Exhibit 17

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JUDGE CROTTY

LEAF O'NEAL, ALEXIS UBIERA, and IVAJLO MILANOV, Individually and on Behalf of all Others Similarly Situated,

Plaintiffs,

- against -

FREM GROUP, L.P., STAMFORD CLUB MANAGEMENT, INC., YORKTOWN CLUB MANAGEMENT, INC., WESTCHESTER INDOOR TENNIS, LTD., STAMFORD INDOOR TENNIS CORPORATION, ELIZABETH GAGLIARDI, ROSEANN GAGLIARDI, FRANK GAGLIARDI and JOHN DEFILLIPO,

Defendants.

Civil Action No.

11 CV 2633

CLASS AND COLLECTIVE ACTION COMPLAINT

JURY TRIAL DEMANDED

INTRODUCTION

1. This is a collective and class action for unpaid wages under the Fair Labor Standards Act ("FLSA") and the New York State Labor Law ("NYLL"). Defendants operate three sports clubs: two in Westchester County, New York, and one in Stamford, Connecticut. Defendants employed Leaf O'Neal, Alexis Ubiera, and Ivajlo Milanov ("Plaintiffs") as tennis instructors at Defendants' sports clubs.

2. Defendants violated the labor laws in several different ways: They misclassified the tennis instructors as independent contractors; they failed to pay appropriate overtime when tennis instructors worked over forty hours per week; they failed to pay tennis instructors for all the hours they worked; and they failed to pay "spread of hours pay" to the New York tennis instructors. Plaintiffs hereby seek appropriate compensation for unpaid wages, overtime, and "spread of hours pay," as well as liquidated damages, attorneys' fees and costs, and other appropriate relief.

3. Plaintiffs allege on behalf of themselves and all other similarly situated current and former tennis instructors of the defendants who elect to opt into this action pursuant to the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 216(b), that they are entitled to: (i) a declaration that they are employees of the defendants, not independent contractors; (ii) an award of unpaid wages from Defendants for hours worked without compensation; (iii) an award of unpaid wages for overtime work for which they did not receive overtime premium pay as required by law; (iv) injunctive relief; (v) liquidated damages; and (vi) payment of attorneys' fees and litigation costs.

4. Plaintiffs Leaf O'Neal and Ivajlo Milanov also bring this action as a New York statewide class action on behalf of current and former tennis instructors who were employed at the two New York clubs in Hawthorne and Yorktown (the "New York Class"), and complain that pursuant to the NYLL §§ 650 *et seq.* and the supporting New York State Department of Labor Regulations, 12 N.Y.C.R.R. Part 142, they are entitled to: (i) a declaration that they are employees of the defendants, not independent contractors; (ii) an award of unpaid wages from Defendants for hours worked without compensation; (iii) an award of unpaid wages from Defendants for overtime work for which they did not receive overtime premium pay; (iv) an award of spread of hours pay for work in excess of ten hours in a single workday; (v) injunctive relief; (vi) liquidated damages and (vii) payment of attorneys' fees and litigation costs.

JURISDICTION AND VENUE

5. This Court has subject matter jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331, 1337 and 1343. In addition, the Court has jurisdiction over Plaintiffs' claims under the FLSA pursuant to 29 U.S.C. § 201, *et seq.*, 29 U.S.C. § 216(b) and supplemental jurisdiction over Plaintiffs' state law claims pursuant to 28 U.S.C. § 1367.

6. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b)(ii), because the Defendants transact business in this District, two of the Plaintiffs were employed by Defendants in this District and most of the actions complained of occurred in this District.

7. This Court is empowered to issue a declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202.

THE PARTIES

8. Plaintiff Leaf O'Neal was, at all relevant times, an adult individual residing in the State of New York. Mr. O'Neal was employed by Defendants from 2007 to 2008 as a tennis instructor at Solaris Sports and Racquet Club, formerly known as Westchester Indoor Racquet Club, in Hawthorne, New York, and Solaris Sports Club, formerly known as Match Point Tennis and Fitness, in Yorktown, New York. His title was "Staff Pro."

9. Plaintiff Alexis Ubiera was, at all relevant times, an adult individual residing in the State of Connecticut. Mr. Ubiera was employed by Defendants from 1997 to 2008 as a tennis instructor at Stamford Indoor Racquet Club in Stamford, Connecticut. His title was "Staff Pro."

10. Plaintiff Ivajlo Milanov was, at all relevant times, an adult individual residing in the State of New York. Mr. Milanov was employed by Defendants from 2001 to 2008 as a tennis instructor at Solaris Sports and Racquet Club, formerly known as Westchester Indoor Racquet Club, in Hawthorne, New York. His title was "Staff Pro."

11. FREM Group, L.P. ("FREM Group") is a New York partnership with its principal place of business at 45 Knollwood Road, Elmsford, New York, in the County of Westchester. FREM Group is controlled by individual defendants Frank, Roseann, and Elizabeth Gagliardi, and is involved in personnel matters at the clubs.

12. Defendant Yorktown Club Management, Inc. (d/b/a Solaris Sports Club and f/k/a Match Point Tennis and Fitness), hereinafter referred to as "Yorktown," is a New York corporation and has its corporate offices at 45 Knollwood Road, Elmsford, New York, in the County of Westchester. Yorktown operates the Solaris Sports Club in Yorktown, New York.

13. Defendant Westchester Indoor Tennis, Ltd. (d/b/a Solaris Sports and Racquet Club and f/k/a Westchester Indoor Racquet Club), hereinafter referred to as "Westchester Indoor," is a New York partnership and has its corporate offices at 45 Knollwood Road, Elmsford, New York, in the County of Westchester. Westchester Indoor operates the Solaris Sports Club in Hawthorne, New York.

14. Defendant Stamford Indoor Tennis Corporation, hereinafter referred to as "Stamford Indoor," is a Connecticut corporation with its principal place of business in Stamford, Connecticut and its corporate offices at 45 Knollwood Road, Elmsford, New York. Stamford Indoor operates the Stamford Indoor Racquet Club in Stamford, Connecticut.

15. Defendant Stamford Club Management, Inc. ("Stamford Management") is a New York corporation, with its principal place of business in, and its corporate offices at, 45 Knollwood Road, Elmsford, New York, in the County of Westchester. Stamford Management is the parent company of the three other corporate defendants, Yorktown, Westchester Indoor, and Stamford Indoor.

16. The Defendants referred to in paragraphs 11 through 15 are collectively referred to herein as the "the Corporate Defendants."

17. Defendant Elizabeth Gagliardi has an ownership interest in each of the Corporate Defendants. She is personally responsible for implementing and enforcing the Corporate Defendants' wage and hour policies.

18. Defendant Roseann Gagliardi has an ownership interest in each of the Corporate Defendants. She is personally responsible for implementing and enforcing the Corporate Defendants' wage and hour policies.

19. Defendant Frank Gagliardi has an ownership interest in each of the Corporate Defendants. He is personally responsible for implementing and enforcing the Corporate Defendants' wage and hour policies.

20. Defendant John DeFilippo is Head of Tennis Operations for all three locations. He is personally responsible for implementing and enforcing the Corporate Defendants' wage and hour policies.

21. The defendants referred to in paragraphs 17 through 20 are collectively referred to herein as the "Individual Defendants."

STATEMENT OF FACTS

22. At all relevant times, Defendants operated three health club facilities. Two of these facilities are located in Westchester County, New York, and the other is in Stamford, Connecticut. All three entities and their parent corporation maintain their corporate offices at the same address in Elmsford, New York, in Westchester County.

23. Each of the Defendants is an employer as defined by the FLSA and the NYLL.

24. The Corporate Defendants operate as a single enterprise for purposes of the FLSA because they engaged in related activities, are under common control, and share a common business purpose.

25. At all relevant times, the gross annual sales of each of the Corporate Defendants exceeded $500,000 per year.

26. At all relevant times, each of the Corporate Defendants was engaged in interstate commerce.

27. At all relevant times, Defendants were the Plaintiffs' and the members of the Classes' employers within the meaning of the FLSA and the NYLL.

28. In the course of their employment, Plaintiffs and the members of the Classes provided tennis instruction to members of Defendants' sports clubs.

29. Plaintiffs and the members of the Classes' work for the Defendants did not involve work that falls within any exemption from the overtime rules pursuant to the FLSA or the NYLL.

30. Plaintiffs and the members of the Classes were paid by the Defendants on an hourly basis for providing tennis instruction.

31. Plaintiffs and the members of the Classes were paid every two weeks on a Form 1099.

A. Plaintiffs Were Misclassified As Independent Contractors

32. Plaintiffs and the members of the Classes were permanent employees of the Defendants.

33. Defendants exerted control over every aspect of Plaintiffs' and the members of the Classes' work experience.

34. Defendants had the power to hire and fire Plaintiffs and the members of the Classes, control the terms of their employment, and determine the rate and method of their compensation.

35. Defendants instructed Plaintiffs and the members of the Classes as to when and where to perform their services.

36. Defendants required Plaintiffs and the members of the Classes to report daily to the tennis court or the office, adhere to the schedule set by Defendants, and attend regularly scheduled meetings of the tennis staff.

37. Defendants provided the materials used by Plaintiffs and the members of the Classes in their work, including tennis courts, tennis balls, tennis ball machines, offices and computers.

38. The club members who received instruction from Plaintiffs and the other members of the Classes were billed directly by the Defendants at rates set by the Defendants.

39. Plaintiffs' and the members of the Classes' services, providing tennis instruction at tennis clubs, was an integral part of the Defendants' business.

40. The only variance in Plaintiffs' and the Classes' opportunity for profit or loss was based on the number of hours that they worked.

41. Plaintiffs and the members of the Classes were hired for an indefinite duration.

42. Beginning in February 2011, Defendants properly reclassified all tennis instructors as employees instead of independent contractors. Defendants also cut the tennis instructors' pay by 10%.

B. Plaintiffs Were Not Compensated For "Off The Clock" Work

43. Plaintiffs and the members of the Classes were required to perform a wide variety of tasks without compensation. For instance, the tennis instructors were required to:

(a) travel to and from external tennis facilities after reporting to work;

(b) communicate with club members via telephone and email to provide advice on their progress as well as to deal with routine cancelations and makeups;

(c) call inactive members and try to persuade them to come and take tennis lessons;

(d) work at USTA sponsored matches (including refereeing, cleaning up, answering players' questions and working at the check-in desk);

(e) sweep and clean the courts;

(f) attend staff meetings;

(g) collect and sort tennis balls;

(h) fill out time sheets and other administrative paperwork;

(i) provide coverage for senior staff and management;

(j) create promotional fliers; and

(k) perform clerical and other office tasks.

44. Plaintiffs and the members of the Classes were not permitted to record their time for performing the tasks listed above. Instead, Plaintiffs were instructed to record time only for hours actually spent on court giving lessons.

C. Damages

45. Plaintiffs and the members of the Classes did not receive compensation for all the hours they worked.

46. Plaintiffs and the members of the Classes are entitled to compensation for all uncompensated hours worked.

47. Plaintiffs and the members of the Classes did not receive appropriate overtime compensation when they worked more than forty hours per week.

48. Plaintiffs and the members of the Classes are entitled to overtime premium pay at a rate of one and one-half times their regular rate for all hours worked over forty hours per workweek pursuant to the FLSA and the NYLL.

49. Plaintiffs Leaf O'Neal and Ivajlo Milanov and the other members of the New York Class did not receive "spread of hours" pay when they worked more than 10 hours in a day pursuant to the NYLL.

50. Plaintiffs Leaf O'Neal and Ivajlo Milanov and the other members of the New York Class are entitled to "spread of hours" premium pay for days when they worked more than ten hours in a single workday pursuant to the NYLL.

51. Defendants' violations of the labor laws were willful.

52. Plaintiffs know of other members of the Classes who did not receive overtime premium pay and were not paid for all hours worked.

THE CLASSES

53. Plaintiffs bring this action on behalf of two classes of similarly-situated persons composed of:

(a) All current and former tennis instructors who have worked for the Defendants within the three years prior to the filing of this Complaint to the present who elect to opt in to this action pursuant to the FLSA (the "FLSA Class");

(b) All current and former tennis instructors, employed by Yorktown and Westchester Indoor within the six years prior to the filing of this Complaint to the present, who do not opt out of this action (the "New York Class").

COLLECTIVE ACTION ALLEGATIONS

54. Pursuant to 29 U.S.C. § 207, Plaintiffs seeks to prosecute their FLSA claims as a collective action on behalf of all tennis instructors who were not paid appropriate compensation.

55. Plaintiffs bring their FLSA claims on behalf of all tennis instructors who worked for the Defendants at any time from three years prior to the filing of this Complaint to entry of judgment.

56. Throughout the time of Plaintiffs' employment with Defendants and, upon information and belief, throughout the Collective Action Period and continuing until today, the Defendants have employed other tennis instructors like the Plaintiffs in hourly positions which

are not exempt from the overtime rules pursuant to the FLSA. These workers, like Plaintiffs, were not paid appropriate overtime and were not paid for all the hours they worked.

57. Defendants are liable under the FLSA for failing to properly compensate Plaintiffs and similarly-situated employees, and as such, notice should be sent to past and present tennis instructors of the Defendants. There are numerous similarly-situated current and former tennis instructors who have not received appropriate compensation in violation of the FLSA and who would benefit from the issuance of a court-supervised notice of the present lawsuit and the opportunity to join in the lawsuit pursuant to 28 U.S.C. § 216(b).

58. The exact number of potential FLSA Class members is presently unknown, but is no fewer than forty. Those similarly situated employees are known to Defendants, are readily identifiable, and can be located through Defendants' records.

CLASS ACTION ALLEGATIONS

59. The tennis instructors in the New York Class are so numerous that joinder of all members is impracticable.

60. Upon information and belief, the size of the New York Class is at least thirty people, although the precise number of such employees is unknown, and facts on which that number can be calculated are presently within the sole control of Defendants.

61. Defendants have acted or have refused to act on grounds generally applicable to the New York Class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the New York Class as a whole.

62. The claims of Plaintiffs Leaf O'Neal and Ivajlo Milanov are typical of the claims of the New York Class they seek to represent. Plaintiffs Leaf O'Neal and Ivajlo Milanov and each of the New York Class members work or have worked for Defendants and were subject to the same compensation policies and practices.

63. Common questions of law and fact exist as to the New York Class that predominate over any questions only affecting them individually and include, but are not limited to, the following:

(a) whether Defendants violated NYLL Article 6, §§ 190 et seq., and Article 19, §§ 650 et seq., and the supporting New York State Department of Labor regulations, N.Y. Comp. Codes R. & Regs. ("NYCRR"), Title 12, Parts 137, as alleged herein;

(b) whether the New York Class members were misclassified as independent contractors;

(c) whether it was Defendants' policy or practice to require the New York Class members to work hours without compensation in violation of the NYLL;

(d) whether it was Defendants' policy or practice not to pay overtime for all hours worked in excess of forty hours per week;

(e) whether it was Defendants' policy or practice not to provide Plaintiffs Leaf O'Neal and Ivajlo Milanov and the New York Class spread-of-hours pay as required by the NYLL;

(f) whether it was Defendants' policy or practice to fail to furnish Plaintiffs Leaf O'Neal and Ivajlo Milanov and the New York Class with an accurate statement of wages, hours worked, rates paid, or gross wages, as required by the NYLL;

(g) whether it was Defendants' policy or practice to fail to keep true and accurate time and pay records for all hours worked by its employees, and other records required by the NYLL;

(h) whether it was Defendants' policy or practice to fail to comply with the posting and notice requirements of the NYLL; and

(i) the nature and extent of classwide injury and the measure of damages for those injuries.

FIRST CLAIM FOR RELIEF UNDER THE FAIR LABOR STANDARDS ACT AGAINST ALL DEFENDANTS

64. Plaintiffs, on behalf of themselves and all FLSA Class members, reallege and incorporate by reference the paragraphs above as if they were set forth again herein.

65. Plaintiffs will consent in writing to be a party to this action, pursuant to 29 U.S.C. § 216(b).

66. Tennis instructors employed by the Defendants were employees, not independent contractors.

67. At all relevant times, Defendants had a willful policy and practice of refusing to pay overtime compensation to its hourly employees for all hours worked in excess of forty hours per workweek.

68. At all relevant times, the Defendants had a willful policy and practice of requiring its tennis instructors to work "off the clock" performing various duties without any pay.

69. As a result of the Defendants' willful failure to properly compensate its employees, including Plaintiffs and the FLSA Class members, by requiring them to work "off the clock" hours without compensation and overtime at a rate not less than one and one-half times the regular rate of pay for work performed in excess of forty hours in a workweek, the Defendants have violated and, continue to violate, the FLSA, 29 U.S.C. §§ 201 *et seq.,* including 29 U.S.C. §§ 207(a) (1) and 215(a).

70. The Defendants have failed to make, keep and preserve records with respect to each of its employees sufficient to determine the wages, hours and other conditions and practices

of employment in violation of the FLSA, 29 U.S.C. §§ 201, *et seq.,* including 29 U.S.C. §§ 211(c) and 215(a).

71. The foregoing conduct, as alleged, constitutes a willful violation of the FLSA within the meaning of 29 U.S.C. § 255(a).

72. Due to the Defendants' FLSA violations, Plaintiffs, on behalf of themselves and the FLSA Class members, are entitled to recover from the Defendants compensation for unpaid wages including appropriate overtime compensation, an additional equal amount as liquidated damages, additional liquidated damages for unreasonably delayed payment of wages, and reasonable attorneys' fees and costs and disbursements of this action, pursuant to 29 U.S.C. § 216(b).

SECOND CLAIM FOR RELIEF UNDER THE NEW YORK LABOR LAW AGAINST ALL DEFENDANTS EXCEPT STAMFORD INDOOR TENNIS CORPORATION

73. Plaintiffs Leaf O'Neal and Ivajlo Milanov, on behalf of themselves and the New York Class, reallege and incorporate by reference the paragraphs above as if they were set forth again herein.

74. Plaintiffs Leaf O'Neal and Ivajlo Milanov and the New York Class members were employed by Defendants within the meaning of the NYLL.

75. Tennis instructors employed by the Defendants were employees, not independent contractors.

76. Defendants willfully violated the NYLL by (a) failing to pay its tennis instructors for all hours worked; (b) failing to pay overtime compensation at rates not less than one and one-half times the regular rate of pay for each hour worked in excess of forty hours in a workweek; and (c) failing to pay workers spread of hours pay on days that they worked more than ten hours.

77. The Defendants' NYLL violations have caused Plaintiffs Leaf O'Neal and Ivajlo Milanov and the New York Class irreparable harm for which there is no adequate remedy at law.

78. Due to the Defendants' NYLL violations, Plaintiffs Leaf O'Neal and Ivajlo Milanov and the New York Class are entitled to recover damages from Defendants for: all uncompensated hours; overtime premium pay; spread of hours pay; liquidated damages; reasonable attorneys' fees and costs; and disbursements of the action, pursuant to the NYLL.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, individually and/or on behalf of themselves and all other similarly situated FLSA Class members and New York Class members, respectfully request that this Court grant the following relief:

A. Designation of this action as a collective action on behalf of the FLSA Class members, and prompt issuance of notice pursuant to 29 U.S.C. § 216(b) to all similarly situated members of an FLSA Opt-In Class, apprising them of the pendency of this action, and permitting them to assert timely FLSA claims in this action by filing individual Consents to Sue pursuant to 29 U.S.C. § 216(b);

B. Certification of the New York Class pursuant to Rule 23 of the Federal Rules of Civil Procedure;

C. An Order appointing Plaintiffs as the representatives of the FLSA Class and plaintiffs Leaf O'Neal and Ivajlo Milanov as the representatives of the New York Class;

D. A declaratory judgment that the tennis instructors employed by the Defendants were employees and not independent contractors.

E. A declaratory judgment that the practices complained of herein are unlawful under the FLSA and the NYLL;

F. An injunction against the Defendants and their officers, agents, successors, employees, representatives and any and all persons acting in concert with it, as provided by law, from engaging in each of the unlawful practices, policies and patterns set forth herein;

G. An injunction against the Defendants and their officers, agents, successors, employees, representatives and any and all persons acting in concert with it, as provided by law, from taking any retaliatory actions against Plaintiffs or the members of the Classes;

H. An award of unpaid overtime compensation to Plaintiffs and the members of the Classes;

I. An award of compensation for unpaid hours worked by Plaintiffs and the members of the Classes;

J. An award to Plaintiffs Leaf O'Neal and Ivajlo Milanov and the New York Class members of spread of hours pay pursuant to the NYLL;

K. An award of liquidated damages to Plaintiffs and the members of the Classes under both the FLSA and the NYLL;

L. An award of prejudgment and post-judgment interest to Plaintiffs and the members of the Classes;

M. An award of costs and expenses of this action together with reasonable attorneys' and expert fees to Plaintiffs and the members of the Classes; and

N. Such other and further relief as this Court deems just and proper.

DEMAND FOR TRIAL BY JURY

Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, Plaintiffs demand a trial by jury on all questions of fact raised by the complaint.

Dated: April 18, 2011

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Exhibit 18

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[Names and Addresses of Additional Counsel Appear on Signature Page]

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ALAMEDA

In re: CELLPHONE TERMINATION FEE CASES This Document Relates To: *Mendoza, et al. v. Cingular Wireless LLC, et al.* Handset Locking and Related Claims Against Cingular Wireless LLC, *et al.*	JCCP No. 4332 Class Action **FOURTH AMENDED COMPLAINT [HANDSET LOCKING]** **JURY TRIAL DEMANDED**

Plaintiffs, by their attorneys, make the following allegations based upon information and belief, except as to allegations specifically pertaining to plaintiffs and their counsel, which are based on personal knowledge:

NATURE OF THE ACTION

1. This is a class action lawsuit filed to redress an unfair and wrongful practice inflicted by defendants on California consumers: the secret locking of cell phone handsets to make it impossible or impracticable for customers to switch cell phone service providers without purchasing a new handset.

2. Plaintiffs seek relief in this action individually, as private attorney generals on behalf of the general public and as a class action on behalf of all California residents who have purchased handsets from defendants, or any of them, which have been secretly programmed with SIM locks, SOC locks or band order locks (all as described more fully below). Plaintiffs contend that the practice of secretly programming handsets with SIM locks, SOC locks or band order locks is an unfair business practice which has no legitimate justification and which substantially harms consumers. Plaintiffs further allege that defendants have a duty to disclose that they have locked a handset before selling it to a consumer and that their failure to do so is a fraudulent and deceptive business practice.

PARTIES

3. Defendant Cingular Wireless LLC is a Delaware limited liability company with its principal place of business in Atlanta, Georgia, which is authorized to do business and doing business in California.

4. Defendant Pacific Telesis Mobile Services LLC is a Delaware limited liability company with its principal place of business in Dallas, Texas, which is authorized to do business and doing business in California.

5. Defendants Cingular Wireless LLC and Pacific Telesis Mobile Services LLC are and at all times relevant hereto have been engaged in the business of providing cell phone service and related products and services to the public in California and in other states. They are hereinafter collectively referred to as "Cingular."

6. The true names and capacities, whether individual, corporate, associate or otherwise, of defendants Does 1 through 100, inclusive, are unknown to plaintiffs, who therefore sue said defendants by such fictitious names. Plaintiffs are informed and believe and thereon allege that each of the defendants designated herein as a Doe is legally responsible in some manner for the events and happenings herein referred to and caused, or is responsible in some proportion for, the damages sustained by plaintiffs and the proposed class herein. Plaintiffs may seek leave to amend this complaint to show the true names, capacities, actions and responsibilities of said defendants so fictitiously named whenever the same shall have been ascertained. At that time, plaintiffs will seek leave to include appropriate charging allegations as to said defendants.

7. Plaintiff Astrid Mendoza ("Mendoza") is currently a resident of Contra Costa County, California. On or about January 12, 2002, she entered into a 12-month service contract to receive cell phone service from Cingular. Mendoza also purchased from Cingular a Nokia 3390 GSM handset which employs a SIM lock, as defined below. Mendoza continues to be a subscriber to Cingular's cellphone service calling plan and continues to use the said Nokia cell phone and Cingular service for personal, family or household purposes. Plaintiffs Jill Bonnington, Ron Ng, Kistler & Kistler, Inc., Mike Freeland, and Richard Yates are residents of the State of California who have been subscribers to cellphone service with Cingular and who purchased locked handsets from Cingular on or after August 28, 1999.

8. Plaintiff Foundation for Taxpayer and Consumer Rights ("FTCR") is a nationally recognized, California-based non-profit education and advocacy group organized under section 501(c)(3) of the Internal Revenue Code. Founded in 1985, FTCR employs teams of public-interest lawyers, policy experts, strategists, public educators and grassroots activists to advance and protect the interests of consumers and taxpayers. Since its inception, FTCR has been particularly involved in representing the interests of utility ratepayers in California in matters before the Legislature, the courts and state agencies. FTCR sues in a representative capacity on behalf of the general public.

9. At all relevant times alleged in this matter, each defendant acted in concert with, with the knowledge and approval of and/or as the agent of the other defendants within the course and scope of the agency, regarding the acts and omissions alleged.

JURISDICTION, VENUE AND APPLICABLE LAW

10. Defendants conduct substantial business in the State of California.

11. The allegations and claims for relief herein arise from acts committed in this state and elsewhere within the United States which violate California law. Because the enforcement of consumer protection statutes and common law prohibitions is within this State's lawful authority, the relief sought herein and the adjudication of the claims which plaintiffs assert are within the jurisdiction of this Court.

12. Venue is proper in this Court. Defendants do business in this county and have entered into contracts with plaintiffs and members of the plaintiff class and the general public that are to be performed in part in this County. A substantial number of the acts complained of herein took place in Alameda County. In addition, plaintiffs, at times relevant to this action, resided in Alameda County.

13. Plaintiffs state, and intend to state, causes of action solely under the laws of the State of California and specifically deny any attempt to state a cause of action under the laws of the United States of America. Furthermore, the claims of Plaintiffs and the members of the plaintiff classes assert no federal question or statute, and plaintiffs' state law causes of action are not federally pre-empted. The individual claims of plaintiffs and the other members of the class do not exceed $75,000.

CINGULAR'S HANDSET LOCKING PRACTICES

14. Cingular does not manufacture handsets. It purchases handsets from equipment vendors such as Nokia, Motorola and Samsung. It then resells those handsets to Cingular subscribers. These handsets are referred to herein as "Cingular handsets."

15. Cellular telephone handsets, including those sold by Cingular, are manufactured to industry standards so that they can be used to obtain service from many different carriers – for example, when "roaming" off the original carrier's network. This allows the original carrier to enter into network-sharing or roaming agreements with other carriers, and thereby expand coverage and generate more service revenues.

16. A Cingular handset can operate on another carrier's network without any alteration or enhancement to the handset. Just as an FM radio is capable of receiving all stations in the FM band, Cingular handsets, as sold, are capable of sending and receiving signals on all cellular or PCS bands in use in the United States.

17. Cingular and other cellular/PCS carriers are members of industry standard setting bodies such as the Cellular Telephone & Internet Association ("CTIA"), GSM Association, and other industry groups. Through CTIA and other standard setting organizations, Cingular conspired with other cellular/PCS carriers and equipment manufacturers to develop locks for cellular/PCS handsets. Cingular also conspired with other wireless carriers and equipment manufacturers, *inter alia*, through the CTIA Certification Program, which was designed to certify that cellular/PCS handsets meet the specifications required for the carriers to program and lock them for use on their respective networks.

18. Cingular's GSM handsets utilize SIM (subscriber information module) cards. A SIM card is a wafer-thin card measuring approximately 7/8-inch by 5/8-inch that stores computer-readable information. The subscriber's identifying information is written onto the SIM card, which is read by the handset and transmitted to the carrier's network. A handset employing a SIM card has a receptacle into which the card can be placed, typically behind the handset battery.

19. It is relatively easy to move a SIM card from handset to handset. No tools or equipment are required. Anyone can simply use his or her fingers to slide the SIM card out of one handset and into another.

20. Cingular requires equipment vendors to alter GSM handsets sold to Cingular by locking them with SIM locks and by setting the SIM Unlock Code based on a secret algorithm provided by Cingular. Cingular also requires its GSM equipment vendors to transmit those SIM Unlock Codes to Cingular. Cingular does not consider a shipment of GSM handsets complete, and will not make payment to an equipment vendor, until it receives the SIM Unlock Codes.

21. The SIM locks employed by Cingular prevent GSM handsets from operating if a SIM card from another cellular/PCS carrier is inserted into the handset. This effectively prevents

the activation of the handset on the facilities of any carrier other than Cingular unless the phone is unlocked.

22. SIM locks cannot be unlocked without a secret code provided by the carrier, or special equipment and expertise which ordinary consumers typically lack. However, with appropriate equipment and expertise or with knowledge of the unlocking codes, it takes only a few minutes to enter the SIM Unlock Code through the handset keypad and reprogram the handset for use on another network, thus restoring the handset's ability to be activated on another network. Indeed, a SIM Unlock Code can be entered to unlock a handset in less time than it takes to dial a long distance phone number, since it contains fewer digits – eight digits for a SIM Unlock Code compared to ten for a phone number (with area code).

23. The TDMA phones marketed by Cingular are programmed with System Operator Code ("SOC") locks and/or band order locks.

24. A system operator code is a 3- or 4-digit number assigned to a cellular/PCS carrier. The SOC code programmed into the handset must match the code of the carrier providing service. However, when these handsets are locked, the SOC code cannot be changed. This SOC lock effectively ensures that handsets programmed by Cingular cannot be reprogrammed for activation on a rival carrier's network.

25. A SOC lock cannot be unlocked without a secret code provided by the carrier, or special equipment and expertise which ordinary consumers typically lack.

26. A band order lock restricts the frequencies or channels on which handsets will operate. AT&T employs band order locks in conjunction with SOC locks.

27. Cellular/PCS services operate on the 800 MHz band or the 1900 MHz band. The 800 MHz band contains two channel sets: Block "A" and Block "B". The 1900 MHz band contains six channel sets: Blocks "A" through "F". Each carrier typically operates on only one or two such blocks within a given geographic area. While cellular/PCS handsets are generally capable of operating across the entire range of frequencies allocated for cellular/PCS services -- i.e., the entire 800 MHz band and the entire 1900 MHz band -- each carrier is licensed to operate only on certain restricted channel sets, or blocks, within those bands.

28. Cingular TDMA handsets are designed to be compatible with the channels and networks of many carriers, and they are manufactured in such a way that band-order settings are reprogrammable. A band order lock employs software to restrict handsets to Cingular's channel blocks and combat the reprogrammability of the handsets, which reinforces the limitations imposed by the SOC locks.

29. A band order lock cannot be unlocked without a secret code provided by the carrier, or special equipment and expertise which ordinary consumers typically lack.

30. Cingular markets handsets which it secretly programs with SIM locks, SOC locks and/or band order locks. Cingular does not disclose to consumers that the handsets it sells and distributes are disabled with SIM locks, SOC locks and/or band order locks.

MISREPRESENTATIONS

31. Cingular makes representations that are materially false, misleading, and likely to deceive a reasonable consumer and have directly caused economic injury in fact to plaintiffs. Plaintiffs and the members of the class, and to their money and property. These include: (i) representations that Cingular handsets are "PCS Phones," which convey to the reasonable consumer that the handsets will function on all PCS bands, (ii) representations that Cingular handsets are "GSM" handsets, which convey to the reasonable consumer that the handsets will function on GSM networks, (iii) representations that Cingular handsets are "TDMA" handsets, which convey to the reasonable consumer that the handsets will function on TDMA networks, (iv) representations that Cingular handsets are dual- or tri-mode, or dual- or tri-band handsets, which suggest functionality not limited to Cingular's network, and (v) representations that Cingular handsets are brand name handsets, such as Nokia, Motorola or Samsung, etc., which convey to the reasonable consumer that the handsets will have functionality similar to unaltered handsets sold under those brand names (hereafter the "Misrepresentations").

CONCEALED FACTS

32. Cingular intentionally concealed and continues to conceal the following material facts (the "Concealed Facts"):

(a) its handset locking practices.

(b) that whatever limitations may exist on the handset's ability to be activated on or make use of the networks of rival carriers who use compatible technology are the result of Cingular's deliberate and systematic degradation of the functionality of the handsets through the use of SIM, SOC and band order locks;

(c) that Cingular handsets are locked with SIM locks, SOC locks and/or band order locks to create an impediment to activation on non-Cingular Wireless networks;

(d) that Cingular handsets can be unlocked in seconds by entering the unlock code through the handset keypad or otherwise;

(e) that once unlocked, Cingular handsets can be activated on non-Cingular Wireless networks; and

(f) the lock codes themselves for the handsets sold to plaintiffs and the other Class members.

33. The Concealed Facts were known to Cingular at all relevant times.

34. The Concealed Facts are important facts which consumers could not have discovered because handset locks are not visible to a purchaser visually inspecting the handset. Nor is there any disclosure about the locks on the packaging or materials provided with the handset at the time of purchase. In the ordinary course, a purchaser would not discover the locking software until attempting to activate the handset with another carrier. Thus, when purchasing a Cingular handset, plaintiffs were not aware that the handset had been altered and locked as described above. Nor were other Class members aware that the handsets they purchased from Cingular had been altered and locked as described above.

35. Plaintiffs did not know the Concealed Facts when purchasing a Cingular handset. Nor did other Class members.

36. Cingular intended to deceive plaintiffs and the other Class members by concealing the Concealed Facts.

37. Plaintiffs and the other Class members reasonably relied on Cingular's deception by purchasing Cingular handsets, activating those handsets on Cingular's network, and remaining Cingular subscribers.

HARMS TO PLAINTIFFS AND THE CLASS

38. Plaintiffs and the other Class members have suffered an injury in fact resulting in a loss of money and property due to Cingular's handset locking practices and deception because (i) they have been locked in to the service of Cingular and impeded from switching to another carrier, (ii) they have incurred or may incur costs to have the handsets unlocked, (iii) they have been, may be or are unable to use their handsets when switching carriers, (iv) the handsets they acquired from Cingular are of diminished value, (v) Cingular's practices deprived them of the full enjoyment of their rights of ownership over the handsets that they purchased, and/or (vi) the option to switch carriers without having to purchase a new cellphone has economic value, the deprivation of which has harmed plaintiffs and the members of the Class.

39. Cingular's deception was a substantial factor in causing these harms to plaintiffs and the other Class members.

CINGULAR'S DUTY TO DISCLOSE THE CONCEALED FACTS

40. Cingular owed a duty to plaintiffs and the other Class members to disclose the handset locks. There are at least five bases for such duty.

41. *First*, Cingular owes a duty to release the unlock codes by virtue of the sale of the handset. Cingular itself does not consider a handset shipment from the manufacturer to Cingular to be completed until the unlock code is transmitted to Cingular, and will not pay for a handset until it has received the unlock code. This demonstrates that Cingular itself regards the unlock code as an essential part of the sale, and essential to obtaining full rights of ownership and use of the handset. Similarly, the transfer of the handsets from Cingular to plaintiffs is not complete because Cingular has not disclosed the unlock codes to plaintiffs. Cingular has thus deprived plaintiffs of full rights of ownership and use of that handset by withholding the unlock code. Cingular would not have paid the manufacturers, for those handsets until the manufacturers provided the unlock codes to Cingular. Cingular thus had a duty, upon receipt of payment from plaintiffs to disclose the unlock codes to plaintiffs so as to transfer to them the full rights of ownership and use of the handset that Cingular itself had received from the manufacturers.

42. *Second*, as a seller, Cingular has a duty to disclose the Concealed Facts because they are known to Cingular but are not accessible to consumers purchasing Cingular handsets. *See, e.g.*, *Nussbaum v. Weeks* (1989) 214 Cal. App.3d 1589, 1600 ("seller has a general duty to disclose material facts that are not accessible to the buyer"), *citing* 5 Witkin, Summary of Cal. Law. (9th ed. 1988) Torts § 700, at 801-02.

43. *Third*, Cingular has a duty to disclose the Concealed Facts to correct the Misrepresentations which are false, misleading, and likely to deceive reasonable consumers in the absence of such disclosure. *See, e.g.*, Restatement (Second) of Torts § 551.

44. *Fourth*, Cingular has a duty to disclose the Concealed Facts to prevent harm to plaintiffs and the Class. *See Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 397 (recognizing a duty to disclose based on "the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm."). Such a duty arises here because the Concealed Facts are integral to a transaction that was intended to affect plaintiffs and the Class, the harm to plaintiffs and the Class was foreseeable (indeed, it was *intended* and *purposeful*), and Cingular's conduct is closely connected to the injuries suffered.

45. *Fifth*, the substantive legal provisions under which plaintiffs bring their claims herein, including without limitation Business & Professions Code §§17200 *et seq.* and the Consumer Legal Remedies Act, Civil Code §§1750 *et seq.*, impose on Cingular a duty not to engage in unfair, unlawful, fraudulent and deceptive business practices and not to conceal facts the disclosure of which is necessary to avoid violating the said provisions.

CLASS ALLEGATIONS

46. Plaintiffs bring this action on their own behalf and on behalf of all other persons similarly situated.

47. Plaintiffs seek to represent a class defined as all California residents who have purchased handsets from Cingular, which have been programmed with SIM locks, SOC locks or

band order locks (the "Class"). Within the Class is a subclass (the "Subclass") consisting of all members of the Class who are "consumers" as defined by Civil Code section 1761.

48. The Class and Subclass are composed of hundreds of thousands or even millions of people, whose joinder in this action would be impracticable. The disposition of their claims through this class action will benefit both the parties and this Court. The identities of individual members of the Class and Subclass are ascertainable through the billing records of the defendants named herein.

