certain tax refunds with its subscribers. A settlement was negotiated shortly before trial under which defendants paid the class \$13 million in cash and paid for all expenses of notice to the class and settlement administration.

Selected Published Decisions

- *In re Cellphone Termination Fee Cases*, 186 Cal.App.4th 1380 (2010)
- *In re Cellphone Termination Fee Cases*, 180 Cal.App.4th 1110 (2009)
- *Gatton v. T-Mobile USA, Inc.*, 152 Cal.App.4th 571 (2007)

JOSEPH I. MARCHESE

Mr. Marchese is an Associate with Bursor & Fisher, P.A. Mr. Marchese focuses his practice on complex business litigation and consumer class actions. Prior to joining Bursor & Fisher in 2011, Mr. Marchese litigated civil actions as an Associate with DLA Piper and Shearman & Sterling where he represented sophisticated investment banks, pharmaceutical companies, insurance carriers, food manufacturers and tobacco companies.

Mr. Marchese is admitted to the State Bar of New York and is a member of the bars of the United States District Courts for the Southern District of New York and the Eastern District of New York.

Mr. Marchese graduated from Boston University School of Law in 2002 where he was a Member of The Public Interest Law Journal. In 1998, Mr. Marchese graduated with honors from Bucknell University where he earned a B.S.B.A. and pitched for the Varsity Baseball Team.

EXHIBIT B

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WHAT WE DO

**Thornton, Davis & Fein, P.A. is unique
in the legal world – a firm of real trial lawyers.**

We are not “litigators” who work up cases for months and years in the hope of never going to trial. We thrive in the courtroom; we are at home in front of a jury, and our opposing counsel know it. This reputation results in early and better settlements, respect from judges, and confident clients who know that when they choose to go to trial, it is business as usual for us.

American International Group, Inc., Anheuser-Busch Companies, Inc., ARAMARK Corporation, Bank of America Corporation, Cooper Tire & Rubber Company, General Electric Company, General Reinsurance Corporation, Global Aerospace Underwriting Managers, The Goodyear Tire & Rubber Company, Honeywell International Inc., Johnson & Johnson, Lloyd’s of London, Raytheon Aerospace LLC, Royal & SunAlliance Worldwide Group, Teledyne Technologies Incorporated, United Air Lines, Inc.

Why do huge, household-name companies with offices, plants, products, and businesses all over the world turn to a medium-sized law firm like Thornton, Davis & Fein when their fortunes, futures, and reputations are on the line?

In a word – results.



We thrive in the
courtroom; we are
at home in front
of a jury, and our
opposing counsel
know it.

WHY CHOOSE US

Trial Skills:

Our success in the courtroom depends primarily upon two things. First, we are better prepared and informed than our opponents. Second, we recognize that many cases turn on technical and complex issues that must be made simple and interesting for a jury to understand.

Our in-house staff includes people with medical, engineering, aviation, insurance, and business backgrounds. Our lawyers and staff are educationally and culturally diverse and do nothing but high-stakes litigation. This enables us to assign the best team for the particular demands of each case.

We partner with our sophisticated clients to understand their business, their products, and their objectives. Learning from our client's knowledge and experience and involving them in each stage of the case is our first step towards achieving a successful result.

Choosing the right experts is essential to winning the case. Our network of experts and legal resources is unrivaled. We locate experts who "wrote the book" and are unassailable on cross-examination. Too often, firms don't spend the time necessary to assure that they have gotten the best. At Thornton, Davis & Fein we pride ourselves on this critical aspect of complex case defense.

The ability to make the complex appear simple and interesting is the key to winning over a jury. Trial exhibits and creative, demonstrative ways to show and tell our client's story are the cornerstones of a successful trial. It takes time. It takes focus. It takes experience. Thornton, Davis & Fein excels at partnering with its clients to develop effective trial exhibits/demonstrations as part of case preparation well in advance of the actual trial.

Efficiency and Costs:

Adherence to budgets and avoidance of financial surprises is the linchpin of our success in efficiently managing litigation. We have developed innovative ways of accomplishing this very important goal. Early evaluation and resolution programs, flexible fee arrangements, and written litigation plans that accompany each bill are part of the Thornton, Davis & Fein business operation. Costs are further minimized through office efficiencies, effective time management, and the use of appropriate levels of personnel for the best billing rate. Our state-of-the-art computer system allows our clients to receive electronic or paper billing in any level of detail requested.

Our in-house staff includes people with medical, engineering, aviation, insurance, and business backgrounds.

PRACTICE AREAS

Appellate:

Our appellate department is admitted to and has appeared in front of the United States Supreme Court, Federal Circuit Courts of Appeals, and all Florida State Appellate Courts. Thornton, Davis & Fein has handled precedent-setting appeals involving products liability, tort reform, jurisdiction, conflict of laws, the Warsaw Convention, pre-emption, *forum non conveniens*, insurance coverage and bad faith, punitive damages, employment, damage limitation issues, injunctions, and many others. Our appellate attorneys have achieved board certification as appellate specialists, participate on rule-making committees of The Florida Bar, and serve as guest lecturers.

