

1 BURSOR & FISHER, P.A.
 Scott A. Bursor (State Bar No. 276006)
 2 369 Lexington Avenue, 10th Floor
 New York, NY 10017
 3 Telephone: (212) 989-9113
 Facsimile: (212) 989-9163
 4 E-Mail: scott@bursor.com

5 BURSOR & FISHER, P.A.
 L. Timothy Fisher (State Bar No. 191626)
 6 Sarah N. Westcot (State Bar No. 264916)
 2121 North California Blvd., Suite 1010
 7 Walnut Creek, CA 94596
 Telephone: (925) 482-1515
 8 Facsimile: (925) 407-2700
 E-Mail: ltfisher@bursor.com
 9 swestcot@bursor.com

10 THORNTON, DAVIS & FEIN, P.A.
 Barry L. Davis (*pro hac vice*)
 11 Daniel R. Lever (*pro hac vice*)
 Aaron P. Davis (*pro hac vice*)
 12 80 SW Eighth Street, 29th Floor
 Miami, Florida 33130
 13 Tel: (305) 446-2646
 Fax: (305) 441-2374
 14 Email: davis@tdflaw.com
lever@tdflaw.com
 15 adavis@tdflaw.com

16 Attorneys for Plaintiff

17 UNITED STATES DISTRICT COURT
 18 NORTHERN DISTRICT OF CALIFORNIA
 19

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

21 Plaintiff,

22 v.

23 AT&T MOBILITY LLC,

24 Defendant.

Case No. C11-00409 CRB

**DECLARATION OF L. TIMOTHY
 FISHER IN OPPOSITION TO AT&T
 MOBILITY LLC'S MOTION TO COMPEL
 ARBITRATION AND TO STAY CASE**

Date: September 23, 2011

Time: 10:00 a.m.

Courtroom 8

Hon. Charles R. Breyer

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

I, L. Timothy Fisher, declare:

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 Patrick Hendricks. 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 hereto as **Exhibit A** is a true and correct copy of a letter from me to AT&T Mobility LLC pursuant to the provisions of California Civil Code § 1782 dated August 7, 2011.

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed at Walnut Creek, California this 8th day of August, 2011.



L. Timothy Fisher

EXHIBIT A



2121 NORTH CALIFORNIA BLVD.
SUITE 1010
WALNUT CREEK, CA 94596-7351
www.bursor.com

L. TIMOTHY FISHER
Tel: 925.482.1515
Fax: 925.407.2700
ltfisher@bursor.com

August 7, 2011

Via Certified Mail – Return Receipt Requested

AT&T Mobility LLC
1025 Lenox Park Blvd.
Atlanta, GA 30319

Re: Demand Letter Pursuant to California Civil Code § 1782

To Whom It May Concern:

This letter serves as a preliminary notice and demand for corrective action by AT&T Mobility LLC (“AT&T”) pursuant to the provisions of California Civil Code § 1782, on behalf of our client, Patrick Hendricks, and all other persons similarly situated.

AT&T’s bills systematically overstate the amount of data used on each data transaction involving an iPhone or iPad account. This was discovered by an independent consulting firm retained by my firm, which conducted a two-month study of AT&T’s billing practices for data usage and found that AT&T bills systematically overstate web server traffic by 7% to 14%, and in some instances by over 300%.

AT&T also bills for phantom data traffic when there is no actual data usage initiated by the customer. This was discovered by the same independent consulting firm, which purchased an iPhone from an AT&T store, immediately disabled all push notifications and location services, confirmed that no e-mail account was configured on the phone, closed all applications, and let the phone sit untouched for ten days. During this 10-day period, AT&T billed the test account for 35 data transactions totaling 2,292 KB of usage.

Tests conducted by the same independent consulting firm also show that AT&T’s billing system does not accurately record the time and date on which data usage occurs, which often causes charges to be posted to the wrong billing cycle. 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.

Patrick Hendricks is a citizen of the State of California and is a consumer as defined in California Civil Code § 1761(d) in that he purchased AT&T cellular telephone services “for personal, family or household purposes.” AT&T has systematically overstated Mr. Hendricks’ data usage. For the October 6, 2010 through November 8, 2010 billing period, AT&T charged Mr. Hendricks’ account for 259 data transactions totaling 223 MB. Many of those charges were for phantom data transactions that either never happened or were never initiated or experienced

by Mr. Hendricks. The remainder of those charges were systematically inflated in terms of the actual amount of data used. AT&T's systematic overstating of Mr. Hendricks' data usage caused him to incur a \$15 charge for excess data usage on his November 2010 bill.

By systematically overstating data usage by its iPhone and iPad customers, AT&T has violated subsection (a)(5) of the Consumers Legal Remedies Act, Civil Code § 1770, which prohibits a company from representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have.

We hereby demand that AT&T immediately (1) cease and desist from the improper billing of data usage and (2) make full restitution of all monies wrongfully obtained.

It is further demanded that AT&T preserve all documents and other evidence that refer or relate to any of the above-described practices including, but not limited to, the following:

1. All documents concerning the billing of data usage;
2. All documents concerning the imposition of additional charges for excess data usage;
3. All documents concerning the manner in which AT&T calculates data usage; and
4. All customer complaints regarding data charges.

Please comply with this demand within 30 days from receipt of this letter.

We are willing to negotiate with AT&T to attempt to resolve the demands asserted in this letter. If AT&T wishes to enter into such discussions, please contact me immediately. If I do not hear from you promptly, I will conclude that AT&T is not interested in resolving this dispute short of litigation, and Mr. Hendricks will seek damages under Civil Code § 1780(a)(1) and injunctive relief under Civil Code § 1780(a)(2) requiring AT&T to cease the improper billing of data usage.

If AT&T contends that any statement in this letter is inaccurate in any respect, please provide us with your contentions and supporting documents immediately upon receipt of this letter, but in no event later than 30 days from the date of receipt.

Very truly yours,



L. Timothy Fisher