49. There is a well-defined community of interest in the questions of law and fact involved affecting the members of the Class and Subclass. Questions of law and fact common to the Class and Subclass predominate over questions which may affect only individual class members, including, but not limited to, the following:

a. Whether Cingular misrepresented and/or concealed the fact that the handsets are locked and the manner in which they are locked;

b. Whether Cingular should be enjoined to offer to unlock the handsets purchased by plaintiffs and the Class and Subclass;

c. Whether Cingular should be enjoined from secretly programming and selling locked handsets; and

d. Whether Cingular should be enjoined to make appropriate disclosures of the existence and effects of its handset locks.

50. Plaintiffs are asserting claims that are typical of the claims of the Class and Subclass, and plaintiffs will fairly and adequately represent and protect the interests of the Class and Subclass. Plaintiffs do not have any interests antagonistic to the interests of the Class and Subclass. Plaintiffs have retained counsel who are competent and experienced in the prosecution of class action litigation.

51. Absent a class action, defendants' practices will irreparably injure the members of the Class and Subclass by defrauding consumers by concealing from them the qualities of the handsets they purchase from Cingular and by secretly imposing unfair and improper obstacles to switching to a carrier other than Cingular. Because of the size of the individual class members'

claims, few, if any, class members could afford to seek legal redress on an individual basis for the wrongs complained of herein. Absent a class action, the class members will continue to suffer losses and the violations of law described herein will continue without remedy and Cingular will retain the proceeds of its misdeeds. Cingular continues, to this day, to engage in the unlawful and unfair conduct which is the subject of the complaint.

COUNT I
Unfair Competition In Violation Of
California Business & Professions Code §§ 17200 *Et Seq*.
(Fraudulent and Deceptive Business Practices)

52. Plaintiffs incorporate by reference all allegations of all prior paragraphs as though fully set forth herein.

53. COUNT I is brought against Cingular by plaintiffs individually, on behalf of the Class and on behalf of the general public.

54. Cingular is subject to the Unfair Competition Law, Business & Professions Code section 17200 *et seq*. (the "UCL"). The UCL provides, in pertinent part: "Unfair competition shall mean and include unlawful, unfair or fraudulent business practices and unfair, deceptive, untrue or misleading advertising…"

55. Cingular's handset locking practices violated the "fraudulent" prong of the UCL by making the Misrepresentations and by concealing the Concealed Facts.

WHEREFORE, plaintiffs prays for relief as hereinafter set forth.

COUNT II
Unfair Competition In Violation Of
California Business & Professions Code §§ 17200 *Et Seq*.
(Unlawful Business Practices)

56. Plaintiffs incorporate by reference all allegations of all prior paragraphs as though fully set forth herein.

57. COUNT II is brought against Cingular by plaintiffs individually, on behalf of the Class and on behalf of the general public.

58. Cingular is subject to the UCL. The UCL provides, in pertinent part: "Unfair competition shall mean and include unlawful, unfair or fraudulent business practices and unfair, deceptive, untrue or misleading advertising…"

59. Cingular violated the "unlawful" prong of the UCL by violating the Consumer Legal Remedies Act, Civil Code §§ 1770 (a)(5) – (7) and (9) as set forth in COUNT IV, below.

60. Cingular violated the "unlawful" prong of the UCL by violating the Consumers Legal Remedies Act, Civil Code § 1770(a)(14) and (19), as set forth in Count VI, below.

61. Cingular violated the "unlawful" prong of the UCL by violating the Cartwright Act, Bus. & Prof. Code § 16720, by conspiring with other cellular/PCS carriers, such as the membership of CTIA, including, for example, Cingular and other carriers, by conspiring to restrain trade by locking handsets to tie the sale of cellular/PCS handsets and services. Beginning at a date unknown to plaintiffs, but at least as early as April 1, 2002, and continuing to the present, Cingular, its co-conspirators, and unknown Doe defendants have engaged in a continuing contract, combination and conspiracy in unreasonable restraint of trade and commerce, as evidenced by the foregoing acts and practices, among others. This contract, combination, and conspiracy had the purpose and effect of unreasonably restraining trade and commerce. The contract, combination, and conspiracy alleged herein consisted of a continuing agreement, understanding, and concert of action among the defendants and their co-conspirators, the substantial terms of which were to lock handsets so that each carrier would be the only source of handsets for that carrier's subscribers, and each carrier's handsets would be locked for use only on that carrier's network, and to create an impediment to activation on other networks. For the purpose of forming and effectuating the contract, combination, and conspiracy, Cingular and its co-conspirators, including, *inter alia*, CTIA, did those things which they contracted, combined, and conspired to do, including but not limited to the acts, practices, and course of conduct set forth above.

62. Cingular violated the "unlawful" prong of the UCL by violating the Cartwright Act, Bus. & Prof. Code § 16727, by unlawfully tying the sale of cellular/PCS handsets and services. Cellular/PCS services and handsets are two separate products. Cingular coerces subscribers to purchase handsets only from Cingular as a condition of obtaining service through Cingular's network and refuses to provide service with handsets purchased from other sources. Cingular has economic power in the tying product market, the provision of cellular/PCS services in the State of California, by virtue of its extensive portfolio of spectrum licenses, the high cost to consumers of

switching to another service, and otherwise. Cingular's tying arrangements have substantially lessened competition by creating barriers to entry to the handset market, by reducing the number of handset manufacturers from several dozen in the mid-1990s to a mere ten or so manufacturers today, by preventing the development of handset technology that would allow handsets to access signals provided by multiple providers of wireless services, by increasing the cost of handsets, and by increasing the cost of handset and services bundles. Cingular's tying arrangements affect a substantial amount of commerce since Cingular has millions of subscribers in California.

63. Cingular violated the "unlawful" prong of the UCL by violating the FTC Act, 15 U.S.C. § 45(n), because Cingular's handset locking practices are business practices that cause or are likely to cause injury to consumers by imposing unnecessary costs when switching carriers, such as the cost to unlock the handset or the cost of a new handset if the consumer is unaware of the lock or unaware of the availability of means to unlock it, and also by degrading the value of the handset. These injuries are substantial, and are not reasonably avoidable by consumers who in most cases are unaware of the locks. There are no countervailing benefits to consumers or to competition because handset locks have no utility whatsoever; their only function is to prevent the purchaser from obtaining full rights of ownership and use of handsets purchased from Cingular.

64. Cingular violated the "unlawful" prong of the UCL by violating the FCC's bundling rule. Due to concerns about the potential anticompetitive impact of tying arrangements, in 1992 the FCC clarified its policy with respect to the bundling of wireless phones and services. The FCC stated its "concern that customers have the ability to choose their own CPE [handset] and service packages to meet their own communication needs and that they not be forced to buy unwanted carrier-provided CPE [handsets] in order to obtain necessary services." *In The Matter Of Bundling Of Cellular Customer Premises Equipment And Cellular Service*, CC Docket No. 91-34, 1992 WL 689944 (F.C.C. June 10, 1992), at ¶ 6. Given these concerns, the FCC permitted cellular carriers to offer handsets and services as a bundled package, provided that cellular service was also offered separately on a nondiscriminatory basis. In other words, the FCC permitted carriers to bundle handsets and service on the condition that the carriers offer service regardless of whether the subscriber purchased a bundled phone from the carrier or an unbundled phone from a source other

than the carrier. *See id.* Cingular does not offer service separately, without the purchase of a bundled Cingular handset, in violation of this rule. Cingular's handset locking practices, including Cingular's conspiracy with other carriers and sellers of handsets, is an integral part of Cingular's violation of this FCC rule.

WHEREFORE, Plaintiffs pray for relief as hereinafter set forth.

COUNT III
Unfair Competition In Violation Of
California Business & Professions Code §§ 17200 *Et Seq*.
(Unfair Business Practices)

65. Plaintiffs incorporate by reference all allegations of all prior paragraphs as though fully set forth herein.

66. COUNT III is brought against Cingular by plaintiffs individually, on behalf of the Class and on behalf of the general public.

67. Cingular is subject to the UCL. The UCL provides, in pertinent part: "Unfair competition shall mean and include unlawful, unfair or fraudulent business practices and unfair, deceptive, untrue or misleading advertising…"

68. Cingular violated the "unfair" prong of the UCL because Cingular's handset locking practices threaten an incipient violation of the Consumer Legal Remedies Act, Civil Code §§ 1770 (a)(5) – (7) and (9) as set forth in COUNT IV, below, and violate the policy or spirit of those laws because the effects of Cingular's handset locking practices are comparable to or the same as a violation of the law, or otherwise significantly threaten or harm competition.

69. Cingular violated the "unfair" prong of the UCL because Cingular's handset locking practices threaten an incipient violation of the Cartwright Act, Bus. & Prof. Code § 16720, and § 16727, as described above, and violate the policy or spirit of those laws because the effects of Cingular's handset locking practices are comparable to or the same as a violation of the law, or otherwise significantly threaten or harm competition.

70. Cingular violated the "unfair" prong of the UCL because Cingular's handset locking practices threaten an incipient violation of the FTC Act, 15 U.S.C. § 45(n), as described above, and violate the policy or spirit of those laws because the effects of Cingular's handset locking practices

are comparable to or the same as a violation of the law, or otherwise significantly threaten or harm competition.

71. Cingular violated the "unfair" prong of the UCL because Cingular's handset locking practices threaten an incipient violation of the FCC's bundling rules set forth in *In The Matter Of Bundling Of Cellular Customer Premises Equipment And Cellular Service,* CC Docket No. 91-34, 1992 WL 689944 (F.C.C. June 10, 1992), as described above, and violate the policy or spirit of those laws because the effects of Cingular's handset locking practices are comparable to or the same as a violation of the law, or otherwise significantly threaten or harm competition.

72. Cingular violated the "unfair" prong of the UCL because Cingular's handset locking practices are contrary to the public policy expressed by the United States Congress which established the promotion of competition in the field of telecommunications as a fundament policy underlying the Communications Act of 1934. *See* The Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(b), amending the Communications Act of 1934 and codified at 47 U.S.C. § 332(c).

73. Cingular violated the "unfair" prong of the UCL because Cingular's handset locking practices are contrary to the public policy expressed by the United States Congress in the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. § 151, *et seq.* ("the 1996 Act" or "the Act"), to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." 1996 Act, preamble.

74. Cingular violated the "unfair" prong of the UCL because Cingular's handset locking practices are contrary to the public policy expressed by the FCC rules requiring wireless carriers to provide number portability. *See Telephone Number Portability, First Report and Order and Further Notice of Proposed Rule,* 11 F.C.C.R. 8352, 1996 WL 400225 (1996) ("First Report and Order"); 47 C.F.R. § 52.31. The FCC ordered wireless number portability because it found that consumers "will be reluctant to change wireless service providers unless they can keep the same number," and "will find themselves forced to stay with carriers with whom they may be dissatisfied because the cost of giving up their wireless phone number in order to move to another carrier is too

high." *See CTIA v. FCC*, 303 F.3d 502, 506-07 (D.C. Cir. 2003), quoting 17 F.C.C.R. at 14,979-80. The same rationale for allowing consumers to keep their phone number when changing carriers, also supports allowing consumers to keep their handsets when changing carriers. Consumers "will be reluctant to change wireless services providers unless they can keep the same [handset]," and "will find themselves forced to stay with carriers with whom they may be dissatisfied because the cost of giving up their wireless phone [handset] in order to move to another carrier is too high." *See id.*

WHEREFORE, Plaintiffs pray for relief as hereinafter set forth.

COUNT IV
Consumer Legal Remedies Act

75. Plaintiffs incorporate by reference all allegations of all prior paragraphs as though fully set forth herein.

76. COUNT IV is brought by plaintiffs (other than Kistler & Kistler, Inc.) individually and on behalf of the Subclass against Cingular.

77. By secretly locking handsets and failing to disclose the existence and effects of Cingular's handset locks as alleged above, Cingular has engaged in, and continues to engage in, unfair methods of competition and unfair or deceptive acts and practices in violation of the Consumer Legal Remedies Act, Civil Code sections 1750 *et seq.* (the "CLRA"), including without limitation, the provisions of California Civil Code sections 1770(a)(5)-(7) and (9).

78. CLRA section 1770(a)(5) prohibits "Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which he or she does not have." Cingular violated this provision by making the Misrepresentations and by concealing the Concealed Facts. Cingular continues to violate this provision in connection with sales of handsets to class members.

79. CLRA section 1770(a)(6) prohibits "Representing that goods are original or new if they have deteriorated unreasonably or are altered, reconditioned, reclaimed, used, or secondhand." Cingular violated this provision by representing that the handset sold to plaintiffs were original or

new when in fact they had been altered by Cingular. Cingular continues to violate this provision in connection with sales of handsets to class members.

80. CLRA section 1770(a)(7) prohibits "Representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another." Cingular violated this provision by making the Misrepresentations and by concealing the Concealed Facts. Cingular continues to violate this provision in connection with sales of handsets to class members.

81. CLRA section 1770(a)(9) prohibits "Advertising goods or services with intent not to sell them as advertised." Cingular violated this provision by advertising the sale of various handset models with the intent of not selling fully functional, unaltered versions of such handsets, but instead selling only such handsets as have been altered by Cingular. Cingular continues to violate this provision in connection with its advertising of handsets. As a proximate result thereof, plaintiffs and the members of the Subclass have been harmed as alleged above and will continue to be harmed in the future unless the Court grants relief as prayed for herein.

82. On February 27, 2004, plaintiff Mendoza, pursuant to Civil Code section 1782, sent defendants a letter via certified mail, return receipt requested, advising them that they are in violation of the CLRA and must correct, repair and rectify such violation or agree to do so within thirty days. A true and correct copy of said demand is attached hereto as Exhibit A.

83. Defendants never responded to plaintiff Mendoza's February 27, 2004 letter.

WHEREFORE, plaintiffs (other than Kistler & Kistler) pray for relief as hereinafter set forth.

COUNT V
Declaratory Relief

84. Plaintiffs incorporate by reference all allegations of all prior paragraphs as though fully set forth herein.

85. COUNT V is brought by plaintiffs individually and on behalf of the Class against Cingular.

86. Plaintiffs are informed and believes that the form contract imposed by Cingular on its subscribers includes the following provision:

> …[I]nstead of suing in court, CINGULAR and you agree to arbitrate any and all disputes and claims (including but limited to claims based on or arising from an alleged tort) arising out of relating to this Agreement, or to any prior Agreement for products or service between you and CINGULAR or any of your or CINGULAR's affiliates or predecessors in interest. The arbitration of any dispute or claim shall be conducted in accordance with the wireless industry arbitration rules ("WIA Rules") as modified by this agreement and as administered by the American Arbitration Association ("AAA").…Except where prohibited by law CINGULAR and you agree that no Arbitrator has the authority to: (1) award relief in excess of what this agreement provides; (2) award punitive damages or any other damages not measured by the prevailing party's actual damages; or (3) order consolidation or class arbitration. The Arbitrator(s) must give effect to the limitations on CINGULAR's liability as set forth in this agreement, any applicable tariff, law or regulation.…CINGULAR, you and the arbitrator(s) shall not disclose the existence, content or results of any arbitration. Judgment on the award rendered by the Arbitrator(s) may be rendered in any Court having jurisdiction thereof. Notwithstanding the foregoing, either party may bring an action in small claims court.

87. An actual and justiciable controversy exists between the parties as to their respective rights and obligations under the form contracts imposed on subscribers by Cingular.

88. Specifically, plaintiffs believe and thereon allege that the above provision that purports to compel arbitration and preclude plaintiffs and the class members from participating in a class or representative action against Cingular is procedurally and substantively unconscionable, and is therefore unenforceable. In addition to the provision purporting to prohibit class actions or consolidation in arbitration, the provisions mandating confidentiality (which prevent subscribers from sharing information with each other about awards against CINGULAR) and requiring the arbitrator to employ the WIA Rules are unconscionable.

89. Plaintiffs believe and thereon allege that these provisions are procedurally unconscionable in that plaintiffs and the class members were not given an opportunity for meaningful negotiation over this term and that the provision was presented by Cingular on a "take it or leave it basis." Plaintiffs are also informed and believes and thereon alleges that other cellular telephone service providers also impose similar provisions in their form contracts and that it would be difficult if not impossible for plaintiffs and the class members to reject the terms of the said provision and obtain similar services elsewhere without the offending provision.

90. Plaintiffs believe and thereon allege that the provisions of the Cingular form contract referenced in Paragraph 86 are substantively unconscionable in that the terms of the provision impose harsh and oppressive terms and are so one-sided as to shock the conscience. These provisions are meant to prevent Cingular customers from seeking redress for relatively small amounts of money and provide them with no benefit whatsoever. Indeed, they seriously jeopardize the rights of Cingular subscribers by prohibiting any effective means of litigating the business practices of Cingular. Cingular seeks to immunize itself from class or representative actions despite their potential merit. The provision also provides a disincentive to Cingular to avoid the type of conduct that might lead to a class or representative action. In fact, Cingular has granted itself a license to push the boundaries of good business practices to their furthest limits.

91. Plaintiffs, on behalf of themselves and all others similarly situated, therefore seek a judicial declaration to that effect.

COUNT VI
Consumer Legal Remedies Act
(Unconscionable Contract Clauses)

92. Plaintiffs incorporate by reference all allegations of all prior paragraphs as though fully set forth herein.

93. COUNT VI is brought by plaintiffs (other than Kistler & Kistler, Inc.) individually and on behalf of the Subclass against Cingular.

94. CLRA section 1770(a)(14) prohibits representing that a transaction confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law." Cingular violated this provision by representing, in its form customer agreements, that customers were required to arbitrate any disputes with Cingular, to waive any right to pursue claims on a class or representative basis, and to waive rights to remedies available to them under California law. Cingular continues to violate this provision by making such representations to its subscribers.

95. CLRA section 1770(a)(19) prohibits "Inserting an unconscionable provision in the contract." Cingular violated this provision by inserting unconscionable provisions in its form customer agreements, including an unconscionable arbitration clause, class or representative action

waiver, and limitations of remedies. Cingular continues to violate this provision by inserting such provisions in its form customer agreements.

WHEREFORE, plaintiffs (other than Kistler & Kistler, Inc.) pray for relief as hereinafter set forth.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs and the Class and Subclass pray for judgment against defendants, and each of them as follows:

On COUNTS I, II and III

1. For an order directing defendants to appropriately disclose the existence and effects of the handset locks defendants have employed;

2. For an order directing defendants to offer to unlock handsets that they have locked, free of charge, and to publicize such offer in a suitable manner;

3. For an order enjoining defendants from secretly programming and selling handsets with SIM Locks, SOC locks or band order locks; and

4. For restitution and/or disgorgement of all amounts wrongfully charged to plaintiffs and the members of the Class.

On COUNT IV

5. For an order directing defendants to appropriately disclose the existence and effects of the handset locks defendants have employed;

6. For an order directing defendants to offer to unlock handsets that they have locked, free of charge, and to publicize such offer in a suitable manner; and

7. For an order enjoining defendants from secretly programming and selling handsets with SIM locks, SOC locks or band order locks;

8. For damages incurred by plaintiffs and the Subclass.

On COUNTS V and VI

9. For a judicial declaration that plaintiffs and the members of the Class may bring and participate in a class or representative action against Cingular and that the provision in the form contract that purports to compel arbitration and prohibit plaintiffs and the class members from

bringing or participating in a class or representative action is procedurally and substantively unconscionable and is therefore void and unenforceable;

On ALL COUNTS

10. For an order certifying this action as a class action on behalf of the Class and Subclass;

11. For costs of suit herein incurred;

12. For both pre- and post-judgment interest on any amounts awarded;

13. For an award of attorneys' fees as appropriate pursuant to the provisions of Code of Civil Procedure section 1021.5 and/or Civil Code section 1780(d); and

14. For such other and further relief as the court may deem proper.

DEMAND FOR JURY TRIAL

Plaintiffs hereby demand a trial by jury.

Dated: November 19, 2008

Respectfully submitted,

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ALAMEDA

In re: CELLPHONE TERMINATION FEE CASES This Document Relates To: *Meoli, et al. v. AT&T Wireless PCS, LLC, et al.* Handset Locking and Related Claims Against AT&T Wireless, *et al.*	JCCP No. 4332 Class Action **FOURTH AMENDED COMPLAINT [HANDSET LOCKING]** **JURY TRIAL DEMANDED**

Plaintiffs, by their attorneys, make the following allegations based upon information and belief, except as to allegations specifically pertaining to themselves and their counsel, which are based on personal knowledge.

NATURE OF THE ACTION

1. This is a class and private attorney general action lawsuit filed to redress an unfair and wrongful practice inflicted by defendants on California consumers: the secret locking of cell phone handsets to make it impossible or impracticable for customers to switch cell phone service providers without purchasing a new handset.

2. Plaintiffs seek relief in this action individually, as private attorney generals on behalf of the general public and as a class action on behalf of all California residents who have purchased handsets from defendants, or any of them, which have been secretly programmed with SOC locks, band order locks, or SIM locks (all as described more fully below). Plaintiffs contend that the practice of secretly programming handsets with SOC locks, band order locks, or SIM locks is an unfair business practice which has no legitimate justification and which substantially harms consumers. Plaintiffs further allege that defendants have a duty to disclose that they have locked a handset before selling it to a consumer, and to disclose a handsets locking code in connection with the sale of a handset, and that their failure to do so is a fraudulent and deceptive business practice.

PARTIES

3. Defendant AT&T Wireless PCS, LLC is a Delaware limited liability company with its principal place of business in Washington, D.C.

4. Defendant AT&T Corporation is a Delaware corporation with its principal place of business in Bedminster, New Jersey.

5.. Defendant Cellular Telephone Company d/b/a AT&T Wireless Services is a Pennsylvania corporation or other type of business entity with its principal place of business in Redmond, Washington.

6. Defendant AT&T Wireless Services Inc. is a Delaware corporation with its principal place of business in New York. Defendant Bay Area Cellular Telephone Company is a company with its principal place of business in Washington, D.C.

7. Defendants AT&T Wireless PCS, LLC, Cellular Telephone Company d/b/a AT&T Wireless Services and AT&T Wireless Services Inc. are and at all times relevant hereto have been engaged in the business of providing cell phone service and related products and services to the public in California and in other states. They are hereinafter collectively referred to as "AT&T" or "AT&T Wireless."

8. The true names and capacities, whether individual, corporate, associate or otherwise, of defendants Does 1 through 100, inclusive, are unknown to plaintiffs, who therefore sue said defendants by such fictitious names. Plaintiffs are informed and believe and thereon allege that each of the defendants designated herein as a Doe is legally responsible in some manner for the events and happenings herein referred to and caused, or is responsible in some proportion for, the damages sustained by plaintiffs herein. Plaintiffs may seek leave to amend this complaint to show the true names, capacities, actions and responsibilities of said defendants so fictitiously named whenever the same shall have been ascertained. At that time, plaintiffs will seek leave to include appropriate charging allegations as to said defendants.

9. Plaintiff Porsha Meoli ("Meoli") is a resident of Los Angeles, California. In or about 2002, she entered into a 12-month service contract to receive cell phone service from AT&T Wireless. Meoli also purchased from AT&T Wireless an Ericsson T60LX cell phone that incorporates a SOC lock and a band order lock, as defined below**.** Meoli continues to be a subscriber to AT&T's Digital Advantage calling plan and continues to use the said Ericsson cell phone and AT&T Wireless service for personal, family or household purposes.

10. Plaintiff Leslie Armstrong ("Armstrong") is a resident of Contra Costa County, California. Armstrong entered into a two-year agreement for wireless services with AT&T Wireless on April 13, 2002. Those agreements, individually and/or collectively, provided, *inter alia*, that Armstrong would be a subscriber to AT&T's Digital Advantage calling plan, at a base rate of $39.99 per month, for a two-year period. The equipment activated at the time Armstrong signed the agreement was an Ericsson R300LX cell phone, which contains a SOC lock and a band order lock, as defined below. Armstrong continues to be a subscriber to AT&T's Digital

Advantage calling plan and continues to use her Ericsson cell phone and AT&T Wireless service for personal, family or household purposes.

11. Plaintiff Sridhar Krishnan ("Krishnan") is a resident of Alameda County, California. Krishnan was a subscriber to AT&T Wireless service prior to January, 2003. While an AT&T Wireless subscriber, Krishnan used several cell phones which he purchased from AT&T Wireless, including most recently a Nokia 8260 cell phone, which contained SOC and band order locks, as defined below. Krishnan used the cell phones and the AT&T Wireless service for, among other reasons, personal, family or household purposes. After Krishnan terminated his AT&T Wireless service on or about January 7, 2003, he purchased cell phone service from one of the competitors of AT&T Wireless, but found that as a result of the SOC and band order locks programmed into his Nokia 8260 cell phone, he was unable to use that cell phone with any carrier other than AT&T Wireless. Plaintiffs Riley Clark, Steve Kozack, Jennifer Preuss, Betty Jennings and Joseph Panganiban are residents of the State of California who were subscribers to cellphone service with AT&T Wireless, and who purchased locked handsets from AT&T Wireless after March 12, 1999 and prior to the date on which AT&T Wireless merged with Cingular Wireless in 2004.

12. Plaintiff Foundation for Taxpayer and Consumer Rights ("FTCR") is a nationally recognized, California-based non-profit education and advocacy group organized under section 501(c)(3) of the Internal Revenue Code. Founded in 1985, FTCR employs teams of public-interest lawyers, policy experts, strategists, public educators and grassroots activists to advance and protect the interests of consumers and taxpayers. Since its inception, FTCR has been particularly involved in representing the interests of utility ratepayers in California in matters before the Legislature, the courts and state agencies. FTCR sues in a representative capacity on behalf of the general public.

13. At all relevant times alleged in this matter, each defendant acted in concert with, with the knowledge and approval of and/or as the agent of the other defendants within the course and scope of the agency, regarding the acts and omissions alleged.

JURISDICTION, VENUE AND APPLICABLE LAW

14. Defendants conduct substantial business in the State of California.

15. The allegations and claims for relief herein arise from acts committed in this state and elsewhere within the United States which violate California law. Because enforcement of consumer protection statutes and common law prohibitions are within this State's lawful authority, the relief and adjudication of claims which plaintiffs seek are within the jurisdiction of this Court.

16. Venue is proper in this Court. Defendants do business in this county and have entered into contracts with plaintiffs Krishnan and Armstrong and members of the plaintiff class and the general public that are to be performed in part in this County. A substantial number of the acts complained of herein took place in Alameda County. In addition, plaintiff Krishnan resides, and at all times relevant hereto has resided, in this County.

17. Plaintiffs state, and intend to state, causes of action solely under the laws of the State of California and specifically deny any attempt to state a cause of action under the laws of the United States of America. Furthermore, the claims of plaintiffs and the members of the plaintiff class assert no federal question or statute, and plaintiffs' state law causes of action are not federally pre-empted. The individual claims of Plaintiffs and the other members of the class do not exceed $75,000.

AT&T'S HANDSET LOCKING PRACTICES

18. AT&T Wireless does not manufacture handsets. It purchases handsets from equipment vendors such as Nokia, Ericsson and Samsung. It then resells those handsets to AT&T Wireless subscribers. These handsets are referred to herein as "AT&T handsets."

19. Cellular telephone handsets, including those sold by AT&T Wireless, are manufactured to industry standards so that they can be used to obtain service from many different carriers – for example, when "roaming" off the original carrier's network. This allows the original carrier to enter into network-sharing or roaming agreements with other carriers, and thereby expand coverage and generate more service revenues.

20. An AT&T handset can operate on another carrier's network without any alteration or enhancement to the handset. Just as an FM radio is capable of receiving all stations in the FM

band, AT&T handsets, as sold, are capable of sending and receiving signals on all cellular or PCS bands in use in the United States.

21. AT&T Wireless and other cellular/PCS carriers are members of industry standard setting bodies such as the Cellular Telephone & Internet Association ("CTIA"), GSM Association, and other industry groups. Through CTIA and other standard setting organizations, AT&T Wireless conspired with other cellular/PCS carriers and equipment manufacturers to develop locks for cellular/PCS handsets. AT&T Wireless also conspired with other wireless carriers and equipment manufacturers, *inter alia*, through the CTIA Certification Program, which was designed to certify that cellular/PCS handsets meet the specifications required for the carriers to program and lock them for use on their respective networks.

22. AT&T Wireless provides cellular/PCS service using one of two digital signaling technologies: Global System for Mobile communications (GSM) or Time Division Multiple Access (TDMA).

23. AT&T's GSM handsets utilize SIM (subscriber information module) cards. A SIM card is a wafer-thin card measuring approximately 7/8-inch by 5/8-inch that stores computer-readable information. The subscriber's identifying information is written onto the SIM card, which is read by the handset and transmitted to the carrier's network. A handset employing a SIM card has a receptacle into which the card can be placed, typically behind the handset battery.

24. It is relatively easy to move a SIM card from handset to handset. No tools or equipment are required. Anyone can simply use his or her fingers to slide the SIM card out of one handset and into another.

25. AT&T Wireless requires equipment vendors to alter GSM handsets sold to AT&T by locking them with SIM locks and by setting the SIM Unlock Code based on a secret algorithm provided by AT&T Wireless. AT&T Wireless also requires its GSM equipment vendors to transmit those SIM Unlock Codes to AT&T Wireless. AT&T Wireless does not consider a shipment of GSM handsets complete, and will not make payment to an equipment vendor, until AT&T Wireless receives the SIM Unlock Codes.

26. The SIM locks employed by AT&T Wireless prevent GSM handsets from operating if a SIM card from another cellular/PCS carrier is inserted into the handset. This effectively prevents the activation of the handset on the facilities of any carrier other than AT&T Wireless unless the phone is unlocked.

27. SIM locks cannot be unlocked without a secret code provided by the carrier, or special equipment and expertise which ordinary consumers typically lack. However, with appropriate equipment and expertise or with knowledge of the unlocking codes, it takes only a few minutes to enter the SIM Unlock Code through the handset keypad and reprogram the handset for use on another network, thus restoring the handset's ability to be activated on another network. Indeed, a SIM Unlock Code can be entered to unlock a handset in less time than it takes to dial a long distance phone number, since it contains fewer digits – eight digits for a SIM Unlock Code compared to ten for a phone number (with area code).

28. The TDMA phones marketed by AT&T are programmed with System Operator Code ("SOC") locks and/or band order locks.

29. A system operator code is a 3- or 4-digit number assigned to a cellular/PCS carrier. For example, the International SOC code for AT&T Wireless is 801 (hex), 2049 (decimal). The SOC code programmed into the handset must match the code of the carrier providing service. However, when these handsets are locked, the SOC code cannot be changed. This SOC lock effectively ensures that handsets programmed by AT&T Wireless cannot be reprogrammed for activation on a rival carrier's network.

30. A SOC lock cannot be unlocked without a secret code provided by the carrier, or special equipment and expertise which ordinary consumers typically lack.

31. A band order lock restricts the frequencies or channels on which handsets will operate. AT&T employs band order locks in conjunction with SOC locks.

32. Cellular/PCS services operate on the 800 MHz band or the 1900 MHz band. The 800 MHz band contains two channel sets: Block "A" and Block "B". The 1900 MHz band contains six channel sets: Blocks "A" through "F". Each carrier typically operates on only one or two such blocks within a given geographic area. While cellular/PCS handsets are generally

capable of operating across the entire range of frequencies allocated for cellular/PCS services -- i.e., the entire 800 MHz band and the entire 1900 MHz band -- each carrier is licensed to operate only on certain restricted channel sets, or blocks, within those bands.

33. AT&T TDMA handsets are designed to be compatible with the channels and networks of many carriers, and they are manufactured in such a way that band-order settings are reprogrammable. A band order lock employs software to restrict handsets to AT&T's channel blocks and combat the reprogrammability of the handsets, which reinforces the limitations imposed by the SOC locks.

34. A band order lock cannot be unlocked without a secret code provided by the carrier, or special equipment and expertise which ordinary consumers typically lack.

35. AT&T Wireless markets handsets which it secretly programs with SIM locks, SOC locks and/or band order locks. AT&T Wireless does not disclose to consumers that the handsets it sells and distributes are disabled with SIM locks, SOC locks and/or band order locks.

MISREPRESENTATIONS

36. AT&T Wireless makes representations that are materially false, misleading, and likely to deceive a reasonable consumer and have directly caused economic injury in fact to Plaintiffs and the members of the class, and to their money and property. These include (i) the statement in AT&T Wireless' form subscriber agreement stating the subscriber's phone "may contain pre-installed software necessary to use [AT&T Wireless] Service, and the software will prevent the phone from being activated with any other carrier's service, " (ii) representations that AT&T Wireless handsets are "PCS Phones," which convey to the reasonable consumer that the handsets will function on all PCS bands, (iii) representations that AT&T Wireless handsets are "GSM" handsets, which convey to the reasonable consumer that the handsets will function on GSM networks, (iv) representations that AT&T Wireless handsets are "TDMA" handsets, which convey to the reasonable consumer that the handsets will function on TDMA networks, (v) representations that AT&T Wireless handsets are dual- or tri-mode, or dual- or tri-band handsets, which suggest functionality not limited to AT&T Wireless' network, and (vi) representations that AT&T Wireless handsets are brand name handsets, such as Nokia, Ericsson or Samsung, etc.,

which convey to the reasonable consumer that the handsets will have functionality similar to unaltered handsets sold under those brand names (hereafter the "Misrepresentations").

37. The first of the Misrepresentations, the statement in AT&T Wireless' form subscriber agreement stating that the subscriber's phone "may contain pre-installed software necessary to use [AT&T Wireless] Service, and the software will prevent the phone from being activated with any other carrier's service, " is materially false, misleading, and likely to deceive a reasonable consumer because it conceals, and is part of a scheme to conceal, the Concealed Facts set forth below, and to prevent consumers from discovering some or all of those Concealed Facts.

CONCEALED FACTS

38. AT&T Wireless intentionally concealed and continues to conceal the following material facts (hereafter, "the Concealed Facts"):

(a) its handset locking practices.

(b) that, contrary to AT&T's representations to existing and/or potential subscribers, AT&T Wireless handsets, as sold, and without alteration or enhancement, *are compatible with* and *will work* with services provided by other wireless carriers;

(c) that whatever limitations may exist on the handset's ability to be activated on or make use of the networks of rival carriers who use compatible technology are the result of AT&T's deliberate and systematic degradation of the functionality of the handsets through the use of SIM, SOC and band order locks;

(d) that locking software *is not* "necessary to use AT&T's service" – its purpose and effect are not to benefit the consumer or enable or facilitate any aspect of AT&T's service but, rather, to restrict consumer choice and render it more difficult and expensive for subscribers to switch to another carrier;

(e) that AT&T Wireless handsets are locked with SIM locks, SOC locks and/or band order locks to create an impediment to activation on non-AT&T Wireless networks;

(f) that AT&T Wireless handsets can be unlocked in seconds by entering the unlock code through the handset keypad or otherwise;

(g) that once unlocked, AT&T Wireless handsets can be activated on non-AT&T Wireless networks; and

(h) the lock codes themselves for the handsets sold to Plaintiffs and the other Class members.

39. The Concealed Facts were known to AT&T Wireless at all relevant times.

40. The Concealed Facts are important facts which consumers could not have discovered because handset locks are not visible to a purchaser visually inspecting the handset. Nor is there any disclosure about the locks on the packaging or materials provided with the handset at the time of purchase. In the ordinary course, a purchaser would not discover the locking software until attempting to activate the handset with another carrier. Thus, when purchasing an AT&T Wireless handset, Plaintiffs were not aware that the handset had been altered and locked as described above. Nor were other Class members aware that the handsets they purchased from AT&T Wireless had been altered and locked as described above.

41. Plaintiffs did not know the Concealed Facts when purchasing an AT&T Wireless handset. Nor did other Class members.

42. AT&T Wireless intended to deceive Plaintiffs and the other Class members by concealing the Concealed Facts.

43. Plaintiffs and the other Class members reasonably relied on AT&T Wireless' deception by purchasing AT&T Wireless handsets, activating those handsets on AT&T Wireless' network, and remaining AT&T Wireless subscribers.

HARMS TO PLAINTIFFS AND THE CLASS

44. Plaintiffs and the other Class members have suffered an injury in fact resulting in a loss of money and property due to AT&T Wireless' aforesaid handset locking practices and deception because (i) they have been locked in to the service of AT&T Wireless and impeded from switching to another carrier, (ii) they have incurred or may incur costs to have the handsets unlocked, (iii) they have been, may be or are unable to use their handsets when switching carriers, (iv) the handsets they acquired from AT&T Wireless are of diminished value, (v) AT&T Wireless' practices deprived them of the full enjoyment of their rights of ownership over the handsets that

they purchased, and/or (vi) the option to switch carriers without having to purchase a new cellphone has economic value, the deprivation of which has harmed Plaintiffs and the members of the Class.

45. AT&T Wireless' deception was a substantial factor in causing these harms to Plaintiffs and the other Class members.

AT&T WIRELESS' DUTY TO DISCLOSE THE CONCEALED FACTS

46. AT&T Wireless owed a duty to Plaintiffs and the other Class members to disclose the handset locks. There are at least five bases for such duty.

47. *First*, AT&T Wireless owes a duty to release the unlock codes by virtue of the sale of the handset. AT&T Wireless itself does not consider a handset shipment from the manufacturer to AT&T Wireless to be completed until the unlock code is transmitted to AT&T Wireless, and will not pay for a handset until it has received the unlock code. This demonstrates that AT&T Wireless itself regards the unlock code as an essential part of the sale, and essential to obtaining full rights of ownership and use of the handset. Similarly, the transfer of the handsets from AT&T Wireless to Plaintiffs is not complete because AT&T Wireless has not disclosed the unlock codes to Plaintiffs. AT&T Wireless has thus deprived Plaintiffs of full rights of ownership and use of that handset by withholding the unlock code. AT&T Wireless would not have paid the manufacturers, for those handsets until the manufacturers provided the unlock codes to AT&T Wireless. AT&T Wireless thus had a duty, upon receipt of payment from Plaintiffs to disclose the unlock codes to Plaintiffs so as to transfer to them the full rights of ownership and use of the handset that AT&T Wireless itself had received from the manufacturers.

48. *Second*, as a seller, AT&T Wireless has a duty to disclose the Concealed Facts because they are known to AT&T Wireless but are not accessible to consumers purchasing AT&T Wireless handsets. *See, e.g., Nussbaum v. Weeks* (1989) 214 Cal. App.3d 1589, 1600 ("seller has a general duty to disclose material facts that are not accessible to the buyer"), *citing* 5 Witkin, Summary of Cal. Law. (9th ed. 1988) Torts § 700, at 801-02.

49. *Third*, AT&T Wireless has a duty to disclose the Concealed Facts to correct the Misrepresentations which are false, misleading, and likely to deceive reasonable consumers in the absence of such disclosure. *See, e.g.*, Restatement (Second) of Torts § 551.

50. *Fourth*, AT&T Wireless has a duty to disclose the Concealed Facts to prevent harm to Plaintiffs and the Class. *See Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 397 (recognizing a duty to disclose based on "the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm."). Such a duty arises here because the Concealed Facts are integral to a transaction that was intended to affect Plaintiffs and the Class, the harm to Plaintiffs and the Class was foreseeable (indeed, it was *intended* and *purposeful*), and AT&T Wireless' conduct is closely connected to the injuries suffered.

51. *Fifth*, the substantive legal provisions under which Plaintiffs bring their claims herein, including without limitation Business & Professions Code §§17200 *et seq.* and the Consumer Legal Remedies Act, Civil Code §§1750 *et seq.*, impose on AT&T Wireless a duty not to engage in unfair, unlawful, fraudulent and deceptive business practices and not to conceal facts the disclosure of which is necessary to avoid violating the said provisions.

CLASS ALLEGATIONS

52. Plaintiffs bring this action on their own behalf and on behalf of all other persons similarly situated.

53. Plaintiffs seek to represent a class defined as all California residents who have purchased handsets from defendants, or any of them, which have been programmed with SIM locks, SOC locks or band order locks (the "Class"). Within the Class is a subclass (the "Subclass") consisting of all members of the Class who are "consumers" as defined by Civil Code § 1761.

54. The Class and Subclass are composed of hundreds of thousands or even millions of people, whose joinder in this action would be impracticable. The disposition of their claims

through this class action will benefit both the parties and this Court. The identities of individual members of the class are ascertainable through the billing records of the defendants named herein.

55. There is a well-defined community of interest in the questions of law and fact involved affecting the members of the Class and Subclass. Questions of law and fact common to the Class and Subclass predominate over questions which may affect only individual class members, including, but not limited to, the following:

a. Whether AT&T misrepresented and/or concealed the fact that the handsets defendants sell are locked, the manner in which they are locked or the purpose or effects of the locks;

b. Whether AT&T should be enjoined to make appropriate disclosures of the existence and effects of its handset locks;

c. Whether AT&T should be enjoined to offer to unlock, or provide the codes to unlock, the handsets purchased by Plaintiffs and the Class and Subclass;

d. Whether AT&T should be enjoined from secretly programming and selling locked handsets; and

e. Whether the representation made in AT&T's form customer agreements that the locks are "software necessary to use [AT&T Wireless] Service" is false, misleading, likely to deceive, or constitutes a violation of California law.

56. Plaintiffs are asserting claims that are typical of the claims of the Class and Subclass, and plaintiffs will fairly and adequately represent and protect the interests of the Class and Subclass. Plaintiffs have no interests antagonistic to the interests of the Class and Subclass. Plaintiffs have retained counsel who are competent and experienced in the prosecution of class action litigation.

57. Absent a class action, defendants' practices will irreparably injure the members of the Class and Subclass by defrauding consumers by concealing from them the qualities of the handsets they purchase from AT&T Wireless, and by secretly imposing unfair and improper obstacles to switching to a carrier other than AT&T Wireless. Because of the size of the individual class members' claims, few, if any, class members could afford to seek legal redress on an

individual basis for the wrongs complained of herein. Absent a class action, the class members will continue to suffer losses and the violations of law described herein will continue without remedy and AT&T Wireless will retain the proceeds of its misdeeds. AT&T Wireless continues, to this day, to engage in the unlawful and unfair conduct which is the subject of this complaint.

COUNT I
Unfair Competition In Violation Of
California Business & Professions Code §§ 17200 *Et Seq*.
(Fraudulent and Deceptive Business Practices)

58. Plaintiffs incorporate by reference all allegations of all prior paragraphs as though fully set forth herein.

59. COUNT I is brought against AT&T Wireless by plaintiffs individually, on behalf of the Class and on behalf of the general public.

60. AT&T Wireless is subject to the Unfair Competition Law, Business & Professions Code section 17200 *et seq*. (the "UCL"). The UCL provides, in pertinent part: "Unfair competition shall mean and include unlawful, unfair or fraudulent business practices and unfair, deceptive, untrue or misleading advertising…"

61. AT&T Wireless' handset locking practices violated the "fraudulent" prong of the UCL by making the Misrepresentations and by concealing the Concealed Facts.

WHEREFORE, plaintiffs pray for relief as hereinafter set forth.

COUNT II
Unfair Competition In Violation Of
California Business & Professions Code §§ 17200 *Et Seq*.
(Unlawful Business Practices)

62. Plaintiffs incorporate by reference all allegations of all prior paragraphs as though fully set forth herein.

63. COUNT II is brought against AT&T Wireless by plaintiffs individually, on behalf of the Class and on behalf of the general public.

64. AT&T Wireless is subject to the UCL. The UCL provides, in pertinent part: "Unfair competition shall mean and include unlawful, unfair or fraudulent business practices and unfair, deceptive, untrue or misleading advertising…"

65. AT&T Wireless violated the "unlawful" prong of the UCL by violating the Consumer Legal Remedies Act, Civil Code §§ 1770 (a)(5) – (7) and (9) as set forth in COUNT IV, below.

66. AT&T Wireless violated the "unlawful" prong of the UCL by violating the Consumers Legal Remedies Act, Civil Code § 1770(a)(14) and (19), as set forth in Count VI, below.

67. AT&T Wireless violated the "unlawful" prong of the UCL by violating the Cartwright Act, Bus. & Prof. Code § 16720, by conspiring with other cellular/PCS carriers, such as the membership of CTIA, including, for example, Cingular and other carriers, by conspiring to restrain trade by locking handsets to tie the sale of cellular/PCS handsets and services. Beginning at a date unknown to plaintiffs, but at least as early as April 1, 2002, and continuing to the present, AT&T Wireless, its co-conspirators, and unknown Doe defendants have engaged in a continuing contract, combination and conspiracy in unreasonable restraint of trade and commerce, as evidenced by the foregoing acts and practices, among others. This contract, combination, and conspiracy had the purpose and effect of unreasonably restraining trade and commerce. The contract, combination, and conspiracy alleged herein consisted of a continuing agreement, understanding, and concert of action among the defendants and their co-conspirators, the substantial terms of which were to lock handsets so that each carrier would be the only source of handsets for that carrier's subscribers, and each carrier's handsets would be locked for use only on that carrier's network, and to create an impediment to activation on other networks. For the purpose of forming and effectuating the contract, combination, and conspiracy, AT&T Wireless and its co-conspirators, including, *inter alia*, CTIA, did those things which they contracted, combined, and conspired to do, including but not limited to the acts, practices, and course of conduct set forth above.

68. AT&T Wireless violated the "unlawful" prong of the UCL by violating the Cartwright Act, Bus. & Prof. Code § 16727, by unlawfully tying the sale of cellular/PCS handsets and services. Cellular/PCS services and handsets are two separate products. AT&T Wireless coerces subscribers to purchase handsets only from AT&T Wireless as a condition of obtaining

service through AT&T Wireless' network and refuses to provide service with handsets purchased from other sources.

69. AT&T Wireless has economic power in the tying product market, the provision of cellular/PCS services in the State of California, by virtue of its extensive portfolio of spectrum licenses, the high cost to consumers of switching to another service, and otherwise. AT&T Wireless' tying arrangements have substantially lessened competition by creating barriers to entry to the handset market, by reducing the number of handset manufacturers from several dozen in the mid-1990s to a mere ten or so manufacturers today, by preventing the development of handset technology that would allow handsets to access signals provided by multiple providers of wireless services, by increasing the cost of handsets, and by increasing the cost of handset and services bundles. AT&T Wireless' tying arrangements affect a substantial amount of commerce since AT&T Wireless has millions of subscribers in California.

70. AT&T Wireless violated the "unlawful" prong of the UCL by violating the FTC Act, 15 U.S.C. § 45(n), because AT&T Wireless' handset locking practices are business practices that cause or are likely to cause injury to consumers by imposing unnecessary costs when switching carriers, such as the cost to unlock the handset or the cost of a new handset if the consumer is unaware of the lock or unaware of the availability of means to unlock it, and also by degrading the value of the handset. These injuries are substantial, and are not reasonably avoidable by consumers who in most cases are unaware of the locks. There are no countervailing benefits to consumers or to competition because handset locks have no utility whatsoever; their only function is to prevent the purchaser from obtaining full rights of ownership and use of handsets purchased from AT&T Wireless.

71. AT&T Wireless violated the "unlawful" prong of the UCL by violating the FCC's bundling rule. Due to concerns about the potential anticompetitive impact of tying arrangements, in 1992 the FCC clarified its policy with respect to the bundling of wireless phones and services. The FCC stated its "concern that customers have the ability to choose their own CPE [handset] and service packages to meet their own communication needs and that they not be forced to buy unwanted carrier-provided CPE [handsets] in order to obtain necessary services." *In The Matter Of*

Bundling Of Cellular Customer Premises Equipment And Cellular Service, CC Docket No. 91-34, 1992 WL 689944 (F.C.C. June 10, 1992), at ¶ 6. Given these concerns, the FCC permitted cellular carriers to offer handsets and services as a bundled package, provided that cellular service was also offered separately on a nondiscriminatory basis. In other words, the FCC permitted carriers to bundle handsets and service on the condition that the carriers offer service regardless of whether the subscriber purchased a bundled phone from the carrier or an unbundled phone from a source other than the carrier. *See id.* AT&T Wireless does not offer service separately, without the purchase of a bundled AT&T Wireless handset, in violation of this rule. AT&T Wireless' handset locking practices, including AT&T Wireless' conspiracy with other carriers and sellers of handsets, is an integral part of AT&T Wireless' violation of this FCC rule.

WHEREFORE, plaintiffs pray for relief as hereinafter set forth.

COUNT III
Unfair Competition In Violation Of
California Business & Professions Code §§ 17200 *Et Seq*.
(Unfair Business Practices)

72. Plaintiffs incorporate by reference all allegations of all prior paragraphs as though fully set forth herein.

73. COUNT III is brought against AT&T Wireless by plaintiffs individually, on behalf of the Class and on behalf of the general public.

74. AT&T Wireless is subject to the UCL. The UCL provides, in pertinent part: "Unfair competition shall mean and include unlawful, unfair or fraudulent business practices and unfair, deceptive, untrue or misleading advertising…"

75. AT&T Wireless violated the "unfair" prong of the UCL because AT&T Wireless' handset locking practices threaten an incipient violation of the Consumer Legal Remedies Act, Civil Code §§ 1770 (a)(5) – (7) and (9) as set forth in COUNT IV, below, and violate the policy or spirit of those laws because the effects of AT&T Wireless' handset locking practices are comparable to or the same as a violation of the law, or otherwise significantly threaten or harm competition.

76. AT&T Wireless violated the "unfair" prong of the UCL because AT&T Wireless' handset locking practices threaten an incipient violation of the Cartwright Act, Bus. & Prof. Code § 16720, and § 16727, as described above, and violate the policy or spirit of those laws because the effects of AT&T Wireless' handset locking practices are comparable to or the same as a violation of the law, or otherwise significantly threaten or harm competition.

77. AT&T Wireless violated the "unfair" prong of the UCL because AT&T Wireless' handset locking practices threaten an incipient violation of the FTC Act, 15 U.S.C. § 45(n), as described above, and violate the policy or spirit of those laws because the effects of AT&T Wireless' handset locking practices are comparable to or the same as a violation of the law, or otherwise significantly threaten or harm competition.

78. AT&T Wireless violated the "unfair" prong of the UCL because AT&T Wireless' handset locking practices threaten an incipient violation of the FCC's bundling rules set forth in *In The Matter Of Bundling Of Cellular Customer Premises Equipment And Cellular Service*, CC Docket No. 91-34, 1992 WL 689944 (F.C.C. June 10, 1992), as described above, and violate the policy or spirit of those laws because the effects of AT&T Wireless' handset locking practices are comparable to or the same as a violation of the law, or otherwise significantly threaten or harm competition.

79. AT&T Wireless violated the "unfair" prong of the UCL because AT&T Wireless' handset locking practices are contrary to the public policy expressed by the United States Congress which established the promotion of competition in the field of telecommunications as a fundament policy underlying the Communications Act of 1934. *See* The Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(b), amending the Communications Act of 1934 and codified at 47 U.S.C. § 332(c).

80. AT&T Wireless violated the "unfair" prong of the UCL because AT&T Wireless' handset locking practices are contrary to the public policy expressed by the United States Congress in the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. § 151, *et seq.* ("the 1996 Act" or "the Act"), to "promote competition and reduce regulation in order

to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." 1996 Act, preamble.

81. AT&T Wireless violated the "unfair" prong of the UCL because AT&T Wireless' handset locking practices are contrary to the public policy expressed by the FCC rules requiring wireless carriers to provide number portability. *See Telephone Number Portability, First Report and Order and Further Notice of Proposed Rule*, 11 F.C.C.R. 8352, 1996 WL 400225 (1996) ("First Report and Order"); 47 C.F.R. § 52.31. The FCC ordered wireless number portability because it found that consumers "will be reluctant to change wireless service providers unless they can keep the same number," and "will find themselves forced to stay with carriers with whom they may be dissatisfied because the cost of giving up their wireless phone number in order to move to another carrier is too high." *See CTIA v. FCC*, 303 F.3d 502, 506-07 (D.C. Cir. 2003), quoting 17 F.C.C.R. at 14,979-80. The same rationale for allowing consumers to keep their phone number when changing carriers, also supports allowing consumers to keep their handsets when changing carriers. Consumers "will be reluctant to change wireless services providers unless they can keep the same [handset]," and "will find themselves forced to stay with carriers with whom they may be dissatisfied because the cost of giving up their wireless phone [handset] in order to move to another carrier is too high." *See id.*

WHEREFORE, plaintiffs pray for relief as hereinafter set forth.

COUNT IV
Consumer Legal Remedies Act

82. Plaintiffs incorporate by reference all allegations of all prior paragraphs as though fully set forth herein.

83. COUNT IV is brought by Plaintiffs individually, on behalf of the Subclass, against AT&T Wireless.

84. By secretly locking handsets and failing to disclose the existence and effects of AT&T's handset locks as alleged above, AT&T Wireless has engaged in, and continues to engage in, unfair methods of competition and unfair or deceptive acts and practices in violation of the

Consumer Legal Remedies Act, Civil Code Sections 1750 *et seq.* (the "CLRA"), including without limitation, the provisions of California Civil Code Sections 1770(a)(5)-(7) and (9).

85. CLRA section 1770(a)(5) prohibits "Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which he or she does not have." AT&T Wireless violated this provision by making the Misrepresentations and by concealing the Concealed Facts. AT&T Wireless continues to violate this provision in connection with sales of handsets to class members.

86. CLRA section 1770(a)(6) prohibits "Representing that goods are original or new if they have deteriorated unreasonably or are altered, reconditioned, reclaimed, used, or secondhand." AT&T Wireless violated this provision by representing that the handsets sold to Plaintiffs were original or new when in fact they had been altered by AT&T Wireless. AT&T Wireless continues to violate this provision in connection with sales of handsets to class members.

87. CLRA section 1770(a)(7) prohibits "Representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another." AT&T Wireless violated this provision by making the Misrepresentations and by concealing the Concealed Facts. AT&T Wireless continues to violate this provision in connection with sales of handsets to class members.

88. CLRA section 1770(a)(9) prohibits "Advertising goods or services with intent not to sell them as advertised." AT&T Wireless violated this provision by advertising the sale of various handset models, including the Ericsson T60LX, Ericsson R300LX, and Nokia 8260, with the intent of not selling fully functional, unaltered versions of such handsets, but instead selling only such handsets as have been altered by AT&T Wireless. AT&T Wireless continues to violate this provision in connection with its advertising of handsets. As a proximate result thereof, Plaintiffs and the members of the Subclass have been harmed as alleged above and will continue to be harmed in the future unless the Court grants relief as prayed for herein.

89. On March 12, 2003, plaintiffs Meoli, Armstrong and Krishnan, pursuant to Civil Code section 1782, sent defendants a letter via certified mail, return receipt requested, advising

them that they are in violation of the CLRA and must correct, repair and rectify such violation or agree to do so within thirty days. A true and correct copy of said demand is attached hereto as Exhibit A.

90. Defendants never responded to the March 12, 2003 letter.

WHEREFORE, Plaintiffs pray for relief as hereinafter set forth.

COUNT V
Declaratory Relief

91. Plaintiffs incorporate by reference all allegations of all prior paragraphs as though fully set forth herein.

92. COUNT V is brought by Plaintiffs individually and on behalf of the Class against AT&T Wireless.

93. Plaintiffs are informed and believe that the form contract imposed by AT&T Wireless on its subscribers includes the following provision:

> Any dispute or claim arising out of or relating to this Agreement or to any product or service provided in connection with the Agreement (whether based in contract, tort, statute, fraud, misrepresentation or any other legal theory) will be resolved by binding arbitration except that (1) you may take claims to small claims court if they qualify for hearing by such court, or (2) you or we may choose to pursue claims in court if the claims relate solely to the collection of any debts you owe to us. However, even for those claims that may be taken to court, you and we both waive any claims for punitive damages and any right to pursue claims on a class or representative basis.

94. An actual and justiciable controversy exists between the parties as to their respective rights and obligations under the form contracts imposed on subscribers by AT&T Wireless.

95. Specifically, Plaintiffs believe and thereon allege that the above provision that purports to compel arbitration and preclude Plaintiffs and the class members from participating in a class or representative action against AT&T Wireless is procedurally and substantively unconscionable, and is therefore unenforceable.

96. Plaintiffs believe and thereon allege that this provision is procedurally unconscionable in that Plaintiffs and the class members were not given an opportunity for meaningful negotiation over this term and that the provision was presented by AT&T Wireless on a "take it or leave it basis." Plaintiffs are also informed and believe and thereon allege that other

cellular telephone service providers also impose a similar provision in their form contracts and that it would be difficult if not impossible for Plaintiffs and the class members to reject the terms of the said provision and obtain similar services elsewhere without the offending provision.

97. Plaintiffs believe and thereon allege that the provision of the AT&T Wireless form contract is substantively unconscionable in that the terms of the provision impose harsh and oppressive terms and are so one-sided as to shock the conscience. For example, the above-quoted provision, while purporting to require binding arbitration for any claims brought by subscribers, purports to allow AT&T Wireless to bring claims to court for collection of debts owed to it by subscribers. Specifically, the provision is meant to prevent AT&T Wireless customers from seeking redress for relatively small amounts of money and provides them with no benefit whatsoever. Indeed, it seriously jeopardizes the rights of AT&T Wireless subscribers by prohibiting any effective means of litigating the business practices of AT&T Wireless. AT&T Wireless seeks to immunize itself from class or representative actions despite their potential merit, while suffering no similar detriment to its own rights. The provision also provides a disincentive to AT&T Wireless to avoid the type of conduct that might lead to a class or representative action. In fact, AT&T Wireless has granted itself a license to push the boundaries of good business practices to their furthest limits.

98. Plaintiffs, on behalf of themselves and all others similarly situated, therefore seek a judicial declaration to that effect.

COUNT VI
Consumer Legal Remedies Act
(Unconscionable Contract Clauses)

99. Plaintiffs incorporate by reference all allegations of all prior paragraphs as though fully set forth herein.

100. COUNT VI is brought by Plaintiffs individually and on behalf of the Subclass against AT&T Wireless.

101. CLRA section 1770(a)(14) prohibits "Representing that a transaction confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law." AT&T violated this provision by representing, in its form customer agreements, that

customers were required to arbitrate any disputes with AT&T, to waive any right to pursue claims on a class or representative basis, and to waive rights to remedies available to them under California law, when such contract terms are prohibited by California law. AT&T continues to violate this provision by making such representations to its subscribers.

102. CLRA section 1770(a)(19) prohibits "Inserting an unconscionable provision in the contract." AT&T violated this provision by inserting unconscionable provisions in its form customer agreements, including an unconscionable arbitration clause, class or representative action waiver, and limitations of remedies.

WHEREFORE, Plaintiffs pray for relief as hereinafter set forth.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs and the Class and Subclass pray for judgment against defendants, and each of them as follows:

On COUNTS I, II and III

1. For an order directing defendants to appropriately disclose the existence and effects of the handset locks defendants have employed;

2. For an order directing defendants to offer to unlock handsets that they have locked, free of charge, and to publicize such offer in a suitable manner;

3. For an order enjoining defendants from secretly programming and selling handsets with SIM locks, SOC locks or band order locks;

4. For an order enjoining defendants from continuing to disseminate materials that represent that SIM locks, SOC locks or band order locks are "software necessary to use [AT&T Wireless] Service"; and

5. For restitution and/or disgorgement of all amounts wrongfully charged to Plaintiffs and members of the Class.

On COUNT IV

6. For an order directing defendants to appropriately disclose the existence and effects of the handset locks defendants have employed;

7. For an order directing defendants to offer to unlock handsets that they have locked, free of charge, and to publicize such offer in a suitable manner; and

8. For an order enjoining defendants from secretly programming and selling handsets with SOC locks, band order locks, or SIM locks;

9. For an order enjoining defendants from continuing to disseminate materials that represent that SOC locks, band order locks or SIM locks are "necessary."

10. For damages incurred by Plaintiffs and the Subclass.

On COUNTS V and VI

11. For a judicial declaration that Plaintiffs and the members of the Class may bring and participate in a class or representative action against AT&T and that the provision in the form contract that purports to compel arbitration and prohibit Plaintiffs and the class members from bringing or participating in a class or representative action is procedurally and substantively unconscionable and is therefore void and unenforceable;

On ALL COUNTS

12. For an order certifying this action as a class action on behalf of the Class and Subclass;

13. For costs of suit herein incurred;

14. For both pre- and post-judgment interest on any amounts awarded;

15. For an award of attorneys' fees as appropriate pursuant to the provisions of Code of Civil Procedure Section 1021.5 and/or Civil Code Section 1780(d); and

16. For such other and further relief as the court may deem proper.

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DEMAND FOR JURY TRIAL

Plaintiffs hereby demand a trial by jury.

Dated: November 19, 2008

Respectfully submitted,

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L. Timothy Fisher (State Bar No. 191626)
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By:_____
L. Timothy Fisher

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Exhibit 20

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Members of Plaintiffs' Executive Committee for Early Termination Fee Claims

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

Coordination Proceeding
Special Title (Rule 1550(b))

CELLPHONE TERMINATION FEE CASES

JUDICIAL COUNCIL COORDINATION PROCEEDING NO. 4332

CLASS ACTION

DECLARATION OF LESLIE ARMSTRONG BERNARDI IN SUPPORT OF MOTION FOR CERTIFICATION OF A CURRENT SUBSCRIBER CLASS AGAINST THE CINGULAR AND T-MOBILE DEFENDANTS

Date: November 14, 2008
Time: ~~9:00 a.m.~~ 9:30
Dept.: 23

Res. No. R863693

ORIGINAL

I, Leslie Armstrong Bernardi, declare:

1. I am a named plaintiff in this action, under my maiden name of Leslie Armstrong. I make this declaration in support of Plaintiffs' Motion for Certification of Current Subscriber Classes, filed herewith. I have personal knowledge of the facts stated herein, and if called to testify thereto I could and would competently do so.

2. I currently have two Cingular accounts that are billed to me. One is used by me and the other by my father. I have had both accounts for many years. Both accounts have a California billing address and a California area code. Those accounts were renewed for two-year terms in December, 2006 and April, 2008, respectively.

3. On both accounts, I receive service from Cingular pursuant to a standard form customer agreement that includes a fixed, flat-fee early termination fee. The terms and conditions of service were determined by Cingular. Cingular has never offered to negotiate those terms and conditions with me, including the early termination fee provision.

4. I am willing to serve as a class representative for the Cingular current subscriber class in this action.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this Declaration was executed this 2d day of September, 2008, at Bay Point, California.

Leslie Armstrong Bernardi

Exhibit 21

American Arbitration Association
Dispute Resolution Services Worldwide

AAA Policy on Class ARBITRATIONS

July 14, 2005

On October 8, 2003, in response to the ruling of the United States Supreme Court in *Green Tree Financial Corp. v. Bazzle* , the American Arbitration Association issued its Supplementary Rules for Class Arbitrations to govern proceedings brought as class arbitrations. In *Bazzle* , the Court held that, where an arbitration agreement was silent regarding the availability of class-wide relief, an arbitrator, and not a court, must decide whether class relief is permitted. Accordingly, the American Arbitration Association will administer demands for class arbitration pursuant to its Supplementary Rules for Class Arbitrations if (1) the underlying agreement specifies that disputes arising out of the parties' agreement shall be resolved by arbitration in accordance with any of the Association's rules, and (2) the agreement is silent with respect to class claims, consolidation or joinder of claims.

The Association is not currently accepting for administration demands for class arbitration where the underlying agreement prohibits class claims, consolidation or joinder, unless an order of a court directs the parties to the underlying dispute to submit any aspect of their dispute involving class claims, consolidation, joinder or the enforceability of such provisions, to an arbitrator or to the Association.

Commentary to the American Arbitration Association's Policy on Class Arbitrations, February 18, 2005

It has been the practice of the American Arbitration Association since its Supplementary Rules for Class Arbitrations were first enacted to require a party seeking to bring a class arbitration under an agreement that on its face prohibits class actions to first seek court guidance as to whether a class arbitration may be brought under such an agreement. The Association's practice has been neither to commence administration of a case nor to refer such a matter to an arbitrator until a court decides that it is appropriate to do so. The Association's determination not to administer class arbitrations where the underlying arbitration agreement explicitly precludes class procedures was made because the law on the enforceability of class action waivers was unsettled; the Association takes no position as to whether such clauses are or should be enforceable.

In a recent review of this practice by the Association's Executive Committee it was agreed that this practice should be maintained in light of the continued unsettled state of the law. Courts in different states and different federal circuits have reached differing conclusions concerning the preclusion of class actions by agreement and "gateway" issues generally. However, the courts that have confronted the question have generally concluded that the decision as to whether an agreement that prohibits class actions is enforceable is one for the courts to make, not the arbitrator. In fidelity to its Due Process Protocols, the Association will continue to require all proceedings brought to it for administration to meet the standards of fairness and due process set forth in those protocols, but the Association will not seek to make decisions concerning class action agreements that the courts appear to have reserved for themselves.

The Executive Committee also determined at the same meeting to proceed forthwith in the creation of a special committee to explore the possibility of identifying counsel who could assist parties who cannot afford to pay for an attorney in arbitral proceedings. This effort would supplement the Association's current ability to provide arbitrators who will serve pro bono , or for a reduced fee, in appropriate cases.

The Association will continue to monitor developments in this rapidly evolving intersection of arbitration and the courts .

Click here to view the Supplementary Rules for Class Arbitrations

Click here to view the Class Arbitration Case Docket

- AAA MISSION & PRINCIPLES
- PRIVACY POLICY
- TERMS OF USE
- TECHNICAL RECOMMENDATIONS

Exhibit 22

Dear Ms. Horton:

I am writing on behalf of AT&T Mobility LLC regarding the following 14 Demands for Arbitration that Bursor & Fisher, P.A. submitted to the American Arbitration Association ("AAA") on July 21 and 22, 2011:

Barrett v. AT&T, Inc., et al.; *Bernardi v. AT&T, Inc., et al.*; *Lea v. AT&T, Inc., et al.*; *Luciano v. AT&T, Inc., et al.*; *Mendoza v. AT&T, Inc., et al.*; *Newman v. AT&T, Inc., et al.*; *O'Neal v. AT&T, Inc., et al.*; *Pope v. AT&T, Inc., et al.*; *Princi v. AT&T, Inc., et al.*; *Shroeder v. AT&T, Inc., et al.*; *Ubiera v. AT&T, Inc., et al.; Kostoff v. AT&T, Inc., et al.; Bushman v. AT&T, Inc., et al; and Haensel v. AT&T, Inc., et al.*

This letter also applies to any additional Demands for Arbitration, of the same nature, that Bursor & Fisher might submit.

As you may be aware, these Demands request that an arbitrator be appointed by the AAA to issue a broad injunction against a proposed merger between AT&T Mobility and T-Mobile. Notwithstanding the express language of the governing AT&T arbitration clause that permits injunctive relief "only in favor of the individual party seeking relief and only to the extent necessary to provide relief warranted by that party's individual claim," these Demands seek an injunction that would affect more than a hundred and twenty million customers of the two companies, and millions of other persons throughout the United States. Within the next three days, I will send you a more detailed letter to explain why the Demands filed by the Bursor firm violate the AAA's rules and policies as well as the Claimants' arbitration agreements. In the meantime, we respectfully request that the AAA defer taking further steps with respect to these arbitration Demands so that you will have time to consider whether it is proper for the Demands to proceed. At a minimum, we ask that you wait to receive my follow-up letter before initiating the process of selecting an arbitrator or arbitrators for these various Demands.

Thank you for your courtesy and attention to this matter.

Sincerely,

Neal S. Berinhout

Associate General Counsel

AT&T Mobility LLC

cc: Scott Bursor

Eric Tuchmann, General Counsel, AAA

Exhibit 23

BURSOR & FISHER P.A.

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SCOTT A. BURSOR
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July 26, 2011

By email only

Eric Tuchmann,
American Arbitration Association
General Counsel
TuchmannE@adr.org

Courtney Horton
American Arbitration Association
Intake Coordinator
casefiling@adr.org

Re: Demands for Arbitration Challenging AT&T's Takeover of T-Mobile

Dear Mr. Tuchman and Ms. Horton:

Mr. Berinhout's letter of yesterday is an improper attempt to influence the AAA to administer this case in a manner inconsistent with AAA's own rules and to usurp the authority of the arbitrator to decide the issues in each of these individual cases.

It is improper for Mr. Berinhout to address legal arguments to AAA's Intake Coordinator and General Counsel. AAA is supposed to be a neutral administrator of arbitrations. If there are disputes about the application of AAA rules, or about the authority of an arbitrator to grant a particular type of relief, only the arbitrator, or in some instances, a court, can decide those matters. AAA administrative personnel cannot. Nor can AAA's general counsel. Section 2.2(3) of the parties' agreement provides that "All issues are for the arbitrator to decide, except that issues relating to the scope and enforceability of the arbitration provision are for the court to decide." AT&T Wireless Customer Agreement § 2.2(3) (Attachment 1). *See also* AAA Commercial Arbitration Rule R-53 ("The arbitrator shall interpret and apply these rules insofar as they relate to the arbitrator's powers and duties."). Neither the parties' agreement, nor any AAA rule, permits the Intake Coordinator, the General Counsel, or any other AAA personnel, to decide the matters raised in Mr. Berinhout's letter.

On the merits, Mr. Berinhout's assertion that demands for injunctive relief against AT&T's takeover of T-Mobile are beyond the authority of an arbitrator are simply wrong. Section 2.1 of the parties' agreement provides that "Arbitrators can award the same damages and relief that a court can award." There is no doubt that a court can enjoin a merger under the Clayton Antitrust Act – thus an arbitrator can grant that same relief. In any event, that is an issue

for the arbitrator to decide in each individual case, in accordance with Rule R-53 and other applicable authorities. Mr. Berinhout and AT&T will have the opportunity to address their arguments to the arbitrator appointed in each individual case. They should not be attempting to prejudice AAA toward their position by addressing substantive arguments to the administrative staff.

I would also call your attention to the decision by Judge Lungstrum concerning exactly this type of undue influence over AAA administrative staff. *In re Universal Service Fund Tel. Billing Practices Litig.*, 2005 WL 1274381 (D. Kan. May 27, 2005) (Attachment 2). In that case, AAA caved to pressure from counsel for AT&T and violated its own rules concerning the administration of a customer's claim against AT&T. Judge Lungstrum found that "counsel for AT&T used AT&T's economic power to successfully persuade the AAA to prematurely bend its own rules." *Id.* at *5.

I would urge the Association to try to remain impartial, and to follow its own rules without "bending" them in this case.

Mr. Berinhout's "request that the AAA defer taking further steps with respect to these arbitration Demands so that you will have time to consider whether it is proper for the Demands to proceed" is outrageous. AAA has no authority to consider any such thing. Each claimant we represent has filed an arbitration demand that complies with the parties' agreement and all applicable AAA rules. At this point, AAA's responsibility is to confirm notice of filing in each case, *see* Commercial Arbitration Rule R-4(a)(iii), and to begin the process of appointing an arbitrator in each case following the procedures specified in Commercial Arbitration Rule R-11 and Wireless Industry Arbitration Rule R-13. Respectfully, it is not your job to decide the merits of Mr. Berinhout's arguments. Your job is to appoint the arbitrator in each individual case so that the arbitrator can make those decisions.

If you have any questions about AAA's responsibilities under the parties' agreement or under the applicable AAA rules, I would urge you to contact me directly. My team and I will be watching closely to make sure that the undue influence AT&T has exerted over AAA previously, and is attempting to exert again, does not interfere with the neutral and prompt administration of these cases.

Very truly yours,

Scott A. Bursor

Copies by email only:

Neal S. Berinhout
Associate General Counsel
AT&T Mobility LLC
nb2520@att.com

Attachment 1: AT&T Wireless Customer Agreement

Attachment 2: *In re Universal Service Fund Tel. Billing Practices Litig.*, 2005 WL 1274381 (D. Kan. May 27, 2005)

EXHIBIT 1

Close

Print this page

Wireless Customer Agreement

Table Of Contents

WIRELESS CUSTOMER AGREEMENT ("Agreement")

"AT&T" or "we," "us" or "our" refers to AT&T Mobility LLC, acting on behalf of its FCC-licensed affiliates doing business as AT&T. "You" or "your" refers to the person or entity that is the customer of record.

PLEASE READ THIS AGREEMENT CAREFULLY TO ENSURE THAT YOU UNDERSTAND EACH PROVISION, INCLUDING OUR USE OF YOUR LOCATION INFORMATION (SEE SECTION 3.6). THIS AGREEMENT REQUIRES THE USE OF ARBITRATION ON AN INDIVIDUAL BASIS TO RESOLVE DISPUTES, RATHER THAN JURY TRIALS OR CLASS ACTIONS, AND ALSO LIMITS THE REMEDIES AVAILABLE TO YOU IN THE EVENT OF A DISPUTE.

This Agreement, including the AT&T Privacy Policy Located at att.com/privacy, terms of service for wireless products, features, applications, and services ("Services") not otherwise described herein that are posted on applicable AT&T websites or devices, and any documents expressly referred to herein or therein, make up the complete agreement between you and AT&T and supersede any and all prior agreements and understandings relating to the subject matter of this Agreement.

1.0 TERM COMMITMENT, CHARGES, BILLING AND PAYMENT

1.1 What Is The Term Of My Service?

Print this section | Print this page

Your Agreement begins on the day we activate your Services and continues through the Term of Service specified on your Customer Service Summary ("Service Commitment"). AT THE END OF YOUR SERVICE COMMITMENT, THIS AGREEMENT WILL AUTOMATICALLY RENEW ON A MONTH-TO-MONTH BASIS.

See related links | See all legal

1.2 What Happens If My Service Is Cancelled Or Terminated Before The End Of My Agreement? Is There A Cancellation/Early Termination Fee?

Print this section | Print this page

If you terminate your Agreement within three (3) days of accepting the Agreement, you will be entitled to a refund of your activation fee, if any, but you must return the Equipment purchased in connection with your Agreement.

You may terminate this Agreement, for any reason and without incurring the Early Termination Fee, within thirty (30) days of accepting your Agreement, PROVIDED, you will remain responsible for any Services fees and charges incurred. If you purchase Equipment directly from AT&T in connection with your Agreement, but you terminate within 30 days and fail to return the Equipment to AT&T, you will be subject to an Equipment Fee in the maximum amount of the difference between the no-commitment price of the Equipment and the amount you actually paid for the Equipment. AT&T may charge you a restocking fee for any returned Equipment. Some dealers impose additional fees. iPhone returns are subject to a 10% restocking fee, except where prohibited.

You have received certain benefits from us in exchange for any Service Commitment greater than one month. If we terminate your Services for nonpayment or other default before the end of your Service Commitment, or if you terminate your Services for any reason other than (a) in accordance with the cancellation policy; or (b) pursuant to a change of terms, conditions or rates as set forth below, you agree to pay us with respect to each device identifier or telephone number assigned to you, in addition to all other amounts owed, an Early Termination Fee in the amount specified below ("Early Termination Fee"). If your Service Commitment includes the purchase of certain specified Equipment on or after June 1, 2010, the Early Termination Fee will be $325 minus $10 for each full month of your Service Commitment that you complete. (For a complete list of the specified Equipment, check att.com/equipmentETF). Otherwise your Early Termination Fee will be $150 minus $4 for each full month of your Service Commitment that you complete. The Early Termination Fee is not a penalty, but rather a charge to compensate us for your failure to satisfy the Service Commitment on which your rate plan is based.

Either party may terminate this Agreement at any time after your Service Commitment ends with thirty (30) days notice to the other party. We may terminate this Agreement at any time without notice if we cease to provide Services in your area. We may interrupt or terminate your Services without notice:

1. for any conduct that we believe violates this Agreement,
2. if you behave in an abusive, derogatory, or similarly unreasonable manner with any of our representatives,
3. if we discover that you are underage,
4. if you fail to make all required payments when due,
5. if we have reasonable cause to believe that your Equipment is being used for an unlawful purpose or in a way that (i) is harmful to, interferes with, or may adversely affect our Services or the network of any other provider, (ii) interferes with the use or enjoyment of Services received by others, (iii) infringes intellectual property rights, (iv) results in the publication of threatening or offensive material, or (v) constitutes spam or other abusive messaging or calling, a security risk, or a violation of privacy,
6. if you provided inaccurate credit information, or
7. we believe your credit has deteriorated and you refuse to pay any requested advance payment or deposit.

If you sign a new Agreement before the end of your original Agreement, but terminate the new Agreement within 30 days as allowed above, the new Agreement will terminate and you agree to be bound to the terms and conditions of your original Agreement, including any remaining Service Commitment.

See related links | See all legal

1.3 Can AT&T Change My Terms And Rates?

Print this section | Print this page

We may change any terms, conditions, rates, fees, expenses, or charges regarding your Services at any time. We will provide you with notice of material changes (other than changes to governmental fees, proportional charges for governmental mandates, roaming rates or administrative charges) either in your monthly bill or separately. You understand and agree that State and Federal Universal Service Fees and other governmentally imposed fees, whether or not assessed directly upon you, may be increased based upon the government's or our calculations.

IF WE INCREASE THE PRICE OF ANY OF THE SERVICES TO WHICH YOU SUBSCRIBE, BEYOND THE LIMITS SET FORTH IN YOUR CUSTOMER SERVICE SUMMARY, OR IF WE MATERIALLY DECREASE THE GEOGRAPHICAL AREA IN WHICH YOUR AIRTIME RATE APPLIES (OTHER THAN A TEMPORARY DECREASE FOR REPAIRS OR MAINTENANCE), WE'LL DISCLOSE THE CHANGE AT LEAST ONE BILLING CYCLE IN ADVANCE (EITHER THROUGH A NOTICE WITH YOUR BILL, A TEXT MESSAGE TO YOUR DEVICE, OR OTHERWISE), AND YOU MAY TERMINATE THIS AGREEMENT WITHOUT PAYING AN EARLY TERMINATION FEE OR RETURNING OR PAYING FOR ANY PROMOTIONAL ITEMS, PROVIDED YOUR NOTICE OF TERMINATION IS DELIVERED TO US WITHIN THIRTY (30) DAYS AFTER THE FIRST BILL REFLECTING THE CHANGE.

If you lose your eligibility for a particular rate plan, we may change your rate plan to one for which you qualify.

See related links | See all legal

1.4 What Charges Am I Responsible For? How Much Time Do I Have To Dispute My Bill?

Print this section | Print this page

You are responsible for paying all charges for or resulting from Services provided under this Agreement, including any activation fee that may apply to each voice or data line. You will receive monthly bills that are due in full.

IF YOU DISPUTE ANY CHARGES ON YOUR BILL, YOU MUST NOTIFY US IN WRITING AT AT&T BILL DISPUTE, 1025 LENOX PARK, ATLANTA, GA 30319 WITHIN 100 DAYS OF THE DATE OF THE BILL OR YOU'LL HAVE WAIVED YOUR RIGHT TO DISPUTE THE BILL AND TO PARTICIPATE IN ANY LEGAL ACTION RAISING SUCH DISPUTE.

Charges include, without limitation, airtime, roaming, recurring monthly service, activation, administrative, and late payment charges; regulatory cost recovery and other surcharges; optional feature charges; toll, collect call and directory assistance charges; restoral and reactivation charges; any other charges or calls billed to your phone number; and applicable taxes and governmental fees, whether assessed directly upon you or upon AT&T.

To determine your primary place of use ("PPU") and which jurisdiction's taxes and assessments to collect, you're required to provide us with your residential or business street address. If you don't provide us with such address, or if it falls outside our licensed Services area, we may reasonably designate a PPU within the licensed Services area for you. You must live and have a mailing address within AT&T's owned network coverage area.

See related links | See all legal

1.5 How Does AT&T Calculate My Bill?

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Usage and monthly fees will be billed as specified in your customer service summary or rate plan information online. If the Equipment you order is shipped to you, your Services may be activated before you take delivery of the Equipment so that you can use it promptly upon receipt. Thus, you may be charged for Services while your Equipment is still in transit. If, upon receiving your first bill, you have been charged for Services while your Equipment was in transit, you may contact Customer Care 1-800-331-0500 to request a credit. Except as provided below, monthly Services and certain other charges are billed one month in advance, and there is no proration of such charges if Service is terminated on other than the last day of your billing cycle. Monthly Service and certain other

charges are billed in arrears if you're a former customer of AT&T Wireless and maintain uninterrupted Service on select AT&T rate plans, however, if you elect to receive your bills for your Services combined with your wireline phone bill (where available) you will be billed in advance as provided above. You agree to pay for all services used with your Device.

AIRTIME AND OTHER MEASURED USAGE ("CHARGEABLE TIME") IS BILLED IN FULL-MINUTE INCREMENTS, AND ACTUAL AIRTIME AND USAGE ARE ROUNDED UP TO THE NEXT FULL-MINUTE INCREMENT AT THE END OF EACH CALL FOR BILLING PURPOSES. AT&T CHARGES A FULL MINUTE OF AIRTIME USAGE FOR EVERY FRACTION OF THE LAST MINUTE OF AIRTIME USED ON EACH WIRELESS CALL. UNLESS OTHERWISE PROVIDED IN YOUR PLAN, MINUTES WILL BE DEPLETED ACCORDING TO USAGE IN THE FOLLOWING ORDER: NIGHT AND WEEKEND MINUTES, MOBILE TO MOBILE MINUTES, ANYTIME MINUTES AND ROLLOVER, EXCEPT THAT MINUTES THAT ARE PART OF BOTH A LIMITED PACKAGE AND AN UNLIMITED PACKAGE WILL NOT BE DEPLETED FROM THE LIMITED PACKAGE. Chargeable Time begins for outgoing calls when you press SEND (or similar key) and for incoming calls when a signal connection from the caller is established with our facilities. Chargeable Time ends after you press END (or similar key), but not until your wireless telephone's signal of call disconnect is received by our facilities and the call disconnect signal has been confirmed.

All outgoing calls for which we receive answer supervision or which have at least 30 seconds of Chargeable Time, including ring time, shall incur a minimum of one minute airtime charge. Answer supervision is generally received when a call is answered; however, answer supervision may also be generated by voicemail systems, private branch exchanges, and interexchange switching equipment. Chargeable Time may include time for us to recognize that only one party has disconnected from the call, time to clear the channels in use, and ring time. Chargeable Time may also occur from other uses of our facilities, including by way of example, voicemail deposits and retrievals, and call transfers. Calls that begin in one rate period and end in another rate period may be billed in their entirety at the rates for the period in which the call began.

DATA TRANSPORT IS CALCULATED IN FULL-KILOBYTE INCREMENTS, AND ACTUAL TRANSPORT IS ROUNDED UP TO THE NEXT FULL-KILOBYTE INCREMENT AT THE END OF EACH DATA SESSION FOR BILLING PURPOSES. AT&T CALCULATES A FULL KILOBYTE OF DATA TRANSPORT FOR EVERY FRACTION OF THE LAST KILOBYTE OF DATA TRANSPORT USED ON EACH DATA SESSION. TRANSPORT IS BILLED EITHER BY THE KILOBYTE ("KB") OR MEGABYTE ("MB"). IF BILLED BY MB, THE FULL KBs CALCULATED FOR EACH DATA SESSION DURING THE BILLING PERIOD ARE TOTALED AND ROUNDED UP TO NEXT FULL MB INCREMENT TO DETERMINE BILLING. IF BILLED BY KB, THE FULL KBs CALCULATED FOR EACH DATA SESSION DURING THE BILLING PERIOD ARE TOTALED TO DETERMINE BILLING. NETWORK OVERHEAD, SOFTWARE UPDATE REQUESTS, EMAIL NOTIFICATIONS, AND RESEND REQUESTS CAUSED BY NETWORK ERRORS CAN INCREASE MEASURED KILOBYTES. DATA TRANSPORT OCCURS WHENEVER YOUR DEVICE IS CONNECTED TO OUR NETWORK AND IS ENGAGED IN ANY DATA TRANSMISSION, INCLUDING BUT NOT LIMITED TO: (i) SENDING OR RECEIVING EMAIL, DOCUMENTS, OR OTHER CONTENT, (ii) ACCESSING WEBSITES, OR (iii) DOWNLOADING AND USING APPLICATIONS. SOME APPLICATIONS, CONTENT, PROGRAMS, AND SOFTWARE THAT YOU DOWNLOAD OR THAT COMES PRE-LOADED ON YOUR DEVICE AUTOMATICALLY AND REGULARLY SEND AND RECEIVE DATA TRANSMISSIONS IN ORDER TO FUNCTION PROPERLY, WITHOUT YOU AFFIRMATIVELY INITIATING THE REQUEST AND WITHOUT YOUR KNOWLEDGE. FOR EXAMPLE, APPLICATIONS THAT PROVIDE REAL-TIME INFORMATION AND LOCATION-BASED APPLICATIONS CONNECT TO OUR NETWORK, AND SEND AND RECEIVE UPDATED INFORMATION SO THAT IT IS AVAILABLE TO YOU WHEN YOU WANT TO ACCESS IT. YOU WILL BE BILLED FOR ALL DATA TRANSPORT AND USAGE WHEN YOUR DEVICE IS CONNECTED TO OUR NETWORK, INCLUDING THAT WHICH YOU AFFIRMATIVELY INITIATE OR THAT WHICH RUNS AUTOMATICALLY IN THE BACKGROUND WITHOUT YOUR KNOWLEDGE, AND WHETHER SUCCESSFUL OR NOT.

If you select a rate plan that includes a predetermined allotment of Services (for example, a predetermined amount of airtime, megabytes or messages), unless otherwise specifically provided as a part of such rate plan, any unused allotment of Services from one billing cycle will not carry over to any other billing cycle. We may bill you in a format as we determine from time to time. Additional charges may apply for additional copies of your bill, or for detailed information about your usage of Services.

Delayed Billing: Billing of usage for calls, messages, data or other Services (such as usage when roaming on other carriers' networks, including internationally) may occasionally be delayed. Such usage charges may appear in a later billing cycle, will be deducted from Anytime monthly minutes or other Services allotments for the month when the usage is actually billed, and may result in additional charges for that month. Those minutes will be applied against your Anytime monthly minutes in the month in which the calls appear on your bill. You also remain responsible for paying your monthly Service fee if your Service is suspended for nonpayment. We may require payment by money order, cashier's check, or a similarly secure form of payment at our discretion.

See related links | See all legal

1.6 Are Advance Payments And/Or Deposits Required?

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We may require you to make deposits or advance payments for Services, which we may offset against any unpaid balance on your account. Interest won't be paid on advance payments or deposits unless required by law. We may require additional advance payments or deposits if we determine that the initial payment was inadequate. Based on your creditworthiness as we determine it, we may establish a credit limit and restrict Services or features. If your account balance goes beyond the limit we set for you, we may immediately interrupt or suspend Services until your balance is brought below the limit. Any charges you incur in excess of your limit become immediately due. If you have more than one account with us, you must keep all accounts in good standing to maintain Services. If one account is past due or over its limit, all accounts in your name are subject to interruption or termination and all other available collection remedies.

See related links | See all legal

1.7 What if I fail to pay my AT&T Bill when it is due?

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Late payment charges are based on the state to which the area code of the wireless telephone number assigned to you is assigned by the North American Numbering Plan Administration (for area code assignments see nationalnanpa.com/area_code_maps). You agree that for amounts not paid by the due date, AT&T may charge, as a part of its rates and charges, and you agree to pay, a late payment fee of $5 in CT, D.C., DE, IL, KS, MA, MD, ME, MI, MO, NH, NJ, NY, OH, OK, PA, RI, VA, VT, WI, WV; the late payment charge is 1.5% of the balance carried forward to the next bill in all other states. **In the event you fail to pay billed charges when due and it becomes necessary for AT&T to refer your account(s) to a third party for collection, AT&T will charge a collection fee at the maximum percentage permitted by applicable law, but not to exceed 18% to cover the internal collection-related costs AT&T has incurred on such account(s) through and including the date on which AT&T refer(s) the account(s) to such third party.**

You expressly authorize, and specifically consent to allowing, AT&T and/or its outside collection agencies, outside counsel, or other agents to contact you in connection with any and all matters relating to unpaid past due charges billed by AT&T to you. You agree that, for attempts to collect unpaid past due charges, such contact may be made to any mailing address, telephone number, cellular phone number, e-mail address, or any other electronic address that you have provided, or may in the future provide, to AT&T. You agree and acknowledge that any e-mail address or any other electronic address that you provide to AT&T is your private address and is not accessible to unauthorized third parties. For attempts to collect unpaid charges, you agree that in addition to individual persons attempting to communicate directly with you, any type of contact described above may be made using, among other methods, pre-recorded or artificial voice messages delivered by an automatic telephone dialing system, pre-set e-mail messages delivered by an automatic e-mailing system, or any other pre-set electronic messages delivered by any other automatic electronic messaging system.

See related links | See all legal

1.8 What Happens If My Check Bounces?

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We'll charge you up to $30 (depending on applicable law) for any check or other instrument (including credit card charge backs) returned unpaid for any reason.

See related links | See all legal

1.9 Are There Business or Government Benefits?

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You may receive or be eligible for certain rate plans, discounts, features, promotions, and other benefits ("Benefits") through a business or government customer's agreement with us ("Business Agreement"). All such Benefits are provided to you solely as a result of the corresponding Business Agreement, and may be modified or terminated without notice.

If a business or government entity pays your charges or is otherwise liable for the charges, you authorize us to share your account information with it or its authorized agents. If you're on a rate plan and/or receive certain Benefits tied to a Business Agreement with us, but you're liable for your own charges, then you authorize us to share enough account information with it or its authorized agents to verify your continuing eligibility for those Benefits.

You may receive Benefits because of your agreement to have the charges for your Services, billed ("Joint Billing") by a wireline company affiliated with AT&T ("Affiliate") or because you subscribe to certain services provided by an Affiliate. If you cancel Joint Billing or the Affiliate service your rates will be adjusted without notice to a rate plan for which you qualify.

See related links | See all legal

1.10 Who Can Access My Account and for What Purpose?

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You authorize us to provide information about and to make changes to your account, including adding new Services, upon the direction of any person able to provide information we deem sufficient to identify you. You consent to the use by us or our authorized agents of regular mail, predictive or autodialing equipment, email, text messaging, facsimile or other reasonable means to contact you to advise you about our Services or other matters we believe may be of interest to you. In any event, we reserve the right to contact you by any means regarding customer service-related notifications, or other such information.

See related links | See all legal

2.0 HOW DO I RESOLVE DISPUTES WITH AT&T?

2.1 Dispute Resolution By Binding Arbitration

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PLEASE READ THIS CAREFULLY. IT AFFECTS YOUR RIGHTS.

Summary:
Most customer concerns can be resolved quickly and to the customer's satisfaction by calling our customer service department at 1-800-331-0500. **In the unlikely event that AT&T's customer service department is unable to resolve a complaint you may have to your satisfaction (or if AT&T has not been able to resolve a dispute it has with you after attempting to do so informally), we each agree to resolve those disputes through binding arbitration or small claims court instead of in courts of general jurisdiction.** Arbitration is more informal than a lawsuit in court. Arbitration uses a neutral arbitrator instead of a judge or jury, allows for more limited discovery than in court, and is subject to very limited review by courts. Arbitrators can award the same damages and relief that a court can award. **Any arbitration under this Agreement will take place on an individual basis; class arbitrations and class actions are not permitted.** For any non-frivolous claim that does not exceed $75,000, AT&T will pay all costs of the arbitration. Moreover, in arbitration you are entitled to recover attorneys' fees from AT&T to at least the same extent as you would be in court.

In addition, under certain circumstances (as explained below), AT&T will pay you more than the amount of the arbitrator's award and will pay your attorney (if any) twice his or her reasonable attorneys' fees if the arbitrator awards you an amount that is greater than what AT&T has offered you to settle the dispute.

See related links | See all legal

2.2 Arbitration Agreement

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(1) AT&T and you agree to arbitrate **all disputes and claims** between us. This agreement to arbitrate is intended to be broadly interpreted. It includes, but is not limited to:

- claims arising out of or relating to any aspect of the relationship between us, whether based in contract, tort, statute, fraud, misrepresentation or any other legal theory;
- claims that arose before this or any prior Agreement (including, but not limited to, claims relating to advertising);
- claims that are currently the subject of purported class action litigation in which you are not a member of a certified class; and
- claims that may arise after the termination of this Agreement.

References to "AT&T," "you," and "us" include our respective subsidiaries, affiliates, agents, employees, predecessors in interest, successors, and assigns, as well as all authorized or unauthorized users or beneficiaries of services or Devices under this or prior Agreements between us. Notwithstanding the foregoing, either party may bring an individual action in small claims court. This arbitration agreement does not preclude you from bringing issues to the attention of federal, state, or local agencies, including, for example, the Federal Communications Commission. Such agencies can, if the law allows, seek relief against us on your behalf. **You agree that, by entering into this Agreement, you and AT&T are each waiving the right to a trial by jury or to participate in a class action.** This Agreement evidences a transaction in interstate commerce, and thus the Federal Arbitration Act governs the interpretation and enforcement of this provision. This arbitration provision shall survive termination of this Agreement.

2) A party who intends to seek arbitration must first send to the other, by certified mail, a written Notice of Dispute ("Notice"). The Notice to AT&T should be addressed to: Office for Dispute Resolution, AT&T, 1025 Lenox Park Blvd., Atlanta, GA 30319 ("Notice Address"). The Notice must (a) describe the nature and basis of the claim or dispute; and (b) set forth the specific relief sought ("Demand"). If AT&T and you do not reach an agreement to resolve the claim within 30 days after the Notice is received, you or AT&T may commence an arbitration proceeding. During the arbitration, the amount of any settlement offer made by AT&T or you shall not be disclosed to the arbitrator until after the arbitrator determines the amount, if any, to which you or AT&T is entitled. You may download or copy a form Notice and a form to initiate arbitration at att.com/arbitration-forms.

(3) After AT&T receives notice at the Notice Address that you have commenced arbitration, it will promptly reimburse you for your payment of the filing fee, unless your claim is for greater than $75,000. (The filing fee currently is $125 for claims under $10,000 but is subject to change by the arbitration provider. If you are unable to pay this fee, AT&T will pay it directly upon receiving a written request at the Notice Address.) The arbitration will be governed by the Commercial Arbitration Rules and the Supplementary Procedures for Consumer Related Disputes (collectively, "AAA Rules") of the American Arbitration Association ("AAA"), as modified by this Agreement, and will be administered by the AAA. The AAA Rules are available online at adr.org, by calling the AAA at 1-800-778-7879, or by writing to the Notice Address. (You may obtain information that is designed for non-lawyers about the arbitration process at

att.com/arbitration-information.) The arbitrator is bound by the terms of this Agreement. All issues are for the arbitrator to decide, except that issues relating to the scope and enforceability of the arbitration provision are for the court to decide. Unless AT&T and you agree otherwise, any arbitration hearings will take place in the county (or parish) of your billing address. If your claim is for $10,000 or less, we agree that you may choose whether the arbitration will be conducted solely on the basis of documents submitted to the arbitrator, through a telephonic hearing, or by an in-person hearing as established by the AAA Rules. If your claim exceeds $10,000, the right to a hearing will be determined by the AAA Rules. Regardless of the manner in which the arbitration is conducted, the arbitrator shall issue a reasoned written decision sufficient to explain the essential findings and conclusions on which the award is based. Except as otherwise provided for herein, AT&T will pay all AAA filing, administration, and arbitrator fees for any arbitration initiated in accordance with the notice requirements above. If, however, the arbitrator finds that either the substance of your claim or the relief sought in the Demand is frivolous or brought for an improper purpose (as measured by the standards set forth in Federal Rule of Civil Procedure 11(b)), then the payment of all such fees will be governed by the AAA Rules. In such case, you agree to reimburse AT&T for all monies previously disbursed by it that are otherwise your obligation to pay under the AAA Rules. In addition, if you initiate an arbitration in which you seek more than $75,000 in damages, the payment of these fees will be governed by the AAA rules.

4) If, after finding in your favor in any respect on the merits of your claim, the arbitrator issues you an award that is greater than the value of AT&T's last written settlement offer made before an arbitrator was selected, then AT&T will:

- pay you the amount of the award or $10,000 ("the alternative payment"), whichever is greater; and
- pay your attorney, if any, twice the amount of attorneys' fees, and reimburse any expenses (including expert witness fees and costs) that your attorney reasonably accrues for investigating, preparing, and pursuing your claim in arbitration ("the attorney premium").

If AT&T did not make a written offer to settle the dispute before an arbitrator was selected, you and your attorney will be entitled to receive the alternative payment and the attorney premium, respectively, if the arbitrator awards you any relief on the merits. The arbitrator may make rulings and resolve disputes as to the payment and reimbursement of fees, expenses, and the alternative payment and the attorney premium at any time during the proceeding and upon request from either party made within 14 days of the arbitrator's ruling on the merits.

(5) The right to attorneys' fees and expenses discussed in paragraph (4) supplements any right to attorneys' fees and expenses you may have under applicable law. Thus, if you would be entitled to a larger amount under the applicable law, this provision does not preclude the arbitrator from awarding you that amount. However, you may not recover duplicative awards of attorneys' fees or costs. Although under some laws AT&T may have a right to an award of attorneys' fees and expenses if it prevails in an arbitration, AT&T agrees that it will not seek such an award.

(6) The arbitrator may award declaratory or injunctive relief only in favor of the individual party seeking relief and only to the extent necessary to provide relief warranted by that party's individual claim. **YOU AND AT&T AGREE THAT EACH MAY BRING CLAIMS AGAINST THE OTHER ONLY IN YOUR OR ITS INDIVIDUAL CAPACITY, AND NOT AS A PLAINTIFF OR CLASS MEMBER IN ANY PURPORTED CLASS OR REPRESENTATIVE PROCEEDING.** Further, unless both you and AT&T agree otherwise, the arbitrator may not consolidate more than one person's claims, and may not otherwise preside over any form of a representative or class proceeding. If this specific provision is found to be unenforceable, then the entirety of this arbitration provision shall be null and void.

(7) Notwithstanding any provision in this Agreement to the contrary, we agree that if AT&T makes any future change to this arbitration provision (other than a change to the Notice Address) during your Service Commitment, you may reject any such change by sending us written notice within 30 days of the change to the Arbitration Notice Address provided above. By rejecting any future change, you are agreeing that you will arbitrate any dispute between us in accordance with the language of this provision.

See related links | See all legal

3.0 TERMS RELATING TO YOUR DEVICE AND CONTENT

3.1 My Device

Print this section | Print this page

You are responsible for all phones and other devices containing a SIM assigned to your account ("Devices"). Your Device must be compatible with, and not interfere with, our Services and must comply with all applicable laws, rules, and regulations. We may periodically program your Device remotely with system settings for roaming service, to direct your Device to use network services most appropriate for your typical usage, and other features that cannot be changed manually.

Devices purchased for use on AT&T's system are designed for use exclusively on AT&T's system ("Equipment"). You agree that you won't make any modifications to the Equipment or programming to enable the Equipment to operate on any other system. AT&T may, at its sole and absolute discretion, modify the programming to enable the operation of the Equipment on other systems.

If you bought a phone from AT&T, your phone may have been programmed with a SIM lock which will prevent the phone from operating with other compatible wireless telephone carriers' services. If you wish to use the SIM-locked phone with the service of another wireless telephone carrier, you must enter a numeric Unlock Code to unlock the phone. AT&T will provide the Unlock Code upon request to eligible current and former customers, provided that (1) the customer has completed a minimum of 90 days of active service with AT&T, is in good standing with AT&T and is current in his or her payments at the time of the request; (2) if applicable, any period of exclusivity associated with AT&T's sale of the handset has expired; and (3) AT&T has such code or can reasonably obtain it from the manufacturer. For phones sold with a Prepaid Plan, AT&T will provide the Unlock Code upon request to eligible current and former customers who provide a detailed receipt or other proof of purchase of the phone. iPhone and certain other devices are not eligible to be unlocked. For further details on eligibility requirements and for assistance on obtaining the Unlock Code for your handset, please call 1-800-331-0500 or visit an AT&T company store.

You are solely responsible for complying with U.S. Export Control laws and regulations and the import laws and regulations of foreign countries when traveling internationally with your Equipment.

See related links | See all legal

3.2 Where and How Does AT&T Service Work?

Print this section | Print this page

AT&T does not guarantee availability of wireless network. Services may be subject to certain Device and compatibility/limitations including memory, storage, network availability, coverage, accessibility and data conversion limitations. Services (including without limitation, eligibility requirements, plans, pricing, features and/or service areas) are subject to change without notice.

When outside AT&T's coverage area, access will be limited to information and applications previously downloaded to or resident on your device. Coverage areas vary between AT&T network technologies. See coverage map(s), available at store or from your sales representative, for details or the coverage map at www.att.com/coverage-viewer.

Actual network speeds depend upon device characteristics, network, network availability and coverage levels, tasks, file characteristics, applications and other factors. Performance may be impacted by transmission limitations, terrain, in-building/in-vehicle use and capacity constraints.

See related links | See all legal

3.3 What Information, Content, And Applications Are Provided By Third Parties?

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Certain information, applications, or other content is provided by independently owned and operated content providers or service providers who are subject to change at any time without notice.

AT&T IS NOT A PUBLISHER OF THIRD-PARTY INFORMATION, APPLICATIONS, OR OTHER CONTENT AND IS NOT RESPONSIBLE FOR ANY OPINIONS, ADVICE, STATEMENTS, OR OTHER INFORMATION, SERVICES OR GOODS PROVIDED BY THIRD PARTIES.

Third-party content or service providers may impose additional charges. Policies regarding intellectual property, privacy and other policies or terms of use may differ among AT&T's content or service providers and you are bound by such policies or terms when you visit their respective sites or use their services. It is your responsibility to read the rules or service agreements of each content provider or service provider.

Any information you involuntarily or voluntarily provide to third parties is governed by their policies or terms. The accuracy, appropriateness, content, completeness, timeliness, usefulness, security, safety, merchantability, fitness for a particular purpose, transmission or correct sequencing of any application, information or downloaded data is not guaranteed or warranted by AT&T or any content providers or other third party. Delays or omissions may occur. Neither AT&T nor its content providers, service providers or other third parties shall be liable to you for any loss or injury arising out of or caused, in whole or in part, by your use of any information, application or content, or any information, application, or other content acquired through the Service.

You acknowledge that every business or personal decision, to some degree or another, represents an assumption of risk, and that neither AT&T nor its content and service providers or suppliers, in providing information, applications or other content or services, or access to information, applications, or other content underwrites, can underwrite, or assumes your risk in any manner whatsoever.

See related links | See all legal

3.4 How Can I Get Mobile Content?

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You understand that Devices can be used to acquire or purchase goods, content, and services (including subscription plans) like ring tones, graphics, games, applications and news alerts from AT&T or other companies ("Content"). You understand that you are responsible for all authorized charges associated with such Content from any Device assigned to your account, that these charges will appear on your bill (including charges on behalf of other companies), and that such purchases can be restricted by using parental controls available from an AT&T salesperson, or by calling AT&T.

You have full-time access to your Content purchase transaction history on our website. You may contest charges and seek refunds for purchases with which you are not satisfied. AT&T reserves the right to restrict Content purchases or terminate the account of anyone who seeks refunds on improper grounds or otherwise abuses this Service.

Actual Content may vary based on the Device capabilities. Content may be delivered in multiple messages. Content charges are incurred at the stated one-time download rate or subscription rate, plus a per kilobyte or per megabyte default pay per use charge for the Content transport when delivered, unless you have a data plan and such charges appear separately on your bill. You will be charged each time you download Content. Data Service charges apply.

See related links | See all legal

3.5 Am I Responsible If Someone Makes A Purchase With My Device?

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Except as otherwise provided in this Agreement, if your Device is used by others to make Content purchases, you are responsible for all such purchases. If this occurs, you are giving those other users your authority to:

1. make Content purchases from those Devices, and to incur charges for those Content purchases that will appear on your bill;
2. give consent required for that Content, including the consent to use that user's location information to deliver customized information to that user's Device; or
3. make any representation required for that content, including a representation of the user's age, if requested.

Usage by others can be restricted by use of parental controls or similar features. Visit att.com/smartlimits to learn more.

See related links | See all legal

3.6 Can I Use Location-Based Services With My Device?

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AT&T collects information about the approximate location of your Device in relation to our cell towers and the Global Positioning System (GPS). We use that information, as well as other usage and performance information also obtained from our network and your Device, to provide you with wireless voice and data services, and to maintain and improve our network and the quality of your wireless experience. We may also use location information to create aggregate data from which your personally identifiable information has been removed or obscured. Such aggregate data may be used for a variety of purposes such as scientific and marketing research and services such as vehicle traffic volume monitoring. It is your responsibility to notify users on your account that we may collect and use location information from Devices.

Your Device is also capable of using optional Content at your request or the request of a user on your account, offered by AT&T or third parties that make use of a Device's location information ("Location-Based Services"). Please review the terms and conditions and the associated privacy policy for each Location-Based Service to learn how the location information will be used and protected. For more information on Location-Based Services, please visit att.com/privacy.

Our directory assistance service (411) may use the location of a Device to deliver relevant customized 411 information based upon the user's request for a listing or other 411 service. By using this directory assistance service, the user is consenting to our use of that user's location information for such purpose. This location information may be disclosed to a third party to perform the directory assistance service and for no other purpose. Such location information will be retained only as long as is necessary to provide the relevant customized 411 information and will be discarded after such use. Please see our privacy policy at att.com/privacy for additional details.

See related links | See all legal

3.7 What If My Device Is Lost Or Stolen?

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If your wireless Device is lost or stolen, you must contact us immediately to report the Device lost or stolen. You're not liable for charges you did not authorize, but the fact that a call was placed from your Device is evidence that the call was authorized. (California Customers see section "What Terms Apply Only To Specific States?" below). Once you report to us that the Device is lost or stolen, you will not be responsible for subsequent charges incurred by that Device.

You can report your Device as lost or stolen and suspend Services without a charge by contacting us at the phone number listed on your bill or at

wireless.att.com. If there are charges on your bill for calls made after the Device was lost or stolen, but before you reported it to us, notify us of the disputed charges and we will investigate. You may submit documents, statements and other information to show any charges were not authorized. You may be asked to provide information and you may submit information to support your claim. We will advise you of the result of our investigation within 30 days. While your phone is suspended you will remain responsible for complying with all other obligations under this Agreement, including, but not limited to, your monthly fee. We both have a duty to act in good faith in a reasonable and responsible manner including in connection with the loss or theft of your Device.

See related links | See all legal

4.0 TERMS RELATING TO THE USE AND LIMITATIONS OF SERVICE

4.1 What Are The Limitations On Service And Liability?

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Unless prohibited by law, the following limitations of liability apply. Service may be interrupted, delayed, or otherwise limited for a variety of reasons, including environmental conditions, unavailability of radio frequency channels, system capacity, priority access by National Security and Emergency Preparedness personnel in the event of a disaster or emergency, coordination with other systems, equipment modifications and repairs, and problems with the facilities of interconnecting carriers. We may block access to certain categories of numbers (e.g., 976, 900, and international destinations) at our sole discretion.

Additional hardware, software, subscription, credit or debit card, Internet access from your compatible PC and/or special network connection may be required and you are solely responsible for arranging for or obtaining all such requirements. Some solutions may require third party products and/or services, which are subject to any applicable third party terms and conditions and may require separate purchase from and/or agreement with the third party provider. AT&T is not responsible for any consequential damages caused in any way by the preceding hardware, software or other items/requirements for which you are responsible.

Not all plans or Services are available for purchase or use in all sales channels, in all areas or with all devices. AT&T is not responsible for loss or disclosure of any sensitive information you transmit. AT&T's wireless services are not equivalent to wireline Internet. AT&T is not responsible for nonproprietary services or their effects on devices.

We may, but do not have the obligation to, refuse to transmit any information through the Services and may screen and delete information prior to delivery of that information to you. There are gaps in service within the Services areas shown on coverage maps, which, by their nature, are only approximations of actual coverage.

WE DO NOT GUARANTEE YOU UNINTERRUPTED SERVICE OR COVERAGE. WE CANNOT ASSURE YOU THAT IF YOU PLACE A 911 CALL YOU WILL BE FOUND. AIRTIME AND OTHER SERVICE CHARGES APPLY TO ALL CALLS, INCLUDING INVOLUNTARILY TERMINATED CALLS. AT&T MAKES NO WARRANTY, EXPRESS OR IMPLIED, OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, SUITABILITY, ACCURACY, SECURITY, OR PERFORMANCE REGARDING ANY SERVICES, SOFTWARE OR GOODS, AND IN NO EVENT SHALL AT&T BE LIABLE, WHETHER OR NOT DUE TO ITS OWN NEGLIGENCE, for any:

a. act or omission of a third party;
b. mistakes, omissions, interruptions, errors, failures to transmit, delays, or defects in the Services or Software provided by or through us;
c. damage or injury caused by the use of Services, Software, or Device, including use in a vehicle;
d. claims against you by third parties;
e. damage or injury caused by a suspension or termination of Services or Software by AT&T; or
f. damage or injury caused by failure or delay in connecting a call to 911 or any other emergency service.

Notwithstanding the foregoing, if your Service is interrupted for 24 or more continuous hours by a cause within our control, we will issue you, upon request, a credit equal to a pro-rata adjustment of the monthly Service fee for the time period your Service was unavailable, not to exceed the monthly Service fee. Our liability to you for Service failures is limited solely to the credit set forth above.

Unless prohibited by law, AT&T isn't liable for any indirect, special, punitive, incidental or consequential losses or damages you or any third party may suffer by use of, or inability to use, Services, Software, or Devices provided by or through AT&T, including loss of business or goodwill, revenue or profits, or claims of personal injuries.

To the full extent allowed by law, you hereby release, indemnify, and hold AT&T and its officers, directors, employees and agents harmless from and against any and all claims of any person or entity for damages of any nature arising in any way from or relating to, directly or indirectly, service provided by AT&T or any person's use thereof (including, but not limited to, vehicular damage and personal injury), INCLUDING CLAIMS ARISING IN WHOLE OR IN PART FROM THE ALLEGED NEGLIGENCE OF AT&T, or any violation by you of this Agreement. This obligation shall survive termination of your Service with AT&T. AT&T is not liable to you for changes in operation, equipment, or technology that cause your Device or Software to be rendered obsolete or require modification.

SOME STATES, INCLUDING THE STATE OF KANSAS, DON'T ALLOW DISCLAIMERS OF IMPLIED WARRANTIES OR LIMITS ON REMEDIES FOR BREACH. THEREFORE, THE ABOVE LIMITATIONS OR EXCLUSIONS MAY NOT APPLY TO YOU. THIS AGREEMENT GIVES YOU SPECIFIC LEGAL RIGHTS, AND YOU MAY HAVE OTHER RIGHTS WHICH VARY FROM STATE TO STATE.

See related links | See all legal

4.2 How Can I Use My AT&T Service?

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All use of AT&T's wireless network and Services is governed by AT&T's Acceptable Use Policy, which can be found at att.com/AcceptableUsePolicy, as determined solely by AT&T. AT&T can revise its Acceptable Use Policy at any time without notice by updating this posting.

See related links | See all legal

4.3 Who Is Responsible For Security?

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AT&T DOES NOT GUARANTEE SECURITY. Data encryption is available with some, but not all, Services sold by AT&T. If you use your device to access company email or information, it is your responsibility to ensure your use complies with your company's internal IT and security procedures.

See related links | See all legal

4.4 How Can I Use the Software?

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The software, interfaces, documentation, data, and content provided for your Equipment as may be updated, downloaded, or replaced by feature enhancements, software updates, system restore software or data generated or provided subsequently by AT&T (hereinafter "Software") is licensed, not sold, to you by AT&T and/or its licensors/suppliers for use only on your Equipment. Your use of the Software shall comply with its intended purposes as determined by

us, all applicable laws, and AT&T's Acceptable Use Policy at att.com/AcceptableUsePolicy.

You are not permitted to use the Software in any manner not authorized by this License. You may not (and you agree not to enable others to) copy, decompile, reverse engineer, disassemble, reproduce, attempt to derive the source code of, decrypt, modify, defeat protective mechanisms, combine with other software, or create derivative works of the Software or any portion thereof. You may not rent, lease, lend, sell, redistribute, transfer or sublicense the Software or any portion thereof. You agree the Software contains proprietary content and information owned by AT&T and/or its licensors/suppliers.

AT&T and its licensors/suppliers reserve the right to change, suspend, terminate, remove, impose limits on the use or access to, or disable access to, the Software at any time without notice and will have no liability for doing so. You acknowledge AT&T's Software licensors/suppliers are intended third party beneficiaries of this license, including the indemnification, limitation of liability, disclaimer of warranty provisions found in this Agreement.

See related links | See all legal

4.5 How Can I Use Another Carrier's Network (Off-Net Usage)?

4.5.1 Voice

Print this section | Print this page

If your use of minutes (including unlimited Services) on other carrier networks ("off-net voice usage") during any two consecutive months exceed your off-net voice usage allowance, AT&T may, at its option, terminate your Services, deny your continued use of other carriers' coverage or change your plan to one imposing usage charges for off-net voice usage. Your off-net voice usage allowance is equal to the lesser of 750 minutes or 40% of the Anytime Minutes included with your plan.

See related links | See all legal

4.5.2 Data

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If your use of the Data Services on other carriers' wireless networks ("offnet data usage") during any month exceeds your offnet data usage allowance, AT&T may at its option terminate your access to Data Services, deny your continued use of other carriers' coverage, or change your plan to one imposing usage charges for offnet data usage. Your offnet data usage allowance is equal to the lesser of 24 megabytes or 20% of the kilobytes included with your plan. You may be required to use a Device programmed with AT&T's preferred roaming database.

See related links | See all legal

4.5.3 Messaging

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If you use messaging services (including unlimited Services) on other carrier networks ("off-net messaging usage") during any two consecutive months exceed your off-net messaging usage allowance, AT&T may, at its option, terminate your messaging service, deny your continued use of other carriers' coverage or change your plan to one imposing usage charges for off-net messaging usage. Your off-net messaging usage allowance is equal to the lesser of 3,000 messages or 50% of the messages included with your plan.

See related links | See all legal

4.5.4 Notice

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AT&T will provide notice that it intends to take any of the above actions, and you may terminate this Agreement.

See related links | See all legal

4.6 How Do I Get Service Outside AT&T's Wireless Network (Roaming)?

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Roaming charges for wireless data or voice Services may be charged with some plans when outside AT&T's wireless network. Services originated or received while outside your plan's included coverage area are subject to roaming charges Use of Services when roaming is dependent upon roaming carrier's support of applicable network technology and functionality. Display on your device will not indicate whether you will incur roaming charges. Check with roaming carriers individually for support and coverage details.

Billing for domestic and international roaming usage may be delayed up to three billing cycles due to reporting between carriers. Substantial charges may be incurred if your phone is taken out of the U.S. even if no Services are intentionally used.

4.6.1 International Services

Certain eligibility restrictions apply which may be based on service tenure, payment history and/or credit. Rates are subject to change. For countries, rates and additional details, see att.com/global.

4.6.1.1 International Roaming:

Compatible Device required. Your plan may include the capability to make and receive calls while roaming internationally. AT&T, in its sole discretion, may block your ability to use your Device while roaming internationally until eligibility criteria are met. International roaming rates, which vary by country, apply for all calls placed or received while outside the United States, Puerto Rico and U.S.V.I. Please consult att.com/global or call 866-246-4852 for a list of currently available countries and carriers. All countries may not be available for roaming. All carriers within available countries may not be available on certain plans or packages. Availability, quality of coverage and services while roaming are not guaranteed. When roaming internationally, you will be charged international roaming airtime rates including when incoming calls are routed to voicemail, even if no message is left. Taxes are additional. If you want to block the ability to make and receive calls or use data functions while roaming internationally, you may request that by calling 1-916-843-4685 (at no charge from your wireless phone).

4.6.1.2 International Data:

Many Devices, including iPhone transmit and receive data messages without user intervention and can generate unexpected charges when powered "on" outside the United States, Puerto Rico and USVI. AT&T may send "alerts" via SMS or email, to notify you of data usage. These are courtesy alerts. There is no guarantee you will receive them. They are not a guarantee of a particular bill limit. Receipt of Visual Voicemail messages are charged at international data pay-per-use rates unless customer has an international data plan, in which case receipt of Visual Voicemail messages decrement Kilobytes included in such plan.

4.6.1.3 Data Global Add-Ons and Global Messaging Plans:

Require that domestic data or messaging capability be in place. Rates apply only for usage within "roam zone" comprised of select carriers. Within the roam zone, overage rate applies if you exceed the MBs allotted for any Data Global Add-On Plan or the messages allotted for any Global Messaging

Package. International roaming pay-per-use rates apply in countries outside the roam zone. See att.com/dataconnectglobal for current roam zone list. If you enroll after the beginning date of your billing cycle, the monthly charge and the data/message allotment included will be correspondingly reduced per day.

4.6.1.4 Data Connect Global/North America Plans:

Do not include capability to place a voice call and require a 1 year agreement. For specific terms regarding international data plans, see Section 6.11.2 of the Wireless Customer Agreement.

4.6.1.5 International Long Distance:

International rates apply for calls made and messages sent from the U.S., Puerto Rico and U.S.V.I. to another country. Calling or messaging to some countries may not be available. Calls to wireless numbers and numbers for special services, such as Premium Rated Services, may cost more than calls to wireline numbers. If a customer calls an overseas wireline number and the call is forwarded to a wireless number, the customer will be charged for a call terminated to a wireless number. International Long Distance calling rates are charged per minute and apply throughout the same footprint in which the customer's airtime package minutes apply.

4.6.1.6 International Long Distance Text, Picture & Video Messaging:

Additional charges apply for premium messages and content. Messages over 300 KBs are billed an additional 50¢/message. For a complete list of countries, please visit att.com/text2world

4.6.1.7 Cruise Ship Roaming:

Cruise ship roaming rates apply for calls placed or data used while on the ship.

4.6.1.8 International Miscellaneous Export Restrictions:

You are solely responsible for complying with U.S. Export Control laws and regulations, and the import laws and regulations of foreign countries when traveling internationally with your Device.

See related links | See all legal

5.0 WHAT VOICE SERVICES DOES AT&T OFFER?

5.1 What Are The General Terms That Apply To All AT&T Voice Rate Plans?

Print this section | Print this page

You may obtain usage information by calling customer service or using one of our automated systems. **Pricing/Taxes/No Proration:** Prices do not include taxes, directory assistance, roaming, Universal Service Fees, and other surcharges. Final month's charges are not prorated. **Activation Fees:** Activation Fee may apply for each new line. **Nights and Weekends:** Nights are 9:00 p.m. to 6:00 a.m. Weekends are 9:00 p.m. Friday to 6:00 a.m. Monday (based on time of day at the cell site or switch providing your Service). Included long distance calls can be made from the 50 United States, Puerto Rico and U.S. Virgin Islands to the 50 United States, Puerto Rico, U.S. Virgin Islands, Guam and Northern Mariana Islands. Roaming charges do not apply when roaming within the Services area of land-based networks of the 50 United States, Puerto Rico and U.S. Virgin Islands. Additional charges apply to Services used outside the land borders of the U.S., Puerto Rico and U.S. Virgin Islands.

See related links | See all legal

5.2 Voicemail

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Unless you subscribe to an Unlimited Voice Plan or are an upstate New York customer subscribing to Enhanced Voicemail, airtime charges apply to calls to your voicemail service, including calls where the caller does not leave a message, because the call has been completed, calls to listen to, send, reply to, or forward messages, or to perform other activities with your voicemail service, including calls forwarded from other phones to your voicemail service. You are solely responsible for establishing and maintaining security passwords to protect against unauthorized use of your voicemail service. For information as to the number of voicemail messages you can store, when voicemail messages will be deleted, and other voicemail features, see att.com/wirelessvoicemail. We reserve the right to change the number of voicemails you can store, the length you can store voicemail messages, when we delete voicemail messages, and other voicemail features without notice. We may deactivate your voicemail service if you do not initialize it within a reasonable period after activation. We will reactivate the service upon your request. See att.com/global for information about using voicemail internationally.

See related links | See all legal

5.3 Voicemail-To-Text (VMTT)

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AT&T is not responsible, nor liable for: 1) errors in the conversion of or its inability to transcribe voicemail messages to text/email; 2) lost or misdirected messages; or, 3) content that is unlawful, harmful, threatening, abusive, obscene, tortious, or otherwise objectionable.

We do not filter, edit or control voice, text, or email messages, or guarantee the security of messages. We can interrupt, restrict or terminate VMTT without notice, if your use of VMTT adversely impacts AT&T's network, for example that could occur from abnormal calling patterns or an unusually large number of repeated calls and messages; or if your use is otherwise abusive, fraudulent, or does not comply with the law.

You are solely responsible for and will comply with all applicable laws as to the content of any text messages or emails you receive from VMTT that you forward or include in a reply to any other person. You authorize AT&T or a third party working on AT&T's behalf to listen to, and transcribe all or part of a voicemail message and to convert such voicemail message into text/email, and to use voicemail messages and transcriptions to enhance, train and improve AT&T's speech recognition and transcription services, software and equipment.

Charges for VMTT include the conversion of the voicemail message and the text message sent to your wireless device. Additional charges, however, may apply to receiving email on your wireless device from VMTT, as well as, replying to or forwarding VMTT messages via SMS (text) or email, depending on your plan.

SMS (text messaging) blocking is incompatible with VMTT. (If you do not have a texting plan on your handset, we add a texting pay per use feature when you add VMTT with text delivery.) If you are traveling outside the U.S. coverage area, you will incur international data charges for emails received from VMTT, as well as, charges for emails you respond to or forward from VMTT, unless you have an international data plan and the usage falls within the plan's usage limits.

Transcription times cannot be guaranteed. Customers purchasing email delivery are responsible for providing a correct email address and updating the email address when changes to the email account are made.

If you choose SMS (text) delivery, VMTT only converts the first 480 characters of a voicemail message into text and you will receive up to three text messages of a transcribed message. The transcription, therefore, may not include the entire voicemail message with SMS delivery. Adding VMTT will create a new voicemail box and all messages and greetings will be deleted from your current voicemail box.

See related links | See all legal

5.4 Unlimited Voice Services

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Unlimited voice Services are provided primarily for live dialog between two individuals. If your use of unlimited voice Services for conference calling or call forwarding exceeds 750 minutes per month, AT&T may, at its option, terminate your Service or change your plan to one with no unlimited usage components.

Unlimited voice Services may not be used for monitoring services, data transmissions, transmission of broadcasts, transmission of recorded material, or other connections which don't consist of uninterrupted live dialog between two individuals. If AT&T finds that you're using an unlimited voice Service offering for other than live dialog between two individuals, AT&T may, at its option terminate your Service or change your plan to one with no unlimited usage components. AT&T will provide notice that it intends to take any of the above actions, and you may terminate the agreement.

See related links | See all legal

5.5 Caller ID

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Your caller identification information (such as your name and phone number) may be displayed on the Device or bill of the person receiving your call; technical limitations may, in some circumstances, prevent you from blocking the transmission of caller identification information. Contact customer service for information on blocking the display of your name and number. Caller ID blocking is not available when using Data Services, and your wireless number is transmitted to Internet sites you visit.

See related links | See all legal

5.6 Rollover Minutes

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If applicable to your plan, Rollover Minutes accumulate and expire through 12 rolling bill periods. Bill Period 1 (activation) unused Anytime Minutes will not carry over. Bill Period 2 unused Anytime Minutes will begin to carry over. Rollover Minutes accumulated starting with Bill Period 2 will expire each bill period as they reach a 12-bill-period age. Rollover Minutes will also expire immediately upon default or if customer changes to a non-Rollover plan. If you change plans (including the formation of a FamilyTalk plan), or if an existing subscriber joins your existing FamilyTalk plan, any accumulated Rollover Minutes in excess of your new plan or the primary FamilyTalk line's included Anytime Minutes will expire. Rollover Minutes are not redeemable for cash or credit and are not transferable. If you change to non-AT&T Unity plans with Rollover Minutes (including the formation of a FamilyTalk plan) any accumulated Rollover Minutes in excess of your new non-AT&T Unity plan or the primary non-AT&T Unity FamilyTalk line's included Anytime Minutes will expire.

See related links | See all legal

5.7 Mobile To Mobile Minutes

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If applicable to your plan, Mobile to Mobile Minutes may be used when directly dialing or receiving calls from any other AT&T wireless phone number from within your calling area. Mobile to Mobile Minutes may not be used for interconnection to other networks. Calls to AT&T voicemail and return calls from voicemail are not included.

See related links | See all legal

5.8 Family Talk Plan

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If applicable to your plan, FamilyTalk may require up to a two-year Service Commitment for each line. FamilyTalk plans include only package minutes included with the primary number, and minutes are shared by the additional lines. The rate shown for additional minutes applies to all minutes in excess of the Anytime Minutes. FamilyTalk requires two lines. If the rate plan for the primary number is changed to an ineligible plan or the primary number is disconnected, one of the existing additional lines shall become the primary number on the rate plan previously subscribed to by the former primary number; if only one line remains, it shall be converted to the closest single line rate.

See related links | See all legal

5.9 A-List

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A-List is available only with select Nation, FamilyTalk and Unity plans. Nation Plan and Individual Subscribers can place/receive calls to/from up to 5 (and FamilyTalk subscribers can place/receive calls to/from up to 10) wireline or wireless telephone numbers without being charged for airtime minutes. All qualifying lines on a FamilyTalk account share the same 10 A-List numbers. Only standard domestic wireline or wireless numbers may be added and A-List is only for domestic calls. Directory assistance, 900 numbers, chat lines, pay per call numbers, customer's own wireless or Voice Mail access numbers, numbers for call routing services and call forwarding services from multiple phones, and machine to machine numbers are not eligible. Depending on the PBX system, a private telephone system often serving businesses, AT&T may not be able to determine if your selected PBX A-List number is calling/receiving calls from your wireless number and airtime charges could apply. Forwarded calls will be billed based on the originating number, not the call forwarding number, and airtime charges may apply. Only voice calling is eligible. A-List number selections may only be managed online via MyWireless Account. Selected telephone numbers do not become active until 24 hours after added. AT&T reserves the right to block any A-List number and to reduce the amount of telephone numbers that can be used for A-List without notice. A-List is not eligible on Save/Promotional Plans.

See related links | See all legal

5.10 AT&T Viva Mexico ("Mexico Plan") & AT&T Nation/FamilyTalk With Canada ("Canada Plan")

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Certain eligibility requirements apply. Anytime Minutes and Night and Weekend Minutes between Mexico and your U.S. wireless coverage area if you subscribe to the Mexico Plan, or Canada and your U.S. wireless coverage area if you subscribe to the Canada Plan, will be treated for billing purposes as calls to and from your U.S. wireless coverage area.

Calls made from or received in Mexico and Canada cannot exceed your monthly off-net usage allowance (the lesser of 750 min./mo. or 40% of your Anytime Minutes/mo.) in any two consecutive months. Calls made from or received in Mexico and Canada will not qualify as Mobile to Mobile Minutes. Special rates apply for data usage in Mexico and Canada. International long distance text, instant, picture and video messaging rates apply to messaging from the U.S. to Mexico and Canada and international roaming rates apply when such messages are sent from Mexico and Canada.

International Roaming charges apply when using voice and data Services outside Mexico and your U.S. wireless coverage area if you subscribe to the Mexico

Plan, and Canada and your U.S. wireless coverage area, if you subscribe to the Canada Plan. International long distance charges apply when calling to areas outside Mexico and your U.S. wireless coverage area if you subscribe to the Mexico Plan, and Canada and your U.S. wireless coverage area if you subscribe to the Canada Plan.

Anytime Minutes are primarily for live dialog between two people. You may not use your Services other than as intended by AT&T and applicable law. Plans are for individual, non-commercial use only and are not for resale. Unlimited Microcell Calling feature cannot be used on accounts with Viva Mexico and Nation Canada calling plans.

See related links | See all legal

5.11 AT&T Unity And AT&T Unity-FamilyTalk Plans Requirements

5.11.1 Eligibility Requirements:

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AT&T local and wireless combined bill required. For residential customers, qualifying AT&T local plan from AT&T required. For business customers, qualifying AT&T local service plan required. Specific AT&T Services that qualify vary by location; see att.com or call 1-800-288-2020. Certain business accounts are not eligible for Unity plans. Discounts on any other combined-bill wireless plans will be lost if an AT&T Unity plan is added to your combined bill. If an existing wireless plan is upgraded to an AT&T Unity plan, all discounts and promotions will be lost when subscribing to that plan.

See related links | See all legal

5.11.2 AT&T Unity Minutes:

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AT&T Unity Calling Minutes may be used when directly dialing or receiving calls from any other eligible AT&T wireline or wireless phone number from within your calling area. Calls to AT&T voicemail and return calls from voicemail not included. AT&T Unity Minutes are not included when checking usage for the current billing period.

See related links | See all legal

5.12 VoiceDial Services

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Regular airtime charges apply. Mobile to Mobile Minutes do not apply. Calls to 911, 411, 611, 711 and international dialing cannot be completed with VoiceDial Services. Caller ID cannot be blocked. Caller ID will be delivered on calls, even if you have permanently blocked your name and number. For complete terms and conditions, see att.com/voicedial.

See related links | See all legal

5.13 AT&T Messaging Unlimited with Mobile to Any Mobile Calling Feature

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Available only with select Nation and FamilyTalk plans and can be discontinued at anytime. Messaging Unlimited Plan required. Mobile to Any Mobile minutes only apply when you directly dial another U.S. mobile number or directly receive a call from another U.S. mobile phone number from within your calling area in the U.S., Puerto Rico, or U.S.V.I. Mobile to Any Mobile is not available with the AT&T Viva Mexico or AT&T Nation/FamilyTalk with Canada plans. Calls made through Voice Connect, calls to directory assistance, and calls to voicemail and return calls from voicemail are not included. Also calls made to and calls received from mobile toll-free numbers, mobile chat lines, mobile directory assistance, calling applications, numbers for call routing and call forwarding services, and machine to machine numbers are not included. Calls to and from wireline numbers that a customer ports and uses as a wireless number will not be treated as a call from a mobile number or a call received from a mobile number, until after the number is ported and included in the wireless number database we use.

See related links | See all legal

6.0 WHAT DATA AND MESSAGING SERVICES DOES AT&T OFFER?

6.1 What Are The General Terms That Apply To All Data And Messaging Plans?

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AT&T provides wireless data and messaging Services, including but not limited to, features that may be used with Data Services and wireless content and applications ("Data Services"). The absolute capacity of the wireless data network is limited; consequently, Data Services may only be used for prescribed purposes. Pricing and data allowances for Data Services are device dependent and based on the transmit and receive capacity of each device.

On Data Services with a monthly megabyte (MB) or gigabyte (GB) data allowance, once you exceed your monthly data allowance you will be automatically charged for overage as specified in the applicable rate plan. All data allowances, including overages, must be used in the billing period in which the allowance is provided. Unused data allowances will not roll over to subsequent billing periods.

AT&T data plans are designed for use with only one of the following distinct device types: (1) Smartphones, (2) basic and Quick Messaging phones, (3) tablets, and (4) LaptopConnect cards, and (5) stand-alone Mobile Hotspot devices. A data plan designated for one type of device may not be used with another type of device. For example, a data plan designated for use with a basic phone or a Smartphone may not be used with a LaptopConnect card, tablet, or stand-alone Mobile Hotspot device, by tethering devices together, by SIM card transfer, or any other means. A data tethering plan, however, may be purchased for an additional fee to enable tethering on a compatible device. An Activation Fee may apply for each data line.

Consumer data plans do not allow access to corporate email, company intranet sites, and other business applications. Access to corporate email, company intranet sites, and/or other business applications requires an applicable Enterprise Data plan. Enterprise Email requires an eligible data plan and Device. Terms may vary depending on selected Enterprise Email solution.

AT&T RESERVES THE RIGHT TO TERMINATE YOUR DATA SERVICES WITH OR WITHOUT CAUSE, INCLUDING WITHOUT LIMITATION, UPON EXPIRATION OR TERMINATION OF YOUR WIRELESS CUSTOMER AGREEMENT.

See related links | See all legal

6.2 What Are The Intended Purposes Of The Wireless Data Service?

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Except as may otherwise be specifically permitted or prohibited for select data plans, data sessions may be conducted only for the following purposes: (i) Internet browsing; (ii) email; and (iii) intranet access (including access to corporate intranets, email, and individual productivity applications like customer relationship management, sales force, and field service automation). **While most common uses for Internet browsing, email and intranet access are**

permitted by your data plan, there are certain uses that cause extreme network capacity issues and interference with the network and are therefore prohibited. Examples of prohibited uses include, without limitation, the following: (i) server devices or host computer applications, including, but not limited to, Web camera posts or broadcasts, automatic data feeds, automated machine-to-machine connections or peer-to-peer (P2P) file sharing; (ii) as a substitute or backup for private lines, wireline s or full-time or dedicated data connections; (iii) "auto-responders," "cancel-bots," or similar automated or manual routines which generate excessive amounts of net traffic, or which disrupt net user groups or email use by others; (iv) "spam" or unsolicited commercial or bulk email (or activities that have the effect of facilitating unsolicited commercial email or unsolicited bulk email); (v) any activity that adversely affects the ability of other people or systems to use either AT&T's wireless services or other parties' Internet-based resources, including "denial of service" (DoS) attacks against another network host or individual user; (vi) accessing, or attempting to access without authority, the accounts of others, or to penetrate, or attempt to penetrate, security measures of AT&T's wireless network or another entity's network or systems; (vii) software or other devices that maintain continuous active Internet connections when a computer's connection would otherwise be idle or any "keep alive" functions, unless they adhere to AT&T's data retry requirements, which may be changed from time to time. This means, by way of example only, that checking email, surfing the Internet, downloading legally acquired songs, and/or visiting corporate intranets is permitted, but downloading movies using P2P file sharing services, redirecting television signals for viewing on Personal Computers, web broadcasting, and/or for the operation of servers, telemetry devices and/or Supervisory Control and Data Acquisition devices is prohibited. Furthermore, plans (unless specifically designated for tethering usage) cannot be used for any applications that tether the device (through use of, including without limitation, connection kits, other phone/smartphone to computer accessories, BLUETOOTH® or any other wireless technology) to Personal Computers (including without limitation, laptops), or other equipment for any purpose. Accordingly, AT&T reserves the right to (i) deny, disconnect, modify and/or terminate Service, without notice, to anyone it believes is using the Service in any manner prohibited or whose usage adversely impacts its wireless network or service levels or hinders access to its wireless network, including without limitation, after a significant period of inactivity or after sessions of excessive usage and (ii) otherwise protect its wireless network from harm, compromised capacity or degradation in performance, which may impact legitimate data flows. You may not send solicitations to AT&T's wireless subscribers without their consent. You may not use the Services other than as intended by AT&T and applicable law. Plans are for individual, non-commercial use only and are not for resale. AT&T may, but is not required to, monitor your compliance, or the compliance of other subscribers, with AT&T's terms, conditions, or policies.

See related links | See all legal

6.3 What Are The Voice And Data Plan Requirements?

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A voice plan is required on all voice-capable Devices, unless specifically noted otherwise in the terms governing your plan.

An eligible tiered pricing data plan is required for certain Devices, including iPhones and other designated Smartphones. Eligible voice and tiered pricing data plans cover voice and data usage in the U.S. and do not cover International voice and data usage and charges. If it is determined that you are using a voice-capable Device without a voice plan, or that you are using an iPhone or designated Smartphone without an eligible voice and tiered data plan, AT&T reserves the right to switch you to the required plan or plans and bill you the appropriate monthly fees. In the case of the tiered data plan, you will be placed on the data plan which provides you with the greatest monthly data usage allowance. If you determine that you do not require that much data usage in a month, you may request a lower data tier at a lower monthly recurring fee.

See related links | See all legal

6.4 How Does AT&T Calculate My Data Usage/Billing?

Print this section | Print this page

Data sent and received includes, but is not limited to downloads, email, application usage, overhead and software update checks. Unless designated for International or Canada use, prices and included use apply to access and use on AT&T's wireless network and the wireless networks of other companies with which AT&T has a contractual relationship within the United States and its territories (Puerto Rico and the U.S. Virgin Islands), excluding areas within the Gulf of Mexico.

Usage on networks not owned by AT&T is limited as provided in your data plan. Charges will be based on the location of the site receiving and transmitting service and not the location of the subscriber. Mobile Broadband and 4G access requires a compatible device.

Data Service charges paid in advance for monthly or annual Data Services are nonrefundable. Some Data Services may require an additional monthly subscription fee and/or be subject to additional charges and restrictions. Prices do not include taxes, directory assistance, roaming, universal services fees or other surcharges.

In order to assess your usage during an applicable billing period, you may obtain approximate usage information by calling customer service or using one of our automated systems.

See related links | See all legal

6.5 Text, Instant Messaging And Picture/Video Messaging

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If you do not enroll in a monthly recurring plan for messaging, data, or Video Share, you may have access to messaging, data, and video share services and be charged on a pay-per-use basis if you use those services.

Messages are limited to 160 characters per message. Premium text and picture/video messages are charged at their stated rates. Standard rates apply to all incoming messages when in the U.S. Different, non-standard per message charges apply to international messages sent from the U.S.

Text, Instant, Picture, and Video messages are charged when sent or received, whether read or unread, solicited or unsolicited. AT&T does not guarantee delivery of messages. Text, Instant, Picture, and Video messages, including downloaded content, not delivered within 3 days will be deleted. AT&T reserves the right to change this delivery period as needed without notification.

You are charged for each part of messages that are delivered to you in multiple parts. Picture/Video Messaging, data plan, and Text Messaging may need to be provisioned on an account in order to use Picture/Video Messaging. Some elements of Picture/Video messages may not be accessible, viewable, or heard due to limitations on certain wireless phones, PCs, or e-mail.

AT&T reserves the right to change the Picture/Video message size limit at any time without notification. Picture/Video Messaging pricing is for domestic messages only. When a single message is sent to multiple recipients, the sender is charged for one message for each recipient and each recipient is charged for the message received.

Text message notifications may be sent to non-Picture/Video Messaging subscribers if they subscribe to Text Messaging. You may receive unsolicited messages from third parties as a result of visiting Internet sites, and a per-message charge may apply whether the message is read or unread, solicited or unsolicited.

You agree you will not use our messaging services to send messages that contain advertising or a commercial solicitation to any person or entity without their

consent. You will have the burden of proving consent with clear and convincing evidence if a person or entity complains you did not obtain their consent. Consent cannot be evidenced by third party lists you purchased or obtained. You further agree you will not use our messaging service to send messages that: (a) are bulk messages (b) are automatically generated; (c) can disrupt AT&T's network; (d) harass or threaten another person (e) interfere with another customer's use or enjoyment of AT&T's Services; (f) generate significant or serious customer complaints, (g) that falsify or mask the sender/originator of the message; or (h) violate any law or regulation. AT&T reserves the right, but is not obligated, to deny, disconnect, suspend, modify and/or terminate your messaging service or messaging services with any associated account(s), or to deny, disconnect, suspend, modify and/or terminate the account(s), without notice, as to anyone using messaging services in any manner that is prohibited. Our failure to take any action in the event of a violation shall not be construed as a waiver of the right to enforce such terms, conditions, or policies. Advertising and commercial solicitations do not include messaging that: (a) facilitates, completes, or confirms a commercial transaction where the recipient of such message has previously agreed to enter into with the sender of such message; or (b) provides account information, service or product information, warranty information, product recall information, or safety or security information with respect to a commercial product or service used or purchased by the recipient of such message.

See related links | See all legal

6.6 AT&T My Media CLUB

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Your enrollment gives you the option to receive text messages each week on music trivia, news and more. Every 30 days your subscription will be automatically renewed and new credits added to your account which can be used to buy ringtones and graphics through the MEdia Mall. Music, Voice, Sound Effect Tones, polyphonic ringtones & graphics are 1 credit. Unused credits expire at the end of each 30 day period. The 30 day period is not necessarily equivalent to a calendar month end or the billing cycle. You may terminate your subscription at any time by texting the word "STOP" to 7225. Any remaining credits will be available for the remainder of your subscription billing cycle. Savings claim based on price of Music Tones. Ringtone and graphics provided by independent providers.

See related links | See all legal

6.7 Mobile Email

Print this section | Print this page

Requires e-mail account with compatible internet service provider and a downloaded or preloaded e-mail application for the wireless device. Access and use of Mobile Email is billed by total volume of data sent and received (in kilobytes) in accordance with your data plan. E-mail attachments can not be sent, downloaded, read, or forwarded on the mobile device. Only a paper clip icon appears indicating an attachment. You must view attachments from your PC. Upgrades to the application may be required in order to continue to use the Service. Wireless data usage charges will apply for downloading the application and any upgrades.

See related links | See all legal

6.8 Mobile Video

Print this section | Print this page

Compatible Phone and eligible data plan required. Service not available outside AT&T's Mobile Broadband and 4G coverage areas. Premium content is charged at stated monthly subscription rates or at stated pay per view rates. Content rotates and is subject to withdrawal. Mobile Video is for individual use, not for resale, commercial purposes or public broadcast. Content can only be displayed on the device screen. No content may be captured, downloaded, forwarded, duplicated, stored, or transmitted. The content owner reserves and owns all content rights. All trademarks, service marks, logos, and copyrights not owned by AT&T are the property of their owners. Some Mobile Video content is intended for mature audiences and may be inappropriate for younger viewers. Parental guidance suggested. Use Parental Controls to restrict access to mature content. Content may be provided by independent providers, and AT&T is not responsible for their content. Providers may collect certain information from your use for tracking and managing content usage.

See related links | See all legal

6.9 AT&T Wi-Fi Services

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AT&T Wi-Fi service use with a Wi-Fi capable wireless device is subject to the Terms of Services & Acceptable Use Policy ("Terms") found at att.com/attwifitosaup. Your use represents your agreement to those Terms, incorporated herein by reference. AT&T Wi-Fi Basic service is available at no additional charge to wireless customers with select Wi-Fi capable devices and a qualified data rate plan. Other restrictions may apply.

See related links | See all legal

6.10 DataConnect Plans

6.10.1 What Are the General Terms that Apply to All DataConnect Plans?

Print this section | Print this page

A voice plan is not required with DataConnect plans.

We may, at our discretion, suspend your account if we believe your data usage is excessive, unusual or is better suited to another rate plan. If you are on a data plan that does not include a monthly MB/GB allowance and additional data usage rates, you agree that AT&T has the right to impose additional charges if you use more than 5 GB in a month; provided that, prior to the imposition of any additional charges, AT&T shall provide you with notice and you shall have the right to terminate your Data Service.

See related links | See all legal

6.10.2 Data Global Add-On/DataConnect Global Plans/DataConnect North America Plans

Print this section | Print this page

Available countries, coverage and participating international carriers included in the "Select International Roam Zone" and "Select Canada/Mexico Roam Zone" vary from our generally available Canada/international wireless data roam zones and may not be as extensive. The Select International Roam Zone is restricted to select international wireless carrier(s). Select Canada/Mexico Roam Zone is restricted to select wireless carrier(s) and coverage areas within Canada and Mexico. See att.com/dataconnectglobal for a current list of participating carriers and eligible roam zones. With respect to the countries included in the Select International Roam Zone, you will be restricted from accessing Data Service through any non-participating Canada/international wireless carriers that may otherwise be included in our generally available Canada and international wireless data roam zones. With the DataConnect North America Plan, you will be restricted from accessing Data Service through any non-participating Canada/Mexico wireless carriers that may otherwise be included in our generally available Canada and international wireless data roam zones.

DATA GLOBAL ADD-ON- May only be used with eligible Equipment. Domestic data usage not included. Qualified domestic wireless data plan required. If combined with a wireless voice plan that includes international voice roaming, your international wireless voice roaming in countries included in the Global

Data Add-On's Select International Roam Zone will be limited to the participating Canada/international wireless carriers and you will be restricted from voice roaming through any non-participating Canada/international wireless carriers that may otherwise be included in our generally available Canada and international voice roam zones.

DATACONNECT GLOBAL/NORTH AMERICA PLANS - Requires minimum one-year Service Commitment and you must remain on the plan, for a minimum one-year term. Voice access is restricted and prohibited.

See related links | See all legal

6.10.3 Pooled DataConnect Plans

Print this section | Print this page

Pooled Data Connect Plans ("Pooled Plans") available only to customers with a qualified AT&T Business Agreement for wireless Services and their respective Corporate Responsibility Users ("CRUs"). Consolidated billing is required. WIN Advantage® may also be required. Within a single Foundation Account (FAN), Customer's CRUs on an eligible Pooled Plan aggregate or "pool" their included wireless data usage ("Included Usage"), creating a "Pool".

To pool together, each CRU in the Pool must subscribe to a Pooled Plan that has the same amount of Included Usage and the same Additional Kilobyte charge ("Similar Pooled Plan"). Every billing cycle, each CRU first uses his or her Included Usage. If a CRU does not use all his or her Included Usage it creates an underage in the amount of unused kilobytes ("Under Usage"). If a CRU uses more than his or her Included Usage it creates an overage with respect to kilobytes of data usage ("Over Usage"). The Pool's Under Usage kilobytes and Over Usage kilobytes are then aggregated respectively and compared. If the aggregate Under Usage kilobytes exceed the aggregate Over Usage kilobytes, then no CRU in the Pool pays Additional Kilobyte charges. If the aggregate Over Usage kilobytes exceeds the aggregate Under Usage kilobytes, then the ratio of Under Usage kilobytes to Over Usage kilobytes is applied to the data usage of each CRU in the Pool with Overage Usage, resulting in a monetary credit against the corresponding Additional Kilobyte charges.

For example, if a Pool has 900 Under Usage kilobytes and 1000 Over Usage kilobytes (90%), then each CRU with Over Usage will receive a credit equal to 90% of his or her Additional Kilobyte charges. CRUs changing price points or migrating to Pooled Plans during a bill cycle may result in one-time prorations or other minor impacts to the credit calculation. Credits will only appear on WIN Advantage®. Customer may have more than one Pool within a FAN provided that Customer may only have one Pool for Similar Pooled Plans within a FAN; however, an individual CRU can only be in one Pool at a time.

AT&T reserves the right to limit the number of CRUs in a Pool due to business needs and system limitations. CRUs on Pooled Plans and CRUs participating in a legacy Pooled Data Connect plan pool created prior to February 17, 2006 ("Legacy Pool") cannot be in the same Pool but can be within the same FAN. End users on non-pooling AT&T plans may be included in the same FAN as CRUs on Pooled Plans; however these non-pooling end users will not receive the pooling benefits or contribute Included Usage to a Pool.

See related links | See all legal

6.11 AT&T DataPlusSM/AT&T DataProSM Plans

6.11.1 AT&T Data Plans With Tethering

Print this section | Print this page

Tethering is a wireless or wired method in which your AT&T mobile device is used as a modem or router to provide a Internet Access connection to other devices, such as laptops, netbooks, tablets, smartphones, other phones, USB modems, network routers, mobile hotspots, media players, gaming consoles, and other data-capable devices. AT&T data plans with tethering enabled may be used for tethering your AT&T Mobile device to other devices. If you are on a data plan that does not include a monthly megabyte allowance and additional data usage rates, you agree that AT&T has the right to impose additional charges if you use more than 5 GB in a month; prior to the imposition of any additional charges, AT&T shall provide you with notice and you shall have the right to terminate your Service (early termination charges may apply).

See related links | See all legal

6.11.2 Blackberry Personal

Print this section | Print this page

Supports personal email access to up to 10 Internet email accounts. Users storing more than 1,000 emails or email older than 30 days, may have some emails automatically deleted. May not be used to access corporate email such as BlackBerry Enterprise Server.

See related links | See all legal

6.11.3 Blackberry Connect; Blackberry Enterprise; Blackberry International

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Supports BlackBerry Enterprise Server™ for corporate access (valid Client Access License required), and personal email access to up to 10 Internet email accounts as per BlackBerry Personal. BlackBerry International requires a minimum one-year agreement.

See related links | See all legal

6.12 GOOD Plan

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Requires compatible Good Server and, as to each end user, a compatible Good Client Access License (CAL) for use with a qualifying AT&T data plan. Solution includes software, products and related services provided by Good Technology, Inc. ("Good"), which are subject to applicable Good terms and conditions. Good is solely responsible for all statements regarding, and technical support for, its software, products and services.

See related links | See all legal

6.13 Microsoft Direct Push

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Requires compatible Microsoft Exchange Server and, as to each end user, a compatible device, a Direct Push enabled email account, and a qualifying AT&T Data Plan. Plans include end user customer support from AT&T for compatible devices. AT&T does not sell, supply, install or otherwise support Microsoft software, products or services (including without limitation, Exchange and Direct Push).

See related links | See all legal

7.0 ARE THERE OTHER TERMS AND CONDITIONS THAT APPLY TO FEATURES AND APPLICATIONS?

ARE THERE OTHER TERMS AND CONDITIONS THAT APPLY TO FEATURES AND APPLICATIONS?

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Terms and conditions for certain features and applications are provided on the Device at the time of feature/application activation or first use. Certain features/applications will not be available in all areas at all times.

See related links | See all legal

8.0 WHAT IS AT&T ROADSIDE ASSISTANCE & OPTIONAL WIRELESS PHONE INSURANCE?

8.1 AT&T Roadside Assistance

Print this section | Print this page

AT&T Roadside Assistance ("RA") is an optional feature that costs $2.99/month per enrolled phone and is automatically billed to the wireless account. Customers may cancel at any time. New RA customers get the first 30 days for free. To cancel RA without incurring charges, contact AT&T by dialing 611 from your wireless phone within the first 30 days. RA covers up to four events per year with a maximum benefit of $50/event. Towing services are for mechanical problems only. RA service is provided by Asurion Roadside Assistance Services, LLC, a licensed motor club. Refer to the RA Welcome Kit for complete terms and conditions wireless.att.com/learn/en_US/pdf/roadside_assistance.pdf.

See related links | See all legal

8.2 Optional Wireless Phone Insurance

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Customers have 30 days from the date of activation or upgrade to enroll. See a Wireless Phone Insurance brochure for complete terms and conditions of coverage, available at participating AT&T retail locations or by visiting att.com/wirelessphoneinsurance. Key terms include: Premium: $4.99/month. Non-refundable Deductible: from $50-$125/ per claim. Limits: 2 claims per 12 months, maximum replacement value of $1500/ per claim. Replacements may be refurbished or of a different model. Cancel at any time for a prorated refund of the monthly charge. Wireless Phone Insurance is underwritten by Continental Casualty Company, a CNA company (CNA) and administered by Asurion Protection Services, LLC (Asurion Protection Services Insurance Agency, LLC CA Lic.#OD63161). Eligibility varies by device. Terms and Conditions are subject to change.

See related links | See all legal

9.0 WHAT OTHER TERMS AND CONDITIONS APPLY TO MY WIRELESS SERVICE?

9.1 Intellectual Property

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You must respect the intellectual property rights of AT&T, our third-party content providers, and any other owner of intellectual property whose protected property may appear on any website and/or dialogue box controlled by AT&T or accessed through the AT&T's websites. Except for material in the public domain, all material displayed in association with the Service is copyrighted or trademarked. Except for personal, non-commercial use, trademarked and copyrighted material may not be copied, downloaded, redistributed, modified or otherwise exploited, in whole or in part, without the permission of the owner. The RIM and BlackBerry families of related marks, images and symbols are the exclusive properties and trademarks or registered trademarks of Research In Motion Limited - used by permission. Good, the Good logo and GoodLink are trademarks of Good Technology, Inc., in the United States and/or other countries. Good Technology, Inc., and its products and services are not related to, sponsored by or affiliated with Research In Motion Limited. All other marks contained herein are the property of their respective owners.

See related links | See all legal

9.2 Severability

Print this section | Print this page

If any provision of this Agreement is found to be unenforceable by a court or agency of competent jurisdiction, the remaining provisions will remain in full force and effect. The foregoing does not apply to the prohibition against class or representative actions that is part of the arbitration clause; if that prohibition is found to be unenforceable, the arbitration clause (but only the arbitration clause) shall be null and void.

See related links | See all legal

9.3 Assignment; Governing Law; English Language

9.3.1 Assignment

Print this section | Print this page

AT&T may assign this Agreement, but you may not assign this Agreement without our prior written consent.

See related links | See all legal

9.3.2 Governing Law

Print this section | Print this page

The law of the state of your billing address shall govern this Agreement except to the extent that such law is preempted by or inconsistent with applicable federal law. In the event of a dispute between us, the law of the state of your billing address at the time the dispute is commenced, whether in litigation or arbitration, shall govern except to the extent that such law is preempted by or inconsistent with applicable federal law.

See related links | See all legal

9.3.3 English Language

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The original version of this Agreement is in the English language. Any discrepancy or conflicts between the English version and any other language version will be resolved with reference to and by interpreting the English version.

See related links | See all legal

9.4 Lifeline Services

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As part of a federal government program, AT&T offers discounted wireless service to qualified low-income residents in selected states. For questions or to apply for Lifeline service, call 1-800-377-9450. Puerto Rico customers should contact 1-787-405-5463. For tips on how to protect against fraud, please visit the CPUC's website at, CalPhoneInfo.com.

See related links | See all legal

9.5 Trial Services

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Trial Services are subject to the terms and conditions of this Agreement; may have limited availability; and may be withdrawn at any time.

See related links | See all legal

10.0 WHAT TERMS APPLY ONLY TO SPECIFIC STATES?

10.1 California: What If There Are Unauthorized Charges Billed To My Device?

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You are not liable for charges you did not authorize, but the fact that a call was placed from your Device is evidence that the call was authorized. You may submit documents, statements and other information to show any charges were not authorized. Unauthorized charges may include calls made to or from your phone or other Device after it was lost or stolen.

If you notify us of any charges on your bill you claim are unauthorized, we will investigate. We will advise you of the result of our investigation within 30 days. If you do not agree with the outcome, you may file a complaint with the California Public Utilities Commission and you may have other legal rights. While an investigation is underway, you do not have to pay any charges you dispute or associated late charges, and we will not send the disputed amount to collection or file an adverse credit report about it.

See related links | See all legal

10.2 Connecticut: Questions About Your Service

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If you have any questions or concerns about your AT&T Service, please call Customer Care at 1-800-331-0500, dial 611 from your wireless phone, or visit att.com/wireless. If you have questions about the Unlimited Local or Unlimited Long Distance Service, please call 1-800-288-2020 or visit att.com. If you are a Connecticut customer and we cannot resolve your issue, you have the option of contacting the Department of Public Utility Control (DPUC). Online: state.ct.us/dpuc; Phone: 1-866-381-2355; Mail: Connecticut DPUC, 10 Franklin Square, New Britain, CT 06051.

See related links | See all legal

10.3 Puerto Rico

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If you are a Puerto Rico customer and we cannot resolve your issue, you may notify the Telecommunications Regulatory Board of Puerto Rico of your grievance. Mail: 500 Ave Roberto H. Todd, (Parada 18), San Juan, Puerto Rico 00907-3941; Phone: 1-787-756-0804 or 1-866-578-5500; Online: jrtpr.gobierno.pr, in addition to using binding arbitration or small claims court to resolve your dispute.

See related links | See all legal

EXHIBIT 2

370 F.Supp.2d 1135, 2005-2 Trade Cases P 75,008
(Cite as: 370 F.Supp.2d 1135)

H

United States District Court,
D. Kansas.
In re: UNIVERSAL SERVICE FUND TELEPHONE BILLING PRACTICES LITIGATION
This Order Relates to All Cases

No. 02-MD-1468-JWL.
May 27, 2005.

Background: Customers sued long distance telephone services providers, claiming providers unlawfully charged customers sums greater than those required to pass through to customers charges imposed upon providers to finance Universal Service Fund (USF) for subsidizing telecommunications services for low income customers. The District Court, Lungstrum, J., 300 F.Supp.2d 1107, granted in part providers' motion to compel arbitration. Customer moved for relief from order compelling arbitration or, in alternative, for limited discovery.

Holding: The District Court, Lungstrum, J., held that it was not authorized to interfere with arbitration proceeding after compelling arbitration and staying claim.

Motion denied.

West Headnotes

[1] T 184

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk184 k. Jurisdiction and Powers of Court. Most Cited Cases
(Formerly 33k23.8 Arbitration)

Under Federal Arbitration Act, district court was not authorized to interfere with arbitration proceeding after compelling arbitration and staying claim, and thus plaintiff's motion for relief from arbitrator's decision regarding whether dispute should be arbitrated under supplementary rules for class arbitration was denied, even though plaintiff claimed that defendant threatened arbitrator destroying impartiality; claim had to wait until court reviewed arbitral award. 9 U.S.C.A. § 1 et seq.

[2] T 184

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk184 k. Jurisdiction and Powers of Court. Most Cited Cases
(Formerly 33k23.8 Arbitration)

Federal Courts 170B 198

170B Federal Courts
170BIII Federal Question Jurisdiction
170BIII(C) Cases Arising Under Laws of the United States
170Bk198 k. Arbitration. Most Cited Cases

Nothing in the Federal Arbitration Act grants or ousts the district court's jurisdiction over arbitrable claims. 9 U.S.C.A. § 1 et seq.

[3] T 184

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk184 k. Jurisdiction and Powers of Court. Most Cited Cases
(Formerly 33k23.8 Arbitration)

The court may not interfere with an ongoing arbitration proceeding. 9 U.S.C.A. § 1 et seq.

[4] T 184

25T Alternative Dispute Resolution
25TII Arbitration

370 F.Supp.2d 1135, 2005-2 Trade Cases P 75,008
(Cite as: 370 F.Supp.2d 1135)

25TII(D) Performance, Breach, Enforcement, and Contest

25Tk184 k. Jurisdiction and Powers of Court. Most Cited Cases

(Formerly 33k23.8 Arbitration)

Allowing court to interfere in an arbitration proceeding would frustrate the Federal Arbitration Act's purpose to ensure that the arbitration procedure, when selected by the parties to a contract, is speedy and not subject to delay and obstruction in the courts. 9 U.S.C.A. § 1 et seq.

***1136** Isaac L. Diel, Law Offices of Isaac L. Diel, Bonner Springs, KS, Jennifer F. Connolly, The Wexler Firm, Chicago, IL, Marc R. Stanley, Stanley Mandel & Iola, Dallas, TX, for Plaintiffs.

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MEMORANDUM AND ORDER

LUNGSTRUM, District Judge.

This multidistrict litigation consists of numerous putative class action lawsuits arising from the practices of defendants AT & T Corporation and Sprint Communications Company, L.P. and non-parties MCI WORLDCOM Network Services, Inc. and MCI WorldCom Communications, Inc. (collectively MCI) of charging their customers to recoup their contributions to the federal Universal Service Fund (USF) program. Plaintiffs are customers or former customers of defendants and MCI who allege that defendants and MCI engaged in an illegal scheme of conspiring to overcharge them for USF-fund surcharges, thereby creating a secret profit center. On December 1, 2003, the court entered a Memorandum and Order in this case that, in relevant part, compelled arbitration of plaintiff Thomas F. Cummings' claims in this case. *See generally In re Universal Serv. Fund Tel. Billing Practices Litig.*, 300 F.Supp.2d 1107, 1129-37 (D.Kan.2003). This matter is presently before the court on plaintiff Cummings' motion for relief from the court's order compelling arbitration or, in the alternative, for limited discovery (doc. 393). For the reasons explained below, this motion is denied.

BACKGROUND

According to the allegations in plaintiffs' Second Consolidated and Amended Class Action Complaint (the complaint), plaintiff Cummings was at all relevant times a non-California AT & T residential customer. He was originally intended to serve as a named plaintiff representing all non-California***1137** AT & T residential customers if the court had not compelled arbitration of his claims and, additionally, certified such a class. The court, however, did neither of those things. Instead, the court compelled arbitration of plaintiffs' Cummings' claims against defendants, thus rendering the class certification issue moot with respect to his claims. In the court's order compelling arbitration, the court noted that the arbitration provision "by its plain terms bans class actions as well as arbitration on a class-wide basis" and the court stated that it would "enforce the parties' arbitration agreement precisely as it is written." *Id.* at 1137-38.

Nearly ten months after the court's order, on October 25, 2004, plaintiff Cummings filed a demand for arbitration with the American Arbitration Association (the AAA). Notwithstanding the court's order compelling arbitration of plaintiff Cummings' claims on a non-class basis, plaintiff Cummings' arbitration demand sought class-wide arbitration of all non-California AT & T residential customers' claims. Subsequently, AT & T and plaintiff Cummings submitted letters to the AAA regarding whether the arbitration should proceed under the AAA's Supplementary Rules for Class Arbitration. On December 29, 2004, after consideration of the parties' positions on this issue, a case manager with the AAA advised the parties as follows:

> [I]n the absence of an agreement by the parties or a clarification from the court, the Association will proceed with administration pursuant to ... the Supplementary Rules for Class Arbitrations, pursuant to the request made on the Demand for Arbitration dated October 25, 2004. *The parties may wish to raise this issue, upon appointment of the arbitrator.*
>
> (Emphasis added.)

370 F.Supp.2d 1135, 2005-2 Trade Cases P 75,008
(Cite as: 370 F.Supp.2d 1135)

On March 7, 2005, counsel for AT & T sent a letter to the AAA's chief executive officer. This letter is at the heart of the current motion. In the letter, counsel for AT & T asked the AAA's CEO to overrule the AAA's staff decision to administer plaintiff Cummings' arbitration demand under the Supplementary Rules for Class Arbitration. The letter argued that doing so was contrary to the AAA's Policy on Class Arbitrations. The letter reasoned that one of AAA's chief competitors, JAMS, had recently adopted a policy of disregarding contractual provisions that expressly prohibit class actions and that, "[a]s a result of the JAMS policy, it appears that ADR users are changing their clauses to delete JAMS as the chosen forum." By comparison, counsel for AT & T stated that, according to his knowledge, "the AAA has not seen an exodus of ADR users similar to that experienced by JAMS, because the [AAA's] Class Arbitration Policy makes it clear that the AAA will respect a class action prohibition unless a court rules otherwise." The letter concluded that if the AAA is not going to follow its own policy then "it should withdraw that policy and issue a clear and accurate statement as to its real policy, so that ADR users can make an informed decision whether to include the AAA in their clauses."

On March 15, 2005, plaintiff Cummings filed the current motion in which he characterizes the letter as threatening the AAA with a mass exodus of ADR users if the AAA did not reverse its position regarding whether plaintiff Cummings' arbitration would be administered on a class basis. The letter further implicitly threatened the AAA with the loss of AT & T's future business. Plaintiff Cummings argues that this threat was improperly geared toward economic considerations, not the merits of the issue. Consequently, this destroyed the AAA's impartiality and the court will ultimately be unable to enforce***1138** the arbitration award because it was procured by undue means.

On March 18, 2005, which was only eleven days after AT & T sent the letter to the AAA's CEO, the AAA sent the parties another letter reversing the AAA's prior position. The letter explained that the AAA had reviewed this court's order compelling arbitration which stated that the court was enforcing "the parties' arbitration agreement precisely as it is written." Thus, "contrary to the [AAA]'s prior understanding, it does not appear that Mr. Cummings' class claims have been directed to arbitration by the Court."

ANALYSIS

[1] For the reasons explained below, the court does not condone the manner in which counsel for AT & T handled this matter. Nonetheless, having compelled arbitration and stayed plaintiff Cummings' claims, the court is not authorized by the Federal Arbitration Act, 9 U.S.C. §§ 1-16(FAA), to interfere with the ongoing arbitration proceeding. Plaintiff Cummings' arguments that AT & T's threat destroyed the impartiality of the AAA and will result in an arbitration award procured by undue means must wait until this court reviews the arbitral award. Accordingly, plaintiff Cummings' motion is denied.

[2] As a threshold matter, the court rejects AT & T's argument that this court does not have jurisdiction to consider plaintiff Cummings' interlocutory arguments. The complaint invoked this court's diversity, federal question, and supplemental jurisdiction. The circumstances that gave rise to that jurisdiction are unchanged because the court did not dismiss plaintiff Cummings' claims when it compelled arbitration. Nothing in the Federal Arbitration Act grants or ousts the district court's jurisdiction over arbitrable claims. *Meyer v. Dans un Jardin, S.A.*, 816 F.2d 533, 538-39 (10th Cir.1987); *see also LaPrade v. Kidder Peabody & Co.*, 146 F.3d 899, 900 (D.C.Cir.1998) (district court's jurisdiction derived from the original diversity suit, not the FAA). The FAA simply directs the court to "stay the trial of the action until such arbitration has been had." 9 U.S.C. § 3. Thus, the court retains continuing jurisdiction over plaintiff Cummings' claims against AT & T.

[3][4] Nonetheless, with that being said, the FAA does not authorize the court to interfere with ongoing arbitration proceedings by making interlocutory rulings concerning the arbitration. Under the FAA, the court's role is limited to determining, first, the issue of whether arbitration should be compelled. *Id.* §§ 3-4. If so, then the court may next confirm, vacate, or modify the award. *Id.* § 9-11. The court may not, however, interfere with the ongoing arbitration proceeding. *See LaPrade*, 146 F.3d at 903 (the FAA contemplates that courts should not interfere with arbitrations by making interlocutory rulings); *Smith, Barney, Harris Upham & Co. v. Robinson*, 12 F.3d 515, 520-21 (5th Cir.1994) (as long as a valid arbitration agreement exists and the specific dispute falls within the substance and scope of that agreement, the court may not interfere with the

arbitration proceedings); *Miller v. Aaacon Auto Transport, Inc.,* 545 F.2d 1019, 1020-21 (5th Cir.1977) (per curiam) (once the court is satisfied that the dispute is referable to arbitration, the court must allow the arbitration to proceed in accordance with the terms of the parties' agreement). This principle is grounded in the notion that allowing such interference would frustrate the FAA's purpose to ensure "that the arbitration procedure, when selected by the parties to a contract, [is] speedy and not subject to delay and obstruction in the courts." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.,* 388 U.S. 395, 404, 87 S.Ct. 1801, 18 L.Ed.2d ***1139** 1270 (1967); *see also Moses H. Cone Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1, 22, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983) (stating that the purpose of the FAA is to "move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible").

This does not mean that upon entering the order compelling arbitration the court must entirely refrain from acting again until the arbitration award is finalized. The court may enforce its order compelling arbitration by, for example, imposing sanctions against a party who contradicts the court's order compelling arbitration, *see generally LaPrade,* 146 F.3d at 899 (district court did not abuse its discretion by imposing sanctions against a party who was ordered to arbitrate the dispute because that party clearly contradicted the order by going to state court to seek an order staying the arbitration without informing the state court about the federal district court's order compelling arbitration), or revoking the order if the party who sought to compel arbitration is "in default in proceeding with such arbitration," 9 U.S.C. § 3; *see also Miller,* 545 F.2d at 1020-21 (noting the court may vacate a stay pending arbitration if the defendant hinders the progress of arbitration). The court may also make sure that its original order compelling arbitration was correct by, for example, reconsidering the ruling to ensure that it was not "improvidently granted." *Miller,* 545 F.2d at 1020. An order compelling arbitration, however, cannot have been improvidently granted based upon the manner in which the arbitral forum is handling the dispute because those types of issues arise after the court has already determined the threshold issue of arbitrability. The FAA requires the court to address the propriety of the manner in which the arbitral forum handles the dispute by virtue of judicial review of the arbitral award. *See, e.g.,* 9 U.S.C. § 10 (authorizing the district court to vacate an arbitration award that was procured by corruption, fraud, or undue means; where there was evident partiality or corruption in the arbitrator; where the arbitrator was guilty of misconduct or misbehavior, or where the arbitrator exceeded his or her powers); *see generally, e.g., Gulf Guar. Life Ins. Co. v. Connecticut Gen.,* 304 F.3d 476 (5th Cir.2002) (holding the district court committed reversible error by striking a particular individual from serving as an arbitrator; evaluation of arbitrator bias must wait until after the award); *Vestax Securities Corp. v. Desmond,* 919 F.Supp. 1061, 1076 (E.D.Mich.1995) (court would not grant interlocutory relief based on an allegation of institutional bias and misconduct by the arbitral forum).

In this case, then, the court is unpersuaded that it has any authority under the FAA to grant plaintiff Cummings the type of interlocutory relief that he seeks by interfering with the AAA's decision regarding whether the dispute should be arbitrated under the AAA's Supplementary Rules for Class Arbitration. Plaintiff Cummings' arguments that AT & T's threat destroyed the impartiality of the AAA and will result in an arbitration award procured by undue means must wait until this court reviews the arbitral award. The cases cited by plaintiff Cummings do not persuade the court otherwise. The only one of those cases that even arguably involved interference with an ongoing arbitration is *Metropolitan Property & Casualty Insurance Co. v. J.C. Penney Casualty Insurance Co.,* 780 F.Supp. 885 (D.Conn.1991). That case, however, involved a vastly different procedural posture in which the district court was evaluating its diversity jurisdiction on removal and, in doing so, determined whether an allegedly partial arbitrator was more than a nominal party whose in-state presence defeated jurisdiction. In evaluating the ***1140** issue of whether the court should interfere with an ongoing arbitration proceeding by disqualifying the arbitrator, the district court touched upon some of the issues presented in this case. The court finds the reasoning of the case to be unpersuasive for numerous reasons, many of which are perhaps attributable to the particular procedural posture of that case. In any event, suffice it to say that the court is not bound by the district court's holding in that case and, more importantly, is unwilling to adopt that reasoning because it would require the court to go beyond the plain language of the FAA and also to disregard appellate-level case law, discussed previously, to the contrary.

Although the court is without power to interfere

with the ongoing arbitration proceeding at this time, the court does wish to observe briefly that it flatly rejects AT & T's argument that its conduct before the AAA was entirely appropriate. It appears to the court that the AAA's staff's original decision was consistent with the AAA's Policy on Class Arbitrations. That policy states, in relevant part, that the AAA will administer demands for class arbitration pursuant to its class arbitration rules if the underlying agreement is silent with respect to class claims, but that the AAA will not accept for administration "demands for class arbitration where the underlying agreement prohibits class claims ... unless an order of a court directs the parties to the underlying dispute *to submit their dispute to an arbitrator or to the Association.*" Policy on Class Arbitrations, ¶ 2 (emphasis added). This policy plainly states that the AAA will accept a demand for arbitration, even if the underlying contract prohibits class arbitration, if there is a court order compelling arbitration of the dispute. The policy does not explicitly state that the party seeking to compel arbitration also needs to obtain a court order that the prohibition on class actions is unenforceable.

It also appears to the court that the AAA's staff's decision was consistent with the AAA's Supplementary Rules for Class Arbitration, which contemplate that the arbitrator will decide the issue of the enforceability of a class action prohibition such as the one contained in AT & T's contract with plaintiff Cummings. As a threshold matter, the Supplementary Rules for Class Arbitration apply "where a party submits a dispute to arbitration on behalf of or against a class or purported class" and also "whenever a court refers a matter pleaded as a class action to the AAA for administration." Supplementary Rules for Class Arbitrations § 1(a) (effective October 8, 2003). In this case, plaintiff Cummings submitted his dispute to arbitration on behalf of a purported class and the original matter in this court was pleaded as a class action. Thus, it appears that the AAA's staff was again following these rules when it advised the parties that the matter would be administered under the class arbitration rules. The Supplementary Rules for Class Arbitration provide that the arbitrator will then decide whether the arbitration will proceed on behalf of a class. *Id.* § 3 (requiring the arbitrator to "determine as a threshold matter ... whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class"). Thus, the fact that the AAA's staff made a preliminary determination to administer the action under the Supplementary Rules for Class Arbitrations did not mean that the dispute would necessarily proceed through arbitration as a class proceeding. Rather, the enforceability of the prohibition on class actions was to be determined by the arbitrator. Notably consistent with this policy was the AAA's staff's December 29, 2004, letter to the parties which pointed out to the parties that they could raise this issue again upon appointment of the arbitrator.

***1141** Moreover, it appears highly likely that the arbitrator would have enforced the prohibition on class arbitration if the arbitrator had been given the opportunity to do so. As the court ruled previously, the underlying contract clearly prohibits class-wide arbitration. Furthermore, the Supplementary Rules for Class Arbitration provide that whenever a court has resolved a matter that would otherwise be decided by an arbitrator, "the arbitrator shall follow the order of the court." *Id.* § 1(c). AT & T, however, did not allow the AAA the opportunity to follow its own rules and allow the arbitrator to resolve this issue. The court is not opining on plaintiff Cummings' undue means argument. As explained previously, the court cannot resolve that issue until this court is confronted with an arbitration award to review. The court observes, however, that the appearance has been created that counsel for AT & T used AT & T's economic power to successfully persuade the AAA to prematurely bend its own rules. The court can certainly understand that such tactics may legitimately have aroused suspicions by plaintiff Cummings.

Lastly, because the court has concluded that the FAA does not give this court the power to interfere with the arbitration proceedings, discovery on this issue is likewise unwarranted.

IT IS THEREFORE ORDERED BY THE COURT that plaintiff Cummings' motion for relief from order compelling arbitration or, in the alternative, for limited discovery (doc. 393) is denied.

IT IS FURTHER ORDERED that AT & T's motion for leave to cite additional authority (doc. 444) is denied as moot. The court notes that in resolving plaintiff Cummings' motion the court did not consider the information contained in AT & T's motion for leave to cite additional authority.

D.Kan.,2005.
In re Universal Service Fund Telephone Billing Prac-

tices Litigation
370 F.Supp.2d 1135, 2005-2 Trade Cases P 75,008

END OF DOCUMENT

Exhibit 24

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July 28, 2011

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Dear Ms. Parvey and Ms. Horton:

I am writing regarding the following 26 Demands for Arbitration that Bursor & Fisher, P.A. submitted to the American Arbitration Association ("AAA") on July 21, 22, 25, and 27 2011:

> *Barrett v. AT&T, Inc., et al.*; *Bernardi v. AT&T, Inc., et al.*; *Lea v. AT&T, Inc., et al.*; *Luciano v. AT&T, Inc., et al.*; *Mendoza v. AT&T, Inc., et al.*; *Newman v. AT&T, Inc., et al.*; *O'Neal v. AT&T, Inc., et al.*; *Pope v. AT&T, Inc., et al.*; *Princi v. AT&T, Inc., et al.*; *Shroeder v. AT&T, Inc., et al.*; *Ubiera v. AT&T, Inc., et al.*; *Kostoff v. AT&T, Inc., et al.*; *Bushman v. AT&T, Inc., et al.*; *Haensel v. AT&T, Inc., et al.*; *Gibbons v. AT&T, Inc., et al.*; *Justak v. AT&T, Inc., et al.*; *Fisher v. AT&T, Inc., et al.*; *Komlossy v. AT&T, Inc., et al.*; *Smith v. AT&T, Inc., et al.*; *Marlborough v. AT&T, Inc., et al.*; *Keller v. AT&T, Inc., et al.*; *Monteverde v. AT&T, Inc., et al.*; *Hidalgo v. AT&T, Inc., et al.*; *Gonnello v. AT&T, Inc., et al.*; *Rodriguez v. AT&T, Inc., et al*; and *Colosimo v. AT&T, Inc. et al.*.[1]

As described in more detail below, the AAA should not administer these Demands because they violate AT&T Mobility's arbitration clause, the AAA's rules, and seek to obstruct the federal and state review of the proposed AT&T Mobility LLC and T-Mobile USA, Inc. merger.[2] These demands each request that the arbitrators either (1) enjoin the $39 billion merger between AT&T Mobility LLC and T-Mobile USA, Inc. or (2) impose a series of detailed, and extremely burdensome, restrictions on that merger. These demands for arbitration and claims for relief are wholly unjustified on the merits, violate the parties' arbitration clause and the governing AAA rules, and constitute an abuse of the arbitration process for the following reasons:

- The Demands constitute **requests for class-wide injunctive relief** in violation of the parties' arbitration agreements.

- The Demands **violate the AAA's Class Arbitration Policy**, and therefore are **not subject to AAA administration**.

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[1] This letter also applies to any additional Demands for Arbitration of the same nature that Bursor & Fisher might submit.

[2] This is true even if the defect that Ms. Parvey identified in her letter of July 27 were remedied.

- The Demands would **obstruct federal and state regulatory review** of the proposed merger.[3]

Accordingly, the AAA should refuse to administer these Demands for Arbitration.

1. <u>The Demands have been filed in violation of AT&T Mobility's arbitration provision.</u>

AT&T Mobility's arbitration clause has a very clear limitation on the scope of injunctive relief that a customer may pursue in arbitration. The provision (attached as Exhibit A to this letter) specifies:

> The arbitrator may award injunctive relief **only in favor of the individual party seeking relief** and **only to the extent necessary to provide relief warranted by that party's individual claim**. YOU AND AT&T AGREE THAT EACH MAY BRING CLAIMS AGAINST THE OTHER ONLY IN YOUR OR ITS INDIVIDUAL CAPACITY, AND NOT AS A PLAINTIFF OR CLASS MEMBER IN ANY PURPORTED CLASS OR REPRESENTATIVE PROCEEDING. Further, unless both you and AT&T agree otherwise, the arbitrator may not consolidate more than one person's claims, and **may not otherwise preside over any form of a representative or class proceeding**. (Emphasis added.)

Therefore, a customer may seek injunctive relief under AT&T Mobility's arbitration clause "only in favor of the individual party seeking relief and only to the extent necessary to provide relief warranted by that party's individual claim." The clause thus expressly precludes all forms of class and representative actions, including actions seeking class-wide or representative injunctive relief—*i.e.*, an injunction whose effect would extend beyond the individual initiating the arbitration.

The Demands violate this fundamental limitation. Indeed, it is difficult to imagine a more flagrant violation of this restriction on the scope of injunctive relief: the Demands call for extraordinarily broad, all-encompassing relief that is the equivalent of a remedy on behalf of well over 120 million class members. It is clear on the face of these virtually-identical 228-page Demands that they seek the broadest possible relief for all current AT&T Mobility and T-Mobile customers, all potential customers of those companies, competing telecommunications companies, and the general public. In each Demand, the Claimant alleges that he or she is an AT&T Mobility subscriber and asks that an arbitrator enter an injunction under the federal Clayton Antitrust Act prohibiting the proposed merger between AT&T Mobility and T-Mobile. *See, e.g.*, *Ubiera* Demand for Arbitration ¶ 334.

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[3] Although the Demands should not be accepted for administration, if they were so accepted, in each case appointment of a panel of three arbitrators may be required because the Demands involve claims that are self-evidently large and complex. *See* AAA, Commercial Arbitration Rules and Mediation Procedures § L-2.

The Claimants alternatively request injunctions imposing a laundry list of conditions on the merger that would affect all of AT&T Mobility's and T-Mobile's current and future customers, as well as a wide swath of the telecommunications industry, including:

- requiring the divestiture of spectrum licenses, network infrastructure, subscribers, money, and technology (*id.* ¶¶ 340, 370-78);

- ordering the combined entity to offer customers rate plan "packages" that are "similar to those now offered by T-Mobile" (*id.* ¶ 340);

- forcing the combined entity to allow competitors to access its facilities and lease data roaming bandwidth at rates set by the arbitrator (*id.* ¶¶ 341-43, 352-54);

- barring the combined entity from contracting for exclusivity with cell phone suppliers, preventing any compatible device from connecting to its network, or financing the implementation of 4G LTE services or equipment with available government subsidies (*id.* ¶¶ 344-51, 383-84);

- requiring the combined entity to extend all existing interconnection and special access agreements with other carriers and to forbear from retiring any existing copper facilities for five years (*id.* ¶¶ 359-68);

- forbidding it from bundling certain wireline and wireless products or from increasing prices for transit services for five years (*id.* ¶¶ 355-58, 369);

- ordering it to publish all roaming agreements with competitors and "turn [them] over" to the Federal Communications Commission ("FCC") to set rates (*id.* ¶¶ 379-82); and

- requiring it to provide unbundled wholesale DSL service to competitors at set rates (*id.* ¶¶ 385-86).

Clearly, without question, this is not injunctive relief "only in favor of the individual party seeking relief . . . necessary to provide relief warranted by that party's individual claim." Rather, the Claimants are seeking to pursue a de facto class or representative action with class-wide relief. For example, the fact that they seek to have the arbitrator order the FCC to set certain rates—notwithstanding that the FCC is not (and could not be) a party to these proceedings—is proof positive that each Demand does not seek relief limited to the individual claimant but instead relief that would extend to every member of an extremely large class comprised of the nearly 120 million customers of the two companies, potential customers, the combined entities' competitors, and the general public. The breadth of the claim for relief is further demonstrated by the fact that a number of the injunctions that each Demand seeks pertain to AT&T services—such as DSL and wireline service—that the Claimants do not even allege that they themselves use.

The Demands therefore clearly violate AT&T Mobility's arbitration provision, which expressly prohibits an arbitrator from ordering relief that would extend beyond the claimant and affect a group or class of customers, and bars arbitrators from presiding over "any form of a representative or class proceeding."

The Claimants cannot circumvent the fundamental limitations of this provision simply by omitting the terms "class" or "representative" from their Demands. The substance of the claims,

not the labels attached by the Claimants, is determinative. These Demands plainly qualify as class proceedings by virtue of the type of relief that the Claimants seek—relief that would extend broadly to all current and future AT&T Mobility and T-Mobile customers and the general public. Indeed, if the Claimants were successful in their request, that injunction would preclude tens of millions of other affected parties who support the merger from realizing the transaction's benefits. That situation, where the effect of injunctive relief is not limited to the parties before the tribunal but instead reaches an entire class of individuals and businesses—here, a class in the hundreds of millions—is a hallmark of a class or other form of representative action.

Such a far reaching injunction is clearly impermissible under the Claimants' arbitration agreements. The clause limits the injunctive relief that may be pursued in arbitration. For example, if an individual customer alleged that AT&T had raised the rates charged for his service without providing him with the notice required by our Wireless Customer Agreement, he could seek an injunction requiring that the company cease charging ***him*** the higher rates without providing the required notice. But he could not seek an injunction mandating that the company roll back its rates with respect to its ***entire hundred-million customer base***—that would be class-wide relief prohibited by AT&T Mobility's arbitration clause. Similarly, a claimant who alleges that AT&T Mobility does not provide him with the service he requires might seek an injunction requiring the company to release him from ***his*** contractual commitments to AT&T Mobility. But he could not seek an injunction requiring that AT&T Mobility permit ***all*** of its customers to terminate their contracts. The same is true here. These Claimants cannot pursue an injunction to preclude the merger from going forward based on cookie-cutter Demands all alleging the same alleged "harms" resulting from the proposed merger. That kind of all-encompassing, class-wide claim—one that that would extend broadly to all AT&T Mobility and T-Mobile customers as well as millions of other individuals and companies—cannot be arbitrated.

Moreover, the scale and nature of the issues implicated by the Claimants' Demands reflect that these Demands seek to initiate proceedings equivalent to class actions. The Claimants seek to replicate in each of these arbitration proceedings the detailed assessments of the AT&T Mobility/T-Mobile merger now being conducted by the FCC and the U.S. Department of Justice Antitrust Division. AT&T alone has submitted more than five million pages of material and thirteen substantial affidavits to these regulators—and numerous other interested parties have made voluminous submissions as well. These facts confirm the broad impact on hundreds of millions of people and entities of the relief sought by the Claimants—the same relief sought by parties opposing the merger in the ongoing regulatory proceedings. That class-wide relief is at the opposite end of the spectrum from the very limited injunctive relief "only in favor of the individual" claimant that is authorized by the arbitration agreement.

Because these Demands seek to arbitrate claims for relief that are barred by the parties' arbitration agreements, the AAA should refuse to administer them.[4]

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[4] The Claimants cite language from the summary of AT&T Mobility's arbitration provision stating the general proposition that "[a]rbitrators can award the same relief and damages that a court can award." *Ubiera* Demand for Arbitration ¶ 26. But although they partially quote the very next sentence of the summary—which states that "[a]ny arbitration under this Agreement will take place on an individual basis; class arbitrations and class actions are not permitted"—they fail to recognize its import. That sentence plainly references the language we have cited above from Paragraph 2.2(6) of the arbitration agreement, which expressly precludes

2. The Demands violate the AAA's policy on class arbitrations.

The Demands also should be rejected for administration—before an arbitrator is appointed—because they violate the AAA's policy on class arbitrations.

The AAA policy provides that the AAA "**is not currently accepting for administration** demands for class arbitration where the underlying agreement prohibits class claims, consolidation or joinder, unless an order of a court directs the parties to the underlying dispute to submit any aspect of their dispute involving class claims, consolidation, joinder or the enforceability of such provisions, to an arbitrator or to the Association." AAA Policy on Class Arbitrations, at http://www.adr.org/Classarbitrationpolicy (emphasis added). In other words, when a class arbitration is filed with the AAA, the AAA refuses to docket it unless either the arbitration agreement itself or a court order authorizes the AAA to do so.

These Demands directly violate this policy.

- First, the plain text of the parties' arbitration agreement prohibits class or representative claims, as described above.

- Second, there is no "order of a court" that "directs" AT&T Mobility and any of the Claimants "to submit any aspect of their dispute involving class claims * * * to an arbitrator or to the [AAA]." AAA Policy on Class Arbitrations, at http://www.adr.org/Classarbitrationpolicy.

- Third, as discussed above, the Demands seek class-wide relief, requesting an injunction whose effect would not be limited to the Claimants themselves, but instead would impact over 120 million AT&T Mobility and T-Mobile customers, future customers of those companies, industry competitors, government regulators, and the general public. The AAA's policy requires it to determine whether or not a particular Demand constitutes a "demand[] for class arbitration"—so that the AAA may decide whether a demand may be "accepted for administration"—and there can be no question that the nature of the relief sought by the Claimants places their Demands squarely within the class arbitration category.

These Demands thus fail to comply with the AAA's Class Arbitration policy. Under the AAA's own policy, therefore, the AAA cannot "accept[]" them "for administration." *Id.* The AAA therefore should refuse to docket these Demands or accept them for administration.[5]

3. The Demands ask for a AAA tribunal to short-circuit regulatory review of the proposed merger between AT&T Mobility and T-Mobile USA, Inc.

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an arbitrator from awarding broad injunctive relief, and instead states that "[t]he arbitrator may award declaratory or injunctive relief **only** in favor of the individual party seeking relief and **only to the extent necessary** to provide relief warranted by that party's individual claim." Ex. A (emphasis added). Any inference the Claimants might try to draw from the prefatory language they quote from the summary of the arbitration agreement unquestionably is dispelled by the specific limitations on the arbitrator's authority contained in Paragraph 2.2(6) of the provision.

[5] Because the docketing of these Demands would conflict with the AAA's Class Arbitration Policy, we have sent a copy of this letter to the AAA's General Counsel.

The FCC, the U.S. Department of Justice, and certain state regulators are currently reviewing the merger. Under AT&T Mobility's arbitration clause, the Claimants here can bring all of their challenges to the merger to the attention of the FCC and DOJ. Instead, however, Claimants have attempted to pursue these arbitrations and have the AAA duplicate these ongoing regulatory proceedings—a motivation made apparent by the fact that the Demands have been cobbled together—in some places, copied wholesale—from submissions to the FCC by opponents of the merger. In fact, all but one of the exhibits to each Demand are declarations of Sprint Nextel employees and economists that Sprint Nextel submitted to the FCC. A key difference, of course, is that the more than 10,000 interested parties that have provided submissions to the FCC—both in support of and opposing the merger—would not be parties to the proposed arbitration proceeding.

It is patently clear that these Demands are being brought in an effort to disrupt the orderly regulatory process by having the arbitrators in any one of these actions enter an order either enjoining the merger or imposing conditions. As explained above, that kind of sweeping injunctive relief both would vastly exceed the arbitrators' contractual authority and would be contrary to the AAA's policy on class arbitration. Moreover, if arbitrators were to issue such an unlawful injunction, it would have the effect of preempting these regulatory reviews established by Congress and, even more importantly, ignoring the views of the thousands of parties participating in the regulatory processes, including individual citizens, issue advocacy organizations, business organizations, and labor unions. These Demands that the AAA administer multiple proceedings in order to trump federal regulatory proceedings, based on warmed-over submissions by other parties, including competitors, to those federal regulators, finds no support whatsoever in the parties' agreements to arbitrate their own disputes on an individual basis.

* * * *

In short, for the reasons we have discussed, the AAA should refuse to administer these Demands. The Claimants would remain free, of course, to file new Demands that seek the types of individual relief actually authorized by AT&T's arbitration provision, accompanied by the applicable filing fee. They also remain free to challenge the merger by participating in the ongoing government regulatory review process.

Mr. Bursor asserts in his July 26, 2011 letter that it is improper for AT&T to bring these deficiencies in these Demands to the AAA's attention instead of waiting until arbitrators are appointed in each case. He is mistaken. It is the AAA's policy to refuse to administer arbitrations that violate these requirements; it would therefore be a deviation from those rules to appoint arbitrators to decide these issues. Moreover, the AAA has every right to know that it is being asked to administer arbitrations that would disrupt state and federal regulatory proceedings.

No rule—AAA or otherwise—forbids a party from alerting the administrative staff of a tribunal to a claimant's failure to comply with administrative requirements, such as, in this instance, the payment of filing fees and the AAA's Class Arbitration policy. AT&T has not communicated ex parte, but rather has provided Mr. Bursor with a copy of the correspondence

simultaneously with its submission to the AAA. Mr. Bursor is, of course, free to try to explain to the AAA why he believes the Demands comply with the AAA's rules.[6]

Thank you for your courtesy and attention to this matter.

Sincerely,

Neal S. Berinhout
Associate General Counsel
AT&T Mobility LLC

cc: Scott Bursor
Eric Tuchmann, General Counsel, AAA

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[6] In his letter, Mr. Bursor suggests that a court criticized AT&T for contacting AAA staff regarding a Demand that violated the AAA's Class Arbitration policy. The case is inapposite here. In *In re Universal Service Fund*, 370 F. Supp. 2d 1135 (D. Kan. 2005), the court noted that both parties "submitted letters to the AAA regarding whether the arbitration should proceed under the AAA's Supplementary Rules for Class Arbitration." *Id.* at 1137. The court did not question the propriety of those submissions to the AAA Case Manager, who initially decided to refer the issue to the arbitrator but subsequently decided that the arbitrations had been submitted in violation of an earlier version of the AAA's Class Arbitration policy. *See id.* at 1137-38. Accordingly, there is nothing improper about AT&T's submission of correspondence to the AAA's Director of Case Filing Services and Intake Coordinator (as Case Managers have not yet been selected).

Mr. Bursor points to a passage in the court's opinion stating that AT&T Corporation (a wireline provider that at the time was a separate and distinct entity from AT&T Mobility's predecessor) allegedly "threatened the AAA with the loss of AT&T's future business." 370 F. Supp. 2d at 1137-38. Whatever may have happened in that case, no such threat has been made here. To the contrary, AT&T's designation of the AAA as the administrator of arbitrations under AT&T Mobility's arbitration provision does not depend in any way on the AAA's decision regarding the propriety of administering these Demands.

In addition to Mr. Bursor's unfounded and unconstructive attacks on AT&T's integrity, he levels personal attacks on me. His embrace of distortion and false innuendo is unfortunate but also irrelevant, and warrants no further response.

Close

2.1 Dispute Resolution By Binding Arbitration

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PLEASE READ THIS CAREFULLY. IT AFFECTS YOUR RIGHTS.

Summary:
Most customer concerns can be resolved quickly and to the customer's satisfaction by calling our customer service department at 1-800-331-0500. **In the unlikely event that AT&T's customer service department is unable to resolve a complaint you may have to your satisfaction (or if AT&T has not been able to resolve a dispute it has with you after attempting to do so informally), we each agree to resolve those disputes through binding arbitration or small claims court instead of in courts of general jurisdiction.** Arbitration is more informal than a lawsuit in court. Arbitration uses a neutral arbitrator instead of a judge or jury, allows for more limited discovery than in court, and is subject to very limited review by courts. Arbitrators can award the same damages and relief that a court can award. **Any arbitration under this Agreement will take place on an individual basis; class arbitrations and class actions are not permitted.** For any non-frivolous claim that does not exceed $75,000, AT&T will pay all costs of the arbitration. Moreover, in arbitration you are entitled to recover attorneys' fees from AT&T to at least the same extent as you would be in court.

In addition, under certain circumstances (as explained below), AT&T will pay you more than the amount of the arbitrator's award and will pay your attorney (if any) twice his or her reasonable attorneys' fees if the arbitrator awards you an amount that is greater than what AT&T has offered you to settle the dispute.

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2.2 Arbitration Agreement

(1) AT&T and you agree to arbitrate **all disputes and claims** between us. This agreement to arbitrate is intended to be broadly interpreted. It includes, but is not limited to:

- claims arising out of or relating to any aspect of the relationship between us, whether based in contract, tort, statute, fraud, misrepresentation or any other legal theory;
- claims that arose before this or any prior Agreement (including, but not limited to, claims relating to advertising);
- claims that are currently the subject of purported class action litigation in which you are not a member of a certified class; and
- claims that may arise after the termination of this Agreement.

References to "AT&T," "you," and "us" include our respective subsidiaries, affiliates, agents, employees, predecessors in interest, successors, and assigns, as well as all authorized or unauthorized users or beneficiaries of services or Devices under this or prior Agreements between us. Notwithstanding the foregoing, either party may bring an individual action in small claims court. This arbitration agreement does not preclude you from bringing issues to the attention of federal, state, or local agencies, including, for example, the Federal Communications Commission. Such agencies can, if the law allows, seek relief against us on your behalf. **You agree that, by entering into this Agreement, you and AT&T are each waiving the right to a trial by jury or to participate in a class action.** This Agreement evidences a transaction in interstate commerce, and thus the Federal Arbitration Act governs the interpretation and enforcement of this provision. This arbitration provision shall survive termination of this Agreement.

2) A party who intends to seek arbitration must first send to the other, by certified mail, a written Notice of Dispute ("Notice"). The Notice to AT&T should be addressed to: Office for Dispute Resolution, AT&T, 1025 Lenox Park Blvd., Atlanta, GA 30319 ("Notice Address"). The Notice must (a) describe the nature and basis of the claim or dispute; and (b) set forth the specific relief sought ("Demand"). If AT&T and you do not reach an agreement to resolve the claim within 30 days after the Notice is received, you or AT&T may commence an arbitration proceeding. During the arbitration, the amount of any settlement offer made by AT&T or you shall not be disclosed to the arbitrator until after the arbitrator determines the amount, if any, to which you or AT&T is entitled. You may download or copy a form Notice and a form to initiate arbitration at att.com/arbitration-forms.

(3) After AT&T receives notice at the Notice Address that you have commenced arbitration, it will promptly reimburse you for your payment of the filing fee, unless your claim is for greater than $75,000. (The filing fee currently is $125 for claims under $10,000 but is subject to change by the arbitration provider. If you are unable to pay this fee, AT&T will pay it directly upon receiving a written request at the Notice Address.) The arbitration will be governed by the Commercial Arbitration Rules and the Supplementary Procedures for Consumer Related Disputes (collectively, "AAA Rules") of the American Arbitration Association ("AAA"), as modified by this Agreement, and will be administered by the AAA. The AAA Rules are available online at adr.org, by calling the AAA at 1-800-778-7879, or by writing to the Notice Address. (You may obtain information that is designed for non-lawyers about the arbitration process at att.com/arbitration-information.) The arbitrator is bound by the terms of this Agreement. All issues are for the arbitrator to decide, except that issues relating to the scope and enforceability of the arbitration provision are for the court to decide. Unless AT&T and you agree otherwise, any arbitration hearings will take place in the county (or parish) of your billing address. If your claim is for $10,000 or less, we agree that you may choose whether the arbitration will be conducted solely on the basis of documents submitted to the arbitrator, through a telephonic hearing, or by an in-person hearing as established by the AAA Rules. If your claim exceeds $10,000, the right to a hearing will be determined by the AAA Rules. Regardless of the manner in which the arbitration is conducted, the arbitrator shall issue a reasoned written decision sufficient to explain the essential findings and conclusions on which the award is based. Except as otherwise provided for herein, AT&T will pay all AAA filing, administration, and arbitrator fees for any arbitration initiated in accordance with the notice requirements above. If, however, the arbitrator finds that either the substance of your claim or the relief sought in the Demand is frivolous or brought for an improper purpose (as measured by the standards set forth in Federal Rule of Civil Procedure 11(b)), then the payment of all such fees will be governed by the AAA Rules. In such case, you agree to reimburse AT&T for all monies previously disbursed by it that are otherwise your obligation to pay under the AAA Rules. In addition, if you initiate an arbitration in which you seek more than $75,000 in damages, the payment of these fees will be governed by the AAA rules.

4) If, after finding in your favor in any respect on the merits of your claim, the arbitrator issues you an award that is greater than the value of AT&T's last written settlement offer made before an arbitrator was selected, then AT&T will:

- pay you the amount of the award or $10,000 ("the alternative payment"), whichever is greater; and
- pay your attorney, if any, twice the amount of attorneys' fees, and reimburse any expenses (including expert witness fees and costs) that your attorney reasonably accrues for investigating, preparing, and pursuing your claim in arbitration ("the attorney premium").

If AT&T did not make a written offer to settle the dispute before an arbitrator was selected, you and your attorney will be entitled to receive the alternative payment and the attorney premium, respectively, if the arbitrator awards you any relief on the merits. The arbitrator may make rulings and resolve disputes as to the payment and reimbursement of fees, expenses, and the alternative payment and the attorney premium at any time during the proceeding and upon request from either party made within 14 days of the arbitrator's ruling on the merits.

(5) The right to attorneys' fees and expenses discussed in paragraph (4) supplements any right to attorneys' fees and expenses you may have under applicable law. Thus, if you would be entitled to a larger amount under the applicable law, this provision does not preclude the arbitrator from awarding you that amount. However, you may not recover duplicative awards of attorneys' fees or costs. Although under some laws AT&T may have a right to an award of attorneys' fees and expenses if it prevails in an arbitration, AT&T agrees that it will not seek such an award.

(6) The arbitrator may award declaratory or injunctive relief only in favor of the individual party seeking relief and only to the extent necessary to provide relief warranted by that party's individual claim. **YOU AND AT&T AGREE THAT EACH MAY BRING CLAIMS AGAINST THE OTHER ONLY IN YOUR OR ITS INDIVIDUAL CAPACITY, AND NOT AS A PLAINTIFF OR CLASS MEMBER IN ANY PURPORTED CLASS OR REPRESENTATIVE PROCEEDING.** Further, unless both you and AT&T agree otherwise, the arbitrator may not consolidate more than one person's claims, and may not otherwise preside over any form of a representative or class proceeding. If this specific provision is found to be unenforceable, then the entirety of this arbitration provision shall be null and void.

(7) Notwithstanding any provision in this Agreement to the contrary, we agree that if AT&T makes any future change to this arbitration provision (other than a change to the Notice Address) during your Service Commitment, you may reject any such change by sending us written notice within 30 days of the change to the Arbitration Notice Address provided above. By rejecting any future change, you are agreeing that you will arbitrate any dispute between us in accordance with the language of this provision.

See related links | See all legal

Exhibit 25

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August 1, 2011

By Email Only

Tara Parvey, Director of Case Filing Services
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Re: Leslie Bernardi and AT&T, Inc. and AT&T Mobility LLC
Daniel Lea and AT&T, Inc. and AT&T Mobility LLC
Helen Luciano and AT&T, Inc. and AT&T Mobility LLC
Astrid Mendoza and AT&T, Inc. and AT&T Mobility LLC
Mark Newman and AT&T, Inc. and AT&T Mobility LLC
Jared Pope and AT&T, Inc. and AT&T Mobility LLC
Michael Princi and AT&T, Inc. and AT&T Mobility LLC
Deborah L. Shroeder and AT&T, Inc. and AT&T Mobility LLC
Alexis Ubiera and AT&T, Inc. and AT&T Mobility LLC
Laura Barrett and AT&T, Inc. and AT&T Mobility LLC
Leaf O'Neal and AT&T, Inc. and AT&T Mobility LLC
Shane Bushman and AT&T, Inc. and AT&T Mobility LLC
Linda Haensel and AT&T, Inc. and AT&T Mobility LLC
Shari Kostoff and AT&T, Inc. and AT&T Mobility LLC
Joan Gibbons and AT&T, Inc. and AT&T Mobility LLC
Alexis Justak and AT&T, Inc. and AT&T Mobility LLC
Bryan Rodriguez and AT&T, Inc. and AT&T Mobility LLC
Juan Monteverde and AT&T, Inc. and AT&T Mobility LLC
Richard Gonnello and AT&T, Inc. and AT&T Mobility LLC
Javier Hidalgo and AT&T, Inc. and AT&T Mobility LLC
Emily Komlossy and AT&T, Inc. and AT&T Mobility LLC
Beth Keller and AT&T, Inc. and AT&T Mobility LLC
Chris Marlborough and AT&T, Inc. and AT&T Mobility LLC
Sandra Smith and AT&T, Inc. and AT&T Mobility LLC
Richard Colisimo and AT&T, Inc. and AT&T Mobility LLC

Dear Ms. Parvey and Ms. Horton:

I have Mr. Berinhout's letter of July 28, 2011. That letter does not cite a single statute, case, or AAA rule. Mr. Berinhout's arguments are so lacking in merit they are completely frivolous.

First, Mr. Berinhout argues that AAA should not administer arbitration demands seeking to enjoin a merger under the Clayton Antitrust Act because those types of claims are too large and complex for an arbitral tribunal to handle. The Supreme Court rejected that argument more than 25 years ago when it upheld the arbitrability of antitrust claims. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633-34 (1985) ("[T]he factor of potential complexity alone does not persuade us that an arbitral tribunal could not properly handle an antitrust matter.").

Second, Mr. Berinhout argues the arbitration demands should be rejected because they request "class-wide injunctive relief in violation of the parties' arbitration agreements." 7/28/11 Berinhout letter at 1. That argument is false. Each demand is submitted on behalf of an individual. None seeks classwide relief. And the relief sought, which would enjoin AT&T's takeover of T-Mobile, or alternatively require divestitures or other conditions to the proposed merger, is available to individuals under the Clayton Act. *See, e.g.*, *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 112 (1986) ("[T]he legislative history of § 16 [of the Clayton Act] is consistent with the view that § 16 affords private plaintiffs injunctive relief."); *Cia. Petrolera Caribe, Inc. v. Arco Caribbean, Inc.*, 754 F.2d 404, 427 (1st Cir. 1985) ("[C]ourts have indicated, correctly, that divestiture is available in a private suit challenging unlawful mergers."); *Federal Trade Commission v. International Paper Company*, 241 F.2d 372, 373 (2d Cir. 1956) ("Individuals may also have injunctive relief against threatened loss or damage by a violation of the anti-trust laws under the same conditions and principles as govern the granting of injunctions by courts of equity, that is to say, district courts.") (underlining added). Each of these demands seeks injunctive relief available under the antitrust laws to individual private plaintiffs. None seeks class certification. None asserts any claim, or seeks any relief, on behalf of any class. Indeed, each claimant specifically invokes the class action waiver, as well as the provision of the parties' agreement stating "the arbitrator may not consolidate more than one person's claims, and may not otherwise preside over any form of a representative or class proceeding." *See*, *e.g.*, Barrett Demand for Arbitration ¶ 26, *quoting* Wireless Customer Agreement § 2.2(6). Each claimant insists these arbitrations be conducted as specified in § 2.2(6) of the parties' agreement – with no class actions, and no consolidation of any kind. Each demand must be administered as a separate individual case. And it is the arbitrator in each case that must decide, according to Commercial Arbitration Rule R-53, whether the arbitral tribunal has the authority to grant the injunctive relief sought. *See also Cia. Petrolera Caribe, Inc.*, 754 F.2d at 430 ("A range of injunctive relief is possible and, like all equitable remedies, the relief ordered is highly dependent upon the proof adduced at trial.").

Third, Mr. Berinhout argues the arbitration of these claims "would obstruct federal and state regulatory review of the proposed merger." 7/28/11 Berinhout letter at 2. That argument is wrong. The antitrust laws were designed to permit public and private enforcement actions to proceed in parallel. *See, e.g.*, Thomas D. Morgan, Modern Antitrust Law And Its Origins at 753 (West 1994) ("Mergers are subject to challenge from four directions – the Justice Department,

the Federal Trade Commission, private parties, and state Attorneys General."). These arbitration demands do not seek to obstruct any state or federal regulatory review – they will proceed in parallel without interference, exactly as intended by the antitrust laws. *See, e.g., Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 131 (1969) ("Section 16 [of the Clayton Act] should be construed and applied with … the knowledge that the remedy it affords, like other equitable remedies, is flexible and capable of nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.").

Finally, I want to voice again our strong objection to the continuing campaign by Mr. Berinhout and AT&T to corrupt the AAA arbitration process and to usurp the authority of the arbitrator to decide each of these cases on the merits. Mr. Berinhout's letter-writing campaign is improper and unethical for all of the reasons set forth in my letter of July 26, which remains unrebutted. In past disputes related to the arbitration of claims asserted by AT&T customers, Mr. Berinhout has committed perjury, as determined by a federal court in *Trujillo v. Apple Computer, Inc.*, 578 F.Supp.2d 979, 989 (N.D. Ill. 2008) (detailing Mr. Berinhout's submission of false declarations, misrepresentations and numerous instances of perjury in connection with AT&T's motion to compel arbitration against a customer, which the court described as "vexatious[]" and "bad faith" conduct). And Mr. Berinhout's employer, AT&T, has attempted to intimidate AAA administrators to prevent the fair administration of arbitration claims. *See, e.g., In re Universal Service Fund Tel. Billing Practices Litig.*, 2005 WL 1274381, at *5 (D. Kan. May 27, 2005) ("[C]ounsel for AT&T used AT&T's economic power to successfully persuade the AAA to prematurely bend its own rules."). Mr. Berinhout has no response to these facts other than to describe them as "false innuendo." 7/28/11 Berinhout letter at 7 n.6. On the contrary, the details of these sordid episodes are taken verbatim from published decisions by federal courts. They are neither false, nor innuendo. They are the findings of two federal judges.

Again I want to repeat, in the strongest terms, that neither Mr. Berinhout nor AT&T should be addressing these arguments to AAA administrators or general counsel who have no authority to consider the merits of these cases. Your job is to administer neutrally, and to appoint arbitrators to decide the merits of each individual case. We are watching closely to make sure that happens without further delay.

Very truly yours,

Scott A. Bursor

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Exhibit 26

at&t

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August 2, 2011

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Re: *Barrett v. AT&T, Inc., et al.*; *Bernardi v. AT&T, Inc., et al.*; *Lea v. AT&T, Inc., et al.*; *Luciano v. AT&T, Inc., et al.*; *Mendoza v. AT&T, Inc., et al.*; *Newman v. AT&T, Inc., et al.*; *O'Neal v. AT&T, Inc., et al.*; *Pope v. AT&T, Inc., et al.*; *Princi v. AT&T, Inc., et al.*; *Shroeder v. AT&T, Inc., et al.*; *Ubiera v. AT&T, Inc., et al.*; *Kostoff v. AT&T, Inc., et al.*; *Bushman v. AT&T, Inc., et al.*; *Haensel v. AT&T, Inc., et al.*; *Gibbons v. AT&T, Inc., et al.*; *Justak v. AT&T, Inc., et al.*; *Fisher v. AT&T, Inc., et al.*; *Komlossy v. AT&T, Inc., et al.*; *Smith v. AT&T, Inc., et al.*; *Marlborough v. AT&T, Inc., et al.*; *Keller v. AT&T, Inc., et al.*; *Monteverde v. AT&T, Inc., et al.*; *Hidalgo v. AT&T, Inc., et al.*; *Gonnello v. AT&T, Inc., et al.*; *Rodriguez v. AT&T, Inc., et al*; and *Colosimo v. AT&T, Inc. et al.*[1]

Dear Ms. Parvey and Ms. Horton:

I am writing to respond to Mr. Bursor's August 1, 2011 letter, which is long on threats and false statements but very short on substance about the AAA's Class Arbitration Policy and AT&T's arbitration agreement, both of which require the AAA to refuse to initiate arbitration proceedings based on the above-referenced Demands.

1. Mr. Bursor falsely states (at page 2) that my July 28, 2011 letter failed to cite any AAA rule requiring a decision by the AAA prior to the commencement of these arbitrations. To the contrary, my letter expressly cited and discussed (at pages 1 and 5) the AAA's Class Arbitration Policy. Under that policy, when the parties' arbitration agreement "prohibits class claims" and no "order of a court" compels arbitration involving class claims to proceed, the AAA "is not currently accepting for administration demands for class arbitration." AAA Policy on Class Arbitrations, http://www.adr.org/Classarbitrationpolicy.

The commentary explains that "[i]t has been the practice of the [AAA] since its Supplementary Rules for Class Arbitrations were first enacted to require a party seeking to bring a class arbitration under an agreement that on its face prohibits class actions ***to first seek court guidance*** as to whether a class arbitration may be brought under such an agreement." *Id.* (emphasis added). Accordingly, "***until a court decides that it is***

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[1] This letter also applies to any additional Demands for Arbitration of the same nature that Bursor & Fisher might submit.

appropriate to do so," the AAA will neither "***commence administration*** of a case nor . . . ***refer*** such a matter ***to an arbitrator***." *Id.* (emphases added).

There is no dispute that AT&T's arbitration agreement does not permit "class arbitration and class actions," and expressly provides that "the arbitrator ... may not ... preside over any form of a representative or class proceeding." The issue here is whether these Demands are for injunctive relief **only** in favor of the individual Claimants and **only** to the extent necessary to provide individual relief to the Claimants, or for injunctive relief in favor of a class of individuals – the Claimants – who are opposed to and want to bar the AT&T/T-Mobile merger. If the AAA staff determines that these Demands essentially seek class arbitration, then the AAA policy dictates that these Demands are **not** eligible for administration. If, however, the AAA staff is in doubt as to whether these Demands seek class arbitration prohibited by our arbitration agreement, then the AAA policy requires that these Claimants first seek court guidance as to whether the proposed arbitration is permitted under the agreement.

Mr. Bursor's repeated assertions that it is improper for a party to explain to the AAA how the rule applies in this particular case are baseless, especially because he also is freely able to explain his position to the AAA. Because the AAA staff must determine whether to administer a particular arbitration, there is no reason why the staff should not be informed by the parties' views (to the extent the parties wish to provide them) before making that determination.[1]

2. Mr. Bursor insists that, because the Claimants' Demands do not use the term "class arbitration" and because the relief sought would be available to an individual in court, the Demands are permitted under the arbitration agreement and the AAA policy does not apply. That is wrong.

To begin with, the relief sought by the Demands plainly is forbidden by the arbitration agreement, which bars both "class" and "representative" actions and further explains this limitation by permitting injunctive relief "only in favor of the individual party seeking relief" and "to the extent necessary" to provide relief to that individual party. Ex. A ¶ 6. Mr. Bursor simply ignores this limitation, instead arguing that, as a general matter, antitrust claims are arbitrable—which we do not dispute—and that individuals could sue in court for the public injunctions his clients seek. But that does not answer whether the Claimants' Demands are precluded by this express element of the arbitration agreement's prohibition of class actions—and for the reasons discussed in my earlier letter (at pages 2-4), they plainly are. Rather than seeking injunctive relief tailored for a single Claimant alone, these Demands request the broadest possible injunction, affecting not only the 120 million

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[1] Mr. Bursor again cites to *In re Universal Service Fund Telephone Billing Practices Litigation*, 370 F. Supp. 2d 1135 (D. Kan. 2005). But as we previously explained, the court did not question the propriety of the parties' letters to the AAA's staff on how the then-current version of the AAA's Class Arbitration policy should be applied. *See id.* at 1137.

customers of AT&T Mobility and T-Mobile but the general public at large. It is hard to imagine a request for injunctive relief more clearly prohibited by the restriction in the arbitration agreement.

For the very same reasons, administration of these Demands is barred by the AAA's Class Arbitration policy. Certainly the fact that the demands do not use the term "class action" and are brought in the names of individuals is not dispositive. Courts have routinely rejected such a formalistic approach in determining whether a claim qualifies as a class action in similar contexts, instead recognizing that plaintiffs cannot disguise the true nature of a claim merely by avoiding certain "magic words" and asserting that the dispute is not a class action when in fact it seeks relief that would affect the rights of a class. The fact that the relief in theory could be obtained by a single plaintiff, in court, also is not dispositive.[2]

Two recent U.S. Supreme Court decisions—*Stolt-Nielsen, S.A. v. Animalfeeds Int'l Corp.*, 130 S. Ct. 1758 (2010), and *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011)—demonstrate that the Demands at issue here constitute requests for class arbitration within the meaning of the AAA's policy. As the Court explained in *Stolt-Nielsen*, there are several "fundamental" differences between class arbitration and traditional, individual arbitration. 130 S. Ct. at 1776. First, the arbitrator "no longer resolves a single dispute between the parties to a single agreement, but instead resolves many disputes between hundreds and thousands of parties." *Id.* Second, "[t]he arbitrator's award no longer purports to bind just the parties to a single arbitration agreement, but adjudicates the rights of absent parties as well." *Id.* Third, the "stakes" of class arbitration "are comparable to those of class-action litigation, even though the scope of judicial review is much more limited." *Id.* (internal citation omitted). And in *Concepcion* the Supreme Court added that, unlike individual arbitration, class arbitration "*requires* procedural formality" in order to assure "the protection of absent parties." 131 S. Ct. at 1750-51.

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[2] *See, e.g., W. Va. ex rel. McGraw v. Comcast Corp.*, 705 F. Supp. 2d 441, 452-53 (E.D. Pa. 2010) (Class Action Fairness Act's "'application should not be confined solely to lawsuits that are labeled "class actions" by the named plaintiff;'" rather, "'*lawsuits that resemble a purported class action should be considered a class action*'") (quoting S. Rep. No. 109-14, at 35, 2005 USCCAN 3) (emphasis added by court)); *Nev. v. Bank of Am. Corp.*, 2011 WL 2633641, *3-*5 (D. Nev. July 5, 2011) (deceptive trade practices action filed by state was removable under Class Action Fairness Act, though not styled as class action); *Int'l Union, United Auto., Aerospace & Agric. Implement Workers v. Acme Precision Prods., Inc.*, 515 F. Supp. 537, 540 (E.D. Mich. 1981) (purportedly "individual" dispute brought by union over retirement benefits "is, in effect then, a class action by the retired employees"); *see also Illuminating Co. v. Utility Workers Union of Am., Local 270*, 440 F.3d 809, 817 (6th Cir. 2006) (requiring "the Union to obtain the consent of the retirees before taking the grievance to arbitration," in retirement benefits dispute, in part because otherwise defendant "could be faced with numerous retirees' claims and lawsuits").

The Demands here possess every single one of those characteristics of class arbitration. First, although each Demand nominally is brought by an individual consumer, the arbitrators would not be asked merely to award relief limited to the individual Claimants, but rather to resolve the competing interests of over 120 million current AT&T Mobility and T-Mobile customers and countless other potential customers. Second, for the same reason, any arbitral award in these proceedings would "adjudicate[] the rights" of many "absent parties"—the most notable feature of class actions. The relief sought by the Claimants would, if granted, preclude this huge class of individuals and businesses from obtaining the benefits of the merger. Third, the stakes of these arbitrations would not merely be "comparable to those of class-action litigation," but far outstrip the stakes of virtually every class action ever filed: The Demands place a $39 billion merger in jeopardy and seek to duplicate ongoing regulatory proceedings in which AT&T alone has submitted five million pages of documents and other parties have submitted over 10,000 additional filings. Finally, because of the industry-wide—and in fact global—implications of the proceedings, the arbitrators will be forced to develop procedures to protect the interests of all of the affected consumers, businesses, and state and federal regulators.

Indeed, Mr. Bursor's recent public statements made in connection with his efforts to recruit clients underscore the class and representative nature of his clients' claims and the relief they seek. He unabashedly describes a strategy of filing thousands of Demands, explaining that all that is needed is a victory in one arbitration to "stop this merger."[3] In other words, if one prevails, all prevail. That is the hallmark of a class or representative action.

The history of the AAA policy confirms that its reference to "class actions" should be interpreted to encompass the Demands here. As the AAA is aware, the potential for class arbitrations "arose" as a "new area of service" for the AAA "when the Supreme Court in *Green Tree Financial Corporation v. Bazzle* held that it was for an arbitrator, not a court, to decide whether an arbitration agreement permits or precludes class actions where the arbitration agreement itself is silent on that issue." AAA, *2005 President's Letter & Financial Statements* 3, at http://www.adr.org/sp.asp?id=28771. In the wake of *Bazzle*, "considerable controversy arose in the legal and ADR communities over class action arbitrations and, in particular, about the inclusion of class action waivers in arbitration clauses." *Id.* at 4. In response, when confronted with a situation where "a party [sought]to bring a class arbitration under an agreement that on its face prohibits class arbitrations," the

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[3] *See, e.g.*, http://www.fightthemerger.com/rights/ ("We have already started the process of initiating dozens of arbitrations on behalf of our clients, any one of which could stop this merger. We have a team in place with the resources to bring thousands more."); Law Firm Strikes Back at AT&T Over Merger, Reuters, July 27, 2011, at http://www.reuters.com/article/2011/07/27/att-merger-arbitration-idUSN1E76Q23820110727 (reporting that Mr. Bursor has recruited 750 AT&T Mobility customers to file arbitration proceedings).

AAA would "first seek court guidance as to whether a class arbitration may be brought under such an agreement." *Id.* The AAA would not "commence administration of [such] a case, nor * * * refer such a matter to an arbitrator until a court decides that it is appropriate to do so." *Id.* In adhering to this "established policy of deferring to the courts on the issue of whether [class action] waivers are enforceable in a particular case" (*id.*), the AAA recognized the foundational point that "[t]he 'principal purpose' of the [Federal Arbitration Act] is to 'ensur[e] that private arbitration agreements are enforced according to their terms" (*Concepcion*, 131 S. Ct. at 1748 (quoting *Volt Info Scis., Inc. v. Board of Trs. of Leland Stanford Junior Univ.*, 489 U. S. 468, 479 (1989))), while "tak[ing] no position as to whether [class-action waiver] clauses are or should be enforceable." *2005 President's Letter* at 4.

The touchstone for the AAA's determination under the Class Arbitration Policy is thus whether the claim in question is precluded by the provision of the governing arbitration agreement that addresses this post-*Bazzle* concern—the arbitrability of claims seeking relief impacting persons other than the individual who filed the demand for arbitration. The policy is designed to ensure that any such claims are arbitrated only when the parties clearly have agreed to that result or a court has ordered it. That is why, under the Class Arbitration Policy, the AAA consistently has "first [sought] court guidance" as to whether such claims may proceed in arbitration when the parties have agreed otherwise.

The case for requiring the Claimants here "to first seek court guidance" is even stronger than when the AAA adopted this policy. The commentary explains that the reason that the AAA "will not seek to make decisions concerning class action agreements" is that "courts appear to have reserved" those issues—the law of which is "unsettled"—" for themselves." Here, not only does the law reserve the issue to the courts, but the arbitration agreement does as well, specifying that "issues relating to the scope and enforceability of the arbitration provision are for the court to decide." Ex. A.

3. Mr. Bursor asserts that administration of his Demands would not obstruct the ongoing regulatory review of the merger, insisting that courts routinely entertain private antitrust litigation during the pendency of that review process. Again, he is wrong.

The U.S. Court of Appeals for the Seventh Circuit has explained that any private litigation seeking to enjoin a merger is premature "until all required state and federal approvals have been obtained—for the agencies might insist on changes that would substantially alter the merger's competitive effects." *S. Austin Coalition Community Council v. SBC Commc'ns Inc.*, 191 F.3d 842, 843 (7th Cir. 1999). Moreover, "[a]ntitrust litigation can be very costly; an expensive challenge to a moving target is worse than pointless." *Id.* at 845. Certainly no "court should try to beat the FCC to the punch." *Id.* at 844; *see also, e.g., Jewel Cos. v. Pay Less Drug Stores N.W., Inc.*, 510 F. Supp. 1006 (N.D. Cal. 1981) (fiduciary-duty claim predicated on potential antitrust violations "was not ripe for adjudication at the injunction stage because any alleged antitrust violation would be purely hypothetical until the merger actually took place").

For the same reasons, the AAA should reject attempts by the Claimants to use the arbitration process to leapfrog the pending review of the merger by the FCC and Department of Justice—especially because permitting the arbitrations to proceed would have the effect of shutting out the views of thousands of interested individuals and businesses who are participating actively in the regulatory process but would be barred from the arbitrations.

4. Finally, Mr. Bursor resorts to impugning my integrity and accusing me and AT&T of trying to "corrupt" the AAA. These gratuitous assertions are clearly aimed at diverting the AAA from focusing on the merits of the issue that its rule requires it to decide.[4]

Equally beside the point are Mr. Buror's portentous statements that the AAA's "job is to administer neutrally" and that "[w]e are watching closely[.]" The AAA has a longstanding and well-deserved reputation for neutral and impartial administration of arbitrations. It should not allow Mr. Bursor's attempts at intimidation to deter it from fully and fairly applying its own Class Arbitration Policy, which explicitly requires an administrative determination *before* an arbitrator may be appointed and, in the circumstances here, plainly requires the AAA to conclude that it may not initiate arbitrations based on these Demands.

Thank you for your courtesy and attention to this matter.

Sincerely,

Neal S. Berinhout
Associate General Counsel
AT&T Mobility LLC

cc: Scott Bursor
Eric Tuchmann, General Counsel, AAA

---

[4] For the record, and to avoid the distraction he seeks to create, Mr. Bursor's attacks on me are not just false, but slanderous. In *Trujillo v. Apple Computer, Inc.*, 578 F. Supp. 2d 979 (N.D. Ill. 2008), a court determined that I had erred in describing the process by which certain customers contracted for wireless service. But the court most certainly did not—as Mr. Bursor asserts—find that I had committed perjury. To the contrary, the court was informed of the errors as soon as I became aware of them (*see id.* at 985-86). In a later hearing, the court stated: "I'm certainly not in any position to say, nor did I suggest, or at least I wasn't intending to suggest, that anybody had engaged in some sort of a * * * deliberate effort to conceal something or hide something or misrepresent something." *Trujillo*, 9/29/08 Hr'g Tr., at 12:3-7.

Exhibit 27

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August 2, 2011

By Email Only

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Courtney Horton, Intake Coordinator
casefiling@adr.org
American Arbitration Association
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Voorhees, NJ 08043
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Re: Leslie Bernardi and AT&T, Inc. and AT&T Mobility LLC
Daniel Lea and AT&T, Inc. and AT&T Mobility LLC
Helen Luciano and AT&T, Inc. and AT&T Mobility LLC
Astrid Mendoza and AT&T, Inc. and AT&T Mobility LLC
Mark Newman and AT&T, Inc. and AT&T Mobility LLC
Jared Pope and AT&T, Inc. and AT&T Mobility LLC
Michael Princi and AT&T, Inc. and AT&T Mobility LLC
Deborah L. Shroeder and AT&T, Inc. and AT&T Mobility LLC
Alexis Ubiera and AT&T, Inc. and AT&T Mobility LLC
Laura Barrett and AT&T, Inc. and AT&T Mobility LLC
Leaf O'Neal and AT&T, Inc. and AT&T Mobility LLC
Shane Bushman and AT&T, Inc. and AT&T Mobility LLC
Linda Haensel and AT&T, Inc. and AT&T Mobility LLC
Shari Kostoff and AT&T, Inc. and AT&T Mobility LLC
Joan Gibbons and AT&T, Inc. and AT&T Mobility LLC
Alexis Justak and AT&T, Inc. and AT&T Mobility LLC
Bryan Rodriguez and AT&T, Inc. and AT&T Mobility LLC
Juan Monteverde and AT&T, Inc. and AT&T Mobility LLC
Richard Gonnello and AT&T, Inc. and AT&T Mobility LLC
Javier Hidalgo and AT&T, Inc. and AT&T Mobility LLC
Emily Komlossy and AT&T, Inc. and AT&T Mobility LLC
Beth Keller and AT&T, Inc. and AT&T Mobility LLC
Chris Marlborough and AT&T, Inc. and AT&T Mobility LLC
Sandra Smith and AT&T, Inc. and AT&T Mobility LLC
Lara Fisher and AT&T, Inc. and AT&T Mobility LLC[1]
Richard Colisimo and AT&T, Inc. and AT&T Mobility LLC

[1] Lara Fisher and AT&T, Inc. and AT&T Mobility LLC was filed on July 25, 2011, but reference to this case was inadvertently omitted from my prior correspondence.

Dear Ms. Parvey and Ms. Horton:

This will respond to Mr. Berinhout's letter of today's date, which again urges AAA to refuse to administer these arbitrations. Given the extent of correspondence, it is perhaps most useful to recap eight points AT&T does not dispute:

1. AT&T does not dispute the validity or enforceability of its own arbitration agreements.

2. AT&T does not dispute that the claims are within the scope of the parties' agreement to arbitrate, which provides for the arbitration of "all disputes and claims between us." Wireless Customer Agreement § 2.2(1) (underlining added).

3. AT&T does not dispute that the parties' agreement provides for arbitration to be administered by AAA under the Commercial Arbitration Rules and Supplementary Procedures For Consumer Related Disputes.

4. AT&T does not dispute that each claimant has complied with §2.2(2) of the parties' agreement by sending, by certified mail, a written notice of dispute 30 days prior to commencing an arbitration proceeding.

5. AT&T does not dispute that each claimant has complied with all AAA administrative filing requirements.

6. AT&T does not dispute that antitrust claims, such as those asserted here, are arbitrable. *See* Mr. Berinhout's 8/2/11 letter at 2 ("as a general matter, antitrust claims are arbitrable – which we do not dispute").

7. AT&T does not dispute that "individuals could sue in court for the public injunctions [Mr. Bursor's] clients seek." *Id.* (underlining added).

8. AT&T does not dispute that the parties' agreement provides "Arbitrators can award the same damages and relief that a court can award." Wireless Customer Agreement § 2.1.

So, to sum up, AT&T does not dispute that each demand asserts arbitrable claims on behalf of an individual, seeking injunctive relief that would be available to an individual party in court.

Nevertheless, Mr. Berinhout urges AAA to apply a "Policy On Class Arbitration" under which the association refuses to administer "demands for class arbitration" where the parties' agreement prohibits class claims and no order of a court compels arbitration involving class claims. 8/2/11 Berinhout letter at 1. But that policy has no application here, since my clients have not filed any "demands for class arbitration." Each demand is asserted only on behalf of an individual claimant, and seeks injunctive relief that AT&T concedes is available to individuals suing in court. *See* Undisputed Point 7, above. None seeks to certify a class. None seeks to bind

absent class members. None invokes AAA's Supplementary Rules For Class Arbitrations. None has any of the characteristics of a class action.[2] There is no basis under the law, or under any AAA rule or precedent, to apply the "Policy On Class Arbitration" to any of these cases.

Mr. Berinhout's letters highlight that the real dispute concerns the jurisdiction of the arbitrator in each case to award the relief sought. Mr. Berinhout argues broad injunctive relief is prohibited by §2.2(6) of the parties' agreement, which states "The arbitrator may award declaratory or injunctive relief only in favor of the individual party seeking relief and only to the extent necessary to provide relief warranted by that party's individual claim." *See* 8/2/11 Berinhout letter at 2. We read that provision as permitting the arbitrator to award any relief that would be available to an individual party in a court case. *See* Undisputed Point 7, above ("AT&T does not dispute that 'individuals could sue in court for the public injunctions [Mr. Bursor's] clients seek.'"). Furthermore, if there is any ambiguity in the agreement arising from § 2.2(6), and § 2.1, which provides that "[a]rbitrators can award the same damages and relief that a court can award," that ambiguity would be construed against AT&T. *See, e.g.*, Restatement (Second) of Contracts § 206 ("In choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds."); *Pasteur Health Plan, Inc. v. Salazar*, 658 So.2d 543, 545 (Fla. 3d DCA 1995) ("any ambiguities and omissions should be construed in favor of [the non-drafting party]"), *rev. denied* 666 So.2d 901 (Fla. 1996); *Gostinelli v. Stein*, 794 N.Y.S.2d 759, 762 (4th Dept. 2005) ("any ambiguity … must be construed against the drafter").

AT&T's argument about the limits imposed on an arbitrator's authority to grant injunctive relief is exceedingly weak on the merits. But the crucial point here – and this is dispositive – is that this is not an administrative matter. This is a disputed legal issue that the parties' agreement, and AAA rules, expressly commit to the determination of the arbitrator in each individual case. AAA Commercial Arbitration Rule R-7(a) provides that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement." Rule R-7(c) provides that objections "to the jurisdiction of the arbitrator or to the arbitrability of a claim" may be ruled on by the arbitrator "as a preliminary matter or as part of the final award." And Rule R-53 provides "[t]he arbitrator shall interpret and apply these rules insofar as they relate to the arbitrator's powers and duties." No AAA rule or policy permits administrative personnel to determine the authority or jurisdiction of an arbitrator.

Mr. Berinhout also argues that actions by private parties to enjoin a merger must await government review and the actual consummation of the merger. *See* Berinhout letter at 5. That is certainly wrong. To rebut that argument, one need look no further than the text of Section 16 of the Clayton Act, 15 U.S.C. § 26, which permits private parties to seek "injunctive relief

[2] Mr. Berinhout seeks to characterize as "class actions" any case with "claims seeking relief impacting persons other than the individual who filed the demand for arbitration." 8/2/11 Berinhout letter at 6. That definition is vague, amorphous, and incorrect. A class action is a case where absent parties would be bound by the judgment. *See, e.g.*, Supplementary Rules for Class Arbitrations, Rule 6(b)(6) (referencing "the binding effect of a class judgment on class members"). Absent parties would not be bound by any ruling in these individual cases.

against threatened conduct." Indeed, the cases granting private parties injunctive relief against proposed mergers, prior to consummation, are too numerous to cite. *See, e.g.*, *Zenith v. Hazeltine Research, Inc.*, 395 U.S. 100, 130 (noting that Section 16 of the Clayton Act "authorizes injunctive relief upon the demonstration of 'threatened' injury"). Because it is often difficult to unscramble eggs, the Clayton Act provides for injunctive relief to prevent the cracking of the egg in the first place.

In any event, Mr. Berinhout's argument concerning the remedies available under the Clayton Act, and whether they must await the consummation of the merger, are not administrative matters. This, again, is a disputed legal issue that goes to the heart of the parties' dispute. It is an issue expressly committed to the arbitrator in each individual case, not to AAA administrative personnel.

In sum, despite the lengthy correspondence from Mr. Berinhout, there is no reason to reverse Ms. Parvey's prior determination that AAA "will proceed with the administration" of these cases. *See* 7/27/11 Parvey letter at 2 ("[W]e ask that you remit the balance of the fee. Once that fee has been paid so that all filing requirements have been met, you will be notified by a case manager that the AAA will proceed with the administration of the arbitration[s], and the AAA will provide you with appropriate response dates for answering statements or counterclaims.").

We look forward to the prompt administration of these cases.

Very truly yours,

Scott A. Bursor

Eric Tuchmann, Esq., TuchmannE@adr.org
Neal S. Berinhout, nb2520@att.com

Exhibit 28

American Arbitration Association
Dispute Resolution Services Worldwide

Western Case Management Center

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August 4, 2011

Via Electronic Mail

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Miami, FL 33130

Neal S. Berinhout, Esq.
Jan Mendel, Litigation Analyst
AT&T Services, Inc.
1025 Lenox Park Boulevard C575
Atlanta, GA 30319

Re: 32 516 00422 11 JEMO
Shane Bushman
and
AT&T, Inc. and AT&T Mobility, LLC

Dear Parties:

This will acknowledge receipt of Mr. Bursor's correspondence dated July 21, 2011; July 26, 2011; August 1, 2011; August 2, 2011, and Mr. Berinhout's correspondence dated July 25, 2011; July 28, 2011; and August 2, 2011, copies of which we note have been exchanged with all parties.

The issue before the American Arbitration Association ("AAA") is whether the filing requirements contained in the AAA's Rules have been met by the Claimant. After review of the file, the AAA has made an administrative determination that Claimant has met the filing requirements by filing a demand for arbitration providing for administration by the AAA under its Rules. Accordingly, in the absence of an agreement by the parties or a court order staying this matter, the AAA will proceed with the administration of the arbitration.

The parties' contentions have been made a part of the file and upon appointment of the arbitrator the parties may raise their jurisdictional or arbitrability arguments to the arbitrator for determination.

The attention of Respondent is directed to Section C-2. If Respondent does not answer by **August 15, 2011**, we will assume the claim is denied. If Respondent wishes to file a counterclaim, file two copies of such counterclaim and send an additional copy of the counterclaim to Claimant. Note that the filing of a counterclaim may require the payment of additional administrative fees and/or compensation deposits. Please review the Fee Schedule of the Consumer Rules.

Enclosed is a checklist for conflicts form to list those witnesses you expect to present, as well as any persons or entities with an interest in these proceedings. The conflicts form is due on or before **August 15, 2011**. An online checklist for conflicts function is available for clients using WebFile, our web-based case management tool. If you do not have a WebFile account, please contact your case manager. The parties are to exchange all correspondence *except* this checklist for conflicts and the arbitrator list.

Pursuant to the parties' contract clause provided "Unless AT&T or [Claimant] agree otherwise, the hearing will take place in the county or parish of [Claimant's] billing address." We note Claimant has requested Lake Worth, FL as the locale for this matter.

The Association has a strict policy regarding requests for extensions. If you need to extend any deadline during the course of these proceedings, please try to obtain the other party's agreement prior to contacting the AAA.

The undersigned will call you within **five (5) days** of the date of this letter to schedule a brief administrative conference to address matters that will assist the Association in administering your case as efficiently and expeditiously as possible.

The Association will make maximum use of fax machines and e-mail when communicating in writing, and requests that the parties do the same.

As a service to our users, you may charge the administrative fee and deposit for arbitrator fees, and expenses to your credit card. If you desire to do so, please contact the undersigned for the charge authorization form.

Additionally, the parties may desire to mediate this case prior to an arbitration hearing. Mediation is a private, non-binding process under which the parties submit their dispute to a third-party neutral. The mediator may suggest ways of resolving the dispute, but may not impose a settlement on the parties; the parties attempt to negotiate their own settlement agreement. Please contact the undersigned for further details regarding mediation.

The American Arbitration Association appreciates the opportunity to assist you with your dispute resolution needs.

Sincerely,

/s/
Jesse M. Molina
Manager of ADR Services
559 650 8098
JesseMolina@adr.org

AMERICAN ARBITRATION ASSOCIATION
CHECKLIST FOR CONFLICTS

In the Matter of the Arbitration between:

Re: 32 516 00422 11 JEMO
Shane Bushman
and
AT&T, Inc. and AT&T Mobility, LLC

CASE MANAGER: Jesse M. Molina
DATE: August 4, 2011

To avoid the possibility of a last-minute disclosure and/or disqualification of the arbitrator pursuant to the rules, we must advise the arbitrator of the names of all persons, firms, companies or other entities involved in this matter. Please list below all interested parties in this case, including, but not limited to, witnesses, consultants, and attorneys. In order to avoid conflicts of interest, parties are requested to also list subsidiary and other related entities. This form will only be used as a list for conflicts, not a preliminary or final witness list. Please note that the AAA will not divulge this information to the opposing party and the parties are not required to exchange this list. This form will, however, be submitted to the arbitrator, together with the filing papers. You should be aware that arbitrators will need to divulge any relevant information in order to make appropriate and necessary disclosures in accordance with the applicable arbitration rules. An online Conflicts Checklist function is available for clients using WebFile, our web-based case management tool. If you do not have a WebFile account, please contact your case manager.

NAME	AFFILIATION	ADDRESS

DATED: _____ PARTY: _____
Please Print

Exhibit 29

American Arbitration Association
Dispute Resolution Services Worldwide

Western Case Management Center

6795 North Palm Ave, 2nd Floor, Fresno, CA 93704
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August 4, 2011

Via Electronic Mail

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Miami, FL 33130

Neal S. Berinhout, Esq.
Jan Mendel, Litigation Analyst
AT&T Services, Inc.
1025 Lenox Park Boulevard C575
Atlanta, GA 30319

Re: 32 516 00435 11 JEMO
Emily Komlossy
and
AT&T, Inc. and AT&T Mobility, LLC

Dear Parties:

This will acknowledge receipt of Mr. Bursor's correspondence dated July 21, 2011; July 26, 2011; August 1, 2011; August 2, 2011, and Mr. Berinhout's correspondence dated July 25, 2011; July 28, 2011; and August 2, 2011, copies of which we note have been exchanged with all parties.

The issue before the American Arbitration Association ("AAA") is whether the filing requirements contained in the AAA's Rules have been met by the Claimant. After review of the file, the AAA has made an administrative determination that Claimant has met the filing requirements by filing a demand for arbitration providing for administration by the AAA under its Rules. Accordingly, in the absence of an agreement by the parties or a court order staying this matter, the AAA will proceed with the administration of the arbitration.

The parties' contentions have been made a part of the file and upon appointment of the arbitrator the parties may raise their jurisdictional or arbitrability arguments to the arbitrator for determination.

The attention of Respondent is directed to Section C-2. If Respondent does not answer by **August 15, 2011**, we will assume the claim is denied. If Respondent wishes to file a counterclaim, file two copies of such counterclaim and send an additional copy of the counterclaim to Claimant. Note that the filing of a counterclaim may require the payment of additional administrative fees and/or compensation deposits. Please review the Fee Schedule of the Consumer Rules.

Enclosed is a checklist for conflicts form to list those witnesses you expect to present, as well as any persons or entities with an interest in these proceedings. The conflicts form is due on or before **August 15, 2011**. An online checklist for conflicts function is available for clients using WebFile, our web-based case management tool. If you do not have a WebFile account, please contact your case manager. The parties are to exchange all correspondence *except* this checklist for conflicts and the arbitrator list.

Pursuant to the parties' contract clause provided "Unless AT&T or [Claimant] agree otherwise, the hearing will take place in the county or parish of [Claimant's] billing address." We note Claimant has requested Hollywood, FL as the locale for this matter.

The Association has a strict policy regarding requests for extensions. If you need to extend any deadline during the course of these proceedings, please try to obtain the other party's agreement prior to contacting the AAA.

The undersigned will call you within **five (5) days** of the date of this letter to schedule a brief administrative conference to address matters that will assist the Association in administering your case as efficiently and expeditiously as possible.

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As a service to our users, you may charge the administrative fee and deposit for arbitrator fees, and expenses to your credit card. If you desire to do so, please contact the undersigned for the charge authorization form.

Additionally, the parties may desire to mediate this case prior to an arbitration hearing. Mediation is a private, non-binding process under which the parties submit their dispute to a third-party neutral. The mediator may suggest ways of resolving the dispute, but may not impose a settlement on the parties; the parties attempt to negotiate their own settlement agreement. Please contact the undersigned for further details regarding mediation.

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Sincerely,

/s/
Jesse M. Molina
Manager of ADR Services
559 650 8098
JesseMolina@adr.org

AMERICAN ARBITRATION ASSOCIATION
CHECKLIST FOR CONFLICTS

In the Matter of the Arbitration between:

Re: 32 516 00435 11 JEMO
Emily Komlossy
and
AT&T, Inc. and AT&T Mobility, LLC

CASE MANAGER: Jesse M. Molina
DATE: August 4, 2011

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NAME	AFFILIATION	ADDRESS

DATED: _____ PARTY: _____
Please Print

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Dispute Resolution Services Worldwide

Western Case Management Center

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August 4, 2011

Via Electronic Mail

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Miami, FL 33130

Neal S. Berinhout, Esq.
Jan Mendel, Litigation Analyst
AT&T Services, Inc.
1025 Lenox Park Boulevard C575
Atlanta, GA 30319

Re: 32 516 00433 11 JEMO
Alexis Justak
and
AT&T, Inc. and AT&T Mobility, LLC

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The American Arbitration Association appreciates the opportunity to assist you with your dispute resolution needs.

Sincerely,

/s/
Jesse M. Molina
Manager of ADR Services
559 650 8098
JesseMolina@adr.org

AMERICAN ARBITRATION ASSOCIATION
CHECKLIST FOR CONFLICTS

In the Matter of the Arbitration between:

Re: 32 516 00433 11 JEMO
Alexis Justak
and
AT&T, Inc. and AT&T Mobility, LLC

CASE MANAGER: Jesse M. Molina
DATE: August 4, 2011

To avoid the possibility of a last-minute disclosure and/or disqualification of the arbitrator pursuant to the rules, we must advise the arbitrator of the names of all persons, firms, companies or other entities involved in this matter. Please list below all interested parties in this case, including, but not limited to, witnesses, consultants, and attorneys. In order to avoid conflicts of interest, parties are requested to also list subsidiary and other related entities. This form will only be used as a list for conflicts, not a preliminary or final witness list. Please note that the AAA will not divulge this information to the opposing party and the parties are not required to exchange this list. This form will, however, be submitted to the arbitrator, together with the filing papers. You should be aware that arbitrators will need to divulge any relevant information in order to make appropriate and necessary disclosures in accordance with the applicable arbitration rules. An online Conflicts Checklist function is available for clients using WebFile, our web-based case management tool. If you do not have a WebFile account, please contact your case manager.

NAME	AFFILIATION	ADDRESS

DATED: _____ PARTY: _____
Please Print

Exhibit 31

American Arbitration Association
Dispute Resolution Services Worldwide

Western Case Management Center

6795 North Palm Ave, 2nd Floor, Fresno, CA 93704
telephone: 877-528-0880 facsimile: 855-270-8400
internet: http://www.adr.org/

August 4, 2011

Via Electronic Mail

Antonio Vozzolo, Esq.
Nadeem Faruqi, Esq.
Faruqi & Faruqi LLP
369 Lexington Avenue 10th Floor
New York, NY 10017

Scott A. Bursor, Esq.
Joseph I. Marchese, Esq.
Bursor & Fisher, PA
369 Lexington Avenue 10th Floor
New York, NY 10017-6506

L. Timothy Fisher, Esq.
Sarah N. Westcot, Esq.
Bursor & Fisher, PA
2121 North Carolina Boulevard, Suite 1010
Walnut Creek, CA 94596

Barry L. Davis, Esq.
Aaron P. Davis, Esq.
Thornton, Davis & Fein, PA
80 SW 8th Street 29th Floor
Miami, FL 33130

Neal S. Berinhout, Esq.
Jan Mendel, Litigation Analyst
AT&T Services, Inc.
1025 Lenox Park Boulevard C575
Atlanta, GA 30319

Re: 32 516 00418 11 JEMO
Daniel Lea
and
AT&T, Inc. and AT&T Mobility, LLC

Dear Parties:

This will acknowledge receipt of Mr. Bursor's correspondence dated July 21, 2011; July 26, 2011; August 1, 2011; August 2, 2011, and Mr. Berinhout's correspondence dated July 25, 2011; July 28, 2011; and August 2, 2011, copies of which we note have been exchanged with all parties.

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Pursuant to the parties' contract clause provided "Unless AT&T or [Claimant] agree otherwise, the hearing will take place in the county or parish of [Claimant's] billing address." We note Claimant has requested Miami, Florida as the locale for this matter.

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/s/
Jesse M. Molina
Manager of ADR Services
559 650 8098
JesseMolina@adr.org

AMERICAN ARBITRATION ASSOCIATION
CHECKLIST FOR CONFLICTS

In the Matter of the Arbitration between:

Re: 32 516 00418 11 JEMO
Daniel Lea
and
AT&T, Inc. and AT&T Mobility, LLC

CASE MANAGER: Jesse M. Molina
DATE: August 4, 2011

To avoid the possibility of a last-minute disclosure and/or disqualification of the arbitrator pursuant to the rules, we must advise the arbitrator of the names of all persons, firms, companies or other entities involved in this matter. Please list below all interested parties in this case, including, but not limited to, witnesses, consultants, and attorneys. In order to avoid conflicts of interest, parties are requested to also list subsidiary and other related entities. This form will only be used as a list for conflicts, not a preliminary or final witness list. Please note that the AAA will not divulge this information to the opposing party and the parties are not required to exchange this list. This form will, however, be submitted to the arbitrator, together with the filing papers. You should be aware that arbitrators will need to divulge any relevant information in order to make appropriate and necessary disclosures in accordance with the applicable arbitration rules. An online Conflicts Checklist function is available for clients using WebFile, our web-based case management tool. If you do not have a WebFile account, please contact your case manager.

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DATED: _____ PARTY: _____
Please Print

Exhibit 32

American Arbitration Association
Dispute Resolution Services Worldwide

Western Case Management Center

6795 North Palm Ave, 2nd Floor, Fresno, CA 93704
telephone: 877-528-0880 facsimile: 855-270-8400
internet: http://www.adr.org/

August 4, 2011

Via Electronic Mail

Antonio Vozzolo, Esq.
Nadeem Faruqi, Esq.
Faruqi & Faruqi LLP
369 Lexington Avenue 10th Floor
New York, NY 10017

Scott A. Bursor, Esq.
Joseph I. Marchese, Esq.
Bursor & Fisher, PA
369 Lexington Avenue 10th Floor
New York, NY 10017-6506

L. Timothy Fisher, Esq.
Sarah N. Westcot, Esq.
Bursor & Fisher, PA
2121 North Carolina Boulevard, Suite 1010
Walnut Creek, CA 94596

Barry L. Davis, Esq.
Aaron P. Davis, Esq.
Thornton, Davis & Fein, PA
80 SW 8th Street 29th Floor
Miami, FL 33130

Neal S. Berinhout, Esq.
Jan Mendel, Litigation Analyst
AT&T Services, Inc.
1025 Lenox Park Boulevard C575
Atlanta, GA 30319

Re: 32 516 00419 11 JEMO
Mark Newman
and
AT&T, Inc. and AT&T Mobility, LLC

Dear Parties:

This will acknowledge receipt of Mr. Bursor's correspondence dated July 21, 2011; July 26, 2011; August 1, 2011; August 2, 2011, and Mr. Berinhout's correspondence dated July 25, 2011; July 28, 2011; and August 2, 2011, copies of which we note have been exchanged with all parties.

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Pursuant to the parties' contract clause provided "Unless AT&T or [Claimant] agree otherwise, the hearing will take place in the county or parish of [Claimant's] billing address." We note Claimant has requested Miami, FL as the locale for this matter.

The Association has a strict policy regarding requests for extensions. If you need to extend any deadline during the course of these proceedings, please try to obtain the other party's agreement prior to contacting the AAA.

The undersigned will call you within **five (5) days** of the date of this letter to schedule a brief administrative conference to address matters that will assist the Association in administering your case as efficiently and expeditiously as possible.

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Sincerely,

/s/
Jesse M. Molina
Manager of ADR Services
559 650 8098
JesseMolina@adr.org

AMERICAN ARBITRATION ASSOCIATION
CHECKLIST FOR CONFLICTS

In the Matter of the Arbitration between:

Re: 32 516 00419 11 JEMO
Mark Newman
and
AT&T, Inc. and AT&T Mobility, LLC

CASE MANAGER: Jesse M. Molina
DATE: August 4, 2011

To avoid the possibility of a last-minute disclosure and/or disqualification of the arbitrator pursuant to the rules, we must advise the arbitrator of the names of all persons, firms, companies or other entities involved in this matter. Please list below all interested parties in this case, including, but not limited to, witnesses, consultants, and attorneys. In order to avoid conflicts of interest, parties are requested to also list subsidiary and other related entities. This form will only be used as a list for conflicts, not a preliminary or final witness list. Please note that the AAA will not divulge this information to the opposing party and the parties are not required to exchange this list. This form will, however, be submitted to the arbitrator, together with the filing papers. You should be aware that arbitrators will need to divulge any relevant information in order to make appropriate and necessary disclosures in accordance with the applicable arbitration rules. An online Conflicts Checklist function is available for clients using WebFile, our web-based case management tool. If you do not have a WebFile account, please contact your case manager.

NAME	AFFILIATION	ADDRESS

DATED: _____ PARTY: _____
Please Print

Exhibit 33

American Arbitration Association
Dispute Resolution Services Worldwide

Western Case Management Center

6795 North Palm Ave, 2nd Floor, Fresno, CA 93704
telephone: 877-528-0880 facsimile: 855-270-8400
internet: http://www.adr.org/

August 4, 2011

Via Electronic Mail

Antonio Vozzolo, Esq.
Nadeem Faruqi, Esq.
Faruqi & Faruqi LLP
369 Lexington Avenue 10th Floor
New York, NY 10017

Scott A. Bursor, Esq.
Joseph I. Marchese, Esq.
Bursor & Fisher, PA
369 Lexington Avenue 10th Floor
New York, NY 10017-6506

L. Timothy Fisher, Esq.
Sarah N. Westcot, Esq.
Bursor & Fisher, PA
2121 North Carolina Boulevard, Suite 1010
Walnut Creek, CA 94596

Barry L. Davis, Esq.
Aaron P. Davis, Esq.
Thornton, Davis & Fein, PA
80 SW 8th Street 29th Floor
Miami, FL 33130

Neal S. Berinhout, Esq.
Jan Mendel, Litigation Analyst
AT&T Services, Inc.
1025 Lenox Park Boulevard C575
Atlanta, GA 30319

Re: 32 516 00424 11 JEMO
Shari Kostoff
and
AT&T, Inc. and AT&T Mobility, LLC

Dear Parties:

This will acknowledge receipt of Mr. Bursor's correspondence dated July 21, 2011; July 26, 2011; August 1, 2011; August 2, 2011, and Mr. Berinhout's correspondence dated July 25, 2011; July 28, 2011; and August 2, 2011, copies of which we note have been exchanged with all parties.

The issue before the American Arbitration Association ("AAA") is whether the filing requirements contained in the AAA's Rules have been met by the Claimant. After review of the file, the AAA has made an administrative determination that Claimant has met the filing requirements by filing a demand for arbitration providing for administration by the AAA under its Rules. Accordingly, in the absence of an agreement by the parties or a court order staying this matter, the AAA will proceed with the administration of the arbitration.

The parties' contentions have been made a part of the file and upon appointment of the arbitrator the parties may raise their jurisdictional or arbitrability arguments to the arbitrator for determination.

The attention of Respondent is directed to Section C-2. If Respondent does not answer by **August 15, 2011**, we will assume the claim is denied. If Respondent wishes to file a counterclaim, file two copies of such counterclaim and send an additional copy of the counterclaim to Claimant. Note that the filing of a counterclaim may require the payment of additional administrative fees and/or compensation deposits. Please review the Fee Schedule of the Consumer Rules.

Enclosed is a checklist for conflicts form to list those witnesses you expect to present, as well as any persons or entities with an interest in these proceedings. The conflicts form is due on or before **August 15, 2011**. An online checklist for conflicts function is available for clients using WebFile, our web-based case management tool. If you do not have a WebFile account, please contact your case manager. The parties are to exchange all correspondence *except* this checklist for conflicts and the arbitrator list.

Pursuant to the parties' contract clause provided "Unless AT&T or [Claimant] agree otherwise, the hearing will take place in the county or parish of [Claimant's] billing address." We note Claimant has requested Lake Worth, Florida as the locale for this matter.

The Association has a strict policy regarding requests for extensions. If you need to extend any deadline during the course of these proceedings, please try to obtain the other party's agreement prior to contacting the AAA.

The undersigned will call you within **five (5) days** of the date of this letter to schedule a brief administrative conference to address matters that will assist the Association in administering your case as efficiently and expeditiously as possible.

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Sincerely,

/s/
Jesse M. Molina
Manager of ADR Services
559 650 8098
JesseMolina@adr.org

AMERICAN ARBITRATION ASSOCIATION
CHECKLIST FOR CONFLICTS

In the Matter of the Arbitration between:

Re: 32 516 00424 11 JEMO
Shari Kostoff
and
AT&T, Inc. and AT&T Mobility, LLC

CASE MANAGER: Jesse M. Molina
DATE: August 4, 2011

To avoid the possibility of a last-minute disclosure and/or disqualification of the arbitrator pursuant to the rules, we must advise the arbitrator of the names of all persons, firms, companies or other entities involved in this matter. Please list below all interested parties in this case, including, but not limited to, witnesses, consultants, and attorneys. In order to avoid conflicts of interest, parties are requested to also list subsidiary and other related entities. This form will only be used as a list for conflicts, not a preliminary or final witness list. Please note that the AAA will not divulge this information to the opposing party and the parties are not required to exchange this list. This form will, however, be submitted to the arbitrator, together with the filing papers. You should be aware that arbitrators will need to divulge any relevant information in order to make appropriate and necessary disclosures in accordance with the applicable arbitration rules. An online Conflicts Checklist function is available for clients using WebFile, our web-based case management tool. If you do not have a WebFile account, please contact your case manager.

NAME	AFFILIATION	ADDRESS

DATED: _____ PARTY: _____
Please Print

Exhibit 34

American Arbitration Association
Dispute Resolution Services Worldwide

Western Case Management Center

6795 North Palm Ave, 2nd Floor, Fresno, CA 93704
telephone: 877-528-0880 facsimile: 855-270-8400
internet: http://www.adr.org/

August 4, 2011

Via Electronic Mail

Antonio Vozzolo, Esq.
Nadeem Faruqi, Esq.
Faruqi & Faruqi LLP
369 Lexington Avenue 10th Floor
New York, NY 10017

Scott A. Bursor, Esq.
Joseph I. Marchese, Esq.
Bursor & Fisher, PA
369 Lexington Avenue 10th Floor
New York, NY 10017-6506

L. Timothy Fisher, Esq.
Sarah N. Westcot, Esq.
Bursor & Fisher, PA
2121 North Carolina Boulevard, Suite 1010
Walnut Creek, CA 94596

Barry L. Davis, Esq.
Aaron P. Davis, Esq.
Thornton, Davis & Fein, PA
80 SW 8th Street 29th Floor
Miami, FL 33130

Neal S. Berinhout, Esq.
Jan Mendel, Litigation Analyst
AT&T Services, Inc.
1025 Lenox Park Boulevard C575
Atlanta, GA 30319

Re: 32 516 00423 11 JEMO
Linda Haensel
and
AT&T, Inc. and AT&T Mobility, LLC

Dear Parties:

This will acknowledge receipt of Mr. Bursor's correspondence dated July 21, 2011; July 26, 2011; August 1, 2011; August 2, 2011, and Mr. Berinhout's correspondence dated July 25, 2011; July 28, 2011; and August 2, 2011, copies of which we note have been exchanged with all parties.

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Sincerely,

/s/
Jesse M. Molina
Manager of ADR Services
559 650 8098
JesseMolina@adr.org

AMERICAN ARBITRATION ASSOCIATION
CHECKLIST FOR CONFLICTS

In the Matter of the Arbitration between:

Re: 32 516 00423 11 JEMO
Linda Haensel
and
AT&T, Inc. and AT&T Mobility, LLC

CASE MANAGER: Jesse M. Molina
DATE: August 4, 2011

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NAME	AFFILIATION	ADDRESS

DATED: _____ PARTY: _____
Please Print

Exhibit 35

American Arbitration Association
Dispute Resolution Services Worldwide

Western Case Management Center

6795 North Palm Ave, 2nd Floor, Fresno, CA 93704
telephone: 877-528-0880 facsimile: 855-270-8400
internet: http://www.adr.org/

August 4, 2011

Via Electronic Mail

Antonio Vozzolo, Esq.
Nadeem Faruqi, Esq.
Faruqi & Faruqi LLP
369 Lexington Avenue 10th Floor
New York, NY 10017

Scott A. Bursor, Esq.
Joseph I. Marchese, Esq.
Bursor & Fisher, PA
369 Lexington Avenue 10th Floor
New York, NY 10017-6506

L. Timothy Fisher, Esq.
Sarah N. Westcot, Esq.
Bursor & Fisher, PA
2121 North Carolina Boulevard, Suite 1010
Walnut Creek, CA 94596

Barry L. Davis, Esq.
Aaron P. Davis, Esq.
Thornton, Davis & Fein, PA
80 SW 8th Street 29th Floor
Miami, FL 33130

Neal S. Berinhout, Esq.
Jan Mendel, Litigation Analyst
AT&T Services, Inc.
1025 Lenox Park Boulevard C575
Atlanta, GA 30319

Re: 32 516 00430 11 JEMO
Joan Gibbons
and
AT&T, Inc. and AT&T Mobility, LLC

Dear Parties:

This will acknowledge receipt of Mr. Bursor's correspondence dated July 21, 2011; July 26, 2011; August 1, 2011; August 2, 2011, and Mr. Berinhout's correspondence dated July 25, 2011; July 28, 2011; and August 2, 2011, copies of which we note have been exchanged with all parties.

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Pursuant to the parties' contract clause provided "Unless AT&T or [Claimant] agree otherwise, the hearing will take place in the county or parish of [Claimant's] billing address." We note Claimant has requested Stuart, FL as the locale for this matter.

The Association has a strict policy regarding requests for extensions. If you need to extend any deadline during the course of these proceedings, please try to obtain the other party's agreement prior to contacting the AAA.

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Sincerely,

/s/
Jesse M. Molina
Manager of ADR Services
559 650 8098
JesseMolina@adr.org

AMERICAN ARBITRATION ASSOCIATION
CHECKLIST FOR CONFLICTS

In the Matter of the Arbitration between:

Re: 32 516 00430 11
Joan Gibbons
and
AT&T, Inc. and AT&T Mobility, LLC

CASE MANAGER: Jesse M. Molina
DATE: August 4, 2011

To avoid the possibility of a last-minute disclosure and/or disqualification of the arbitrator pursuant to the rules, we must advise the arbitrator of the names of all persons, firms, companies or other entities involved in this matter. Please list below all interested parties in this case, including, but not limited to, witnesses, consultants, and attorneys. In order to avoid conflicts of interest, parties are requested to also list subsidiary and other related entities. This form will only be used as a list for conflicts, not a preliminary or final witness list. Please note that the AAA will not divulge this information to the opposing party and the parties are not required to exchange this list. This form will, however, be submitted to the arbitrator, together with the filing papers. You should be aware that arbitrators will need to divulge any relevant information in order to make appropriate and necessary disclosures in accordance with the applicable arbitration rules. An online Conflicts Checklist function is available for clients using WebFile, our web-based case management tool. If you do not have a WebFile account, please contact your case manager.

NAME	AFFILIATION	ADDRESS

DATED: _____ PARTY: _____
Please Print

Exhibit 36

Commercial Arbitration Rules and Mediation Procedures

Including Procedures for Large, Complex Commercial Disputes

Rules Amended and Effective June 1, 2009
Fee Schedule Amended and Effective June 1, 2010

American Arbitration Association
Dispute Resolution Services Worldwide

www.adr.org

500

Table of Contents

Commercial Arbitration Rules and Mediation Procedures

Important Notice

These rules and any amendment of them shall apply in the form in effect at the time the administrative filing requirements are met for a demand for arbitration or submission agreement received by the AAA. To ensure that you have the most current information, see our website at **www.adr.org**.

Introduction

Each year, many millions of business transactions take place. Occasionally, disagreements develop over these business transactions. Many of these disputes are resolved by arbitration, the voluntary submission of a dispute to an impartial person or persons for final and binding determination. Arbitration has proven to be an effective way to resolve these disputes privately, promptly, and economically.

The American Arbitration Association (AAA), a not-for-profit, public service organization, offers a broad range of dispute resolution services to business executives, attorneys, individuals, trade associations, unions, management, consumers, families, communities, and all levels of government. Services are available through AAA headquarters in New York and through offices located in major cities throughout the United States. Hearings may be held at locations convenient for the parties and are not limited to cities with AAA offices. In addition, the AAA serves as a center for education and training, issues specialized publications, and conducts research on all forms of out-of-court dispute settlement.

Standard Arbitration Clause

The parties can provide for arbitration of future disputes by inserting the following clause into their contracts:

Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

Arbitration of existing disputes may be accomplished by use of the following:

We, the undersigned parties, hereby agree to submit to arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules the following controversy: (describe briefly) We further agree that the above controversy be submitted to (one) (three) arbitrator(s). We further agree that we will faithfully observe this agreement and the rules, that we will abide by and perform any award rendered by the arbitrator(s), and that a judgment of any court having jurisdiction may be entered on the award.

In transactions likely to require emergency interim relief, the parties may wish to add to their clause the following language:

The parties also agree that the AAA Optional Rules for Emergency Measures of Protection shall apply to the proceedings.

These Optional Rules may be found on page 49.

The services of the AAA are generally concluded with the transmittal of the award. Although there is voluntary compliance with the majority of awards, judgment on the award can be entered in a court having appropriate jurisdiction if necessary.

Administrative Fees

The AAA charges a filing fee based on the amount of the claim or counterclaim. This fee information, which is included with these rules, allows the parties to exercise control over their administrative fees.

The fees cover AAA administrative services; they do not cover arbitrator compensation or expenses, if any, reporting services, or any post-award charges incurred by the parties in enforcing the award.

Mediation

The parties might wish to submit their dispute to mediation prior to arbitration. In mediation, the neutral mediator assists the parties in reaching a settlement but does not have the authority to make a binding decision or award. Mediation is administered by the AAA in accordance with its Commercial Mediation Procedures. There is no additional administrative fee where parties to a pending arbitration attempt to mediate their dispute under the AAA's auspices.

If the parties want to adopt mediation as a part of their contractual dispute settlement procedure, they can insert the following mediation clause into their contract in conjunction with a standard arbitration provision:

If a dispute arises out of or relates to this contract, or the breach thereof, and if the dispute cannot be settled through negotiation, the parties agree first to try in good faith to settle the dispute by mediation administered by the American Arbitration Association under its Commercial Mediation Procedures before resorting to arbitration, litigation, or some other dispute resolution procedure.

If the parties want to use a mediator to resolve an existing dispute, they can enter into the following submission:

The parties hereby submit the following dispute to mediation administered by the American Arbitration Association under its Commercial Mediation Procedures. (The clause may also provide for the qualifications of the mediator(s), method of payment, locale of meetings, and any other item of concern to the parties.)

Large, Complex Cases

Unless the parties agree otherwise, the Procedures for Large, Complex Commercial Disputes, which appear in this pamphlet, will be applied to all cases administered by the AAA under the Commercial Arbitration Rules in which the disclosed claim or counterclaim of any party is at least $500,000 exclusive of claimed interest, arbitration fees and costs.

The key features of these procedures include:

- a highly qualified, trained Roster of Neutrals;
- a mandatory preliminary hearing with the arbitrators, which may be conducted by teleconference;
- broad arbitrator authority to order and control discovery, including depositions;
- presumption that hearings will proceed on a consecutive or block basis.

Commercial Mediation Procedures

M-1. Agreement of Parties

Whenever, by stipulation or in their contract, the parties have provided for mediation or conciliation of existing or future disputes under the auspices of the American Arbitration Association (AAA) or under these procedures, the parties and their representatives, unless agreed otherwise in writing, shall