Aviation:

The firm's 20+ years of experience with aviation matters includes the defense of dozens of aviation mass disaster cases, multidistrict litigation, airframe, engine and component part products liability claims, maintenance issues, accidents in South and Central America and the Caribbean, and contract litigation. We also represent most of the major airports in Florida. Thornton, Davis & Fein is internationally recognized in the aviation industry as one of the premier law firms in the United States.

Business Torts/Commercial Litigation:

The firm represents clients with business tort claims involving fraud, misrepresentation, civil theft, breach of fiduciary duty, and intentional interference in business relationships. Our experience also extends to international arbitration and other alternative dispute resolution forums.

Construction Litigation:

Construction litigation matters are typically high-exposure, complex, and involve numerous parties. The keys to a successful result are to retain experts early to focus the case, obtain an immediate "case management" order to limit discovery, schedule early mediation, and secure a firm trial date. Thornton, Davis & Fein's experience includes the representation of construction companies, developers, architects and engineers, product manufacturers, and insurance companies. Types of cases handled include hurricane damage claims, government contract disputes, delay claims, product defect claims, insurance coverage disputes, and alleged faulty design/construction of schools, high-rise buildings, roads, underground construction, marinas, and housing developments.

Employment Law:

The passage of liberal laws permitting a deluge of costly claims against employers caused Thornton, Davis & Fein to aggressively develop this area of practice. Our employment litigation team is led by a partner who served 18 years as a human resources director for a NYSE company prior to becoming a lawyer. We do not represent employees, only employers, and are experienced with claims involving sexual harassment, the “whistle-blower” statutes, ADA, ERISA, and age, race, and gender-based discrimination.

General Liability Litigation:

Wrongful death, quadriplegia, paraplegia, brain damage, class action, and catastrophic personal injury cases are the routine at Thornton, Davis & Fein. Success in high-exposure litigation is how we built our reputation, where we are unique, and explains why a senior partner is personally involved in every single case. Partners have also received formal media training, enabling us to skillfully convey a client’s message to the press when requested in high-profile cases.

Insurance Coverage/Bad Faith:

Insurance coverage litigation is one of the significant areas of our practice. Declaratory judgment actions, excess insurer rights and obligations, bad faith, reservations of rights, conflict of laws, subrogation, and policy interpretations are examples of the firm’s experience, expertise, and current caseload. Our attorneys are called upon to testify as experts on insurance coverage and bad-faith matters by other lawyers and judges.

Intellectual Property:

The intellectual property department limits itself to the litigation and trials of intellectual property matters. While our intellectual property litigation team has engineering and technical backgrounds, we are first, foremost, and only a firm of trial lawyers. We believe that it takes a different type of lawyer and a different type of law firm to write patents or appear in front of the United States Patent and Trademark Office. In-house patent and trademark lawyers or their designated outside counsel are our partners during case preparation and development. This partnering method of handling intellectual property litigation assures that our clients receive the best of both worlds.

Maritime:

Cruise lines, marinas, commercial vessel owners, individual boat operators, insurers, and P & I clubs comprise the list of clients served by Thornton, Davis & Fein. Our maritime attorneys handle Jones Act, Death on the High Seas Act, salvage, and other admiralty jurisdiction cases. The firm developed and distributes a customized “Maritime Law Primer” to its regular clients that answers some of the most frequently asked questions concerning this area of practice.


Medical/Professional Malpractice:

Thornton, Davis & Fein represents major hospitals, physicians, nursing homes, ancillary medical care providers, governmental agencies, engineers, architects, attorneys, and other professionals and their insurers. In addition to hundreds of litigation matters and trials, Thornton, Davis & Fein partners are routinely invited to advise physician groups and other professionals, along with their insurance carriers, on litigation avoidance techniques, pre-suit requirements, and trial preparation. We maintain an extensive library of medical books, anatomical models, trial exhibits, and expert resources.

Products Liability and Toxic Tort:

Products liability and toxic tort cases have been a major part of the law firm’s practice since our inception more than 20 years ago. Thornton, Davis & Fein has been called upon by manufacturers and suppliers of aircraft and aircraft component parts, asbestos, automotive components, blood, chemicals, construction materials, consumer products, electrical and industrial equipment, engines, escalators, exercise equipment, medical devices, pesticides, pharmaceuticals, pressure vessels, tires, tractors, and numerous other diverse products. We serve as national and local counsel in individual, class action, and mass tort cases.

Our lawyers are experts in products liability and toxic tort matters and stay in the forefront of appellate issues in these areas of the law. Partners are members, directors, and committee chairpersons of the Product Liability Advisory Council (PLAC), International Association of Defense Counsel (IADC), Federation of Defense and Corporate Counsel (FDCC), Defense Research Institute (DRI), and the Torts and Insurance Practice Section (TIPS) of the American Bar Association. Thornton, Davis & Fein lawyers have served as law professors teaching products liability law, authored numerous articles, and are frequently invited to speak on products liability and toxic tort issues.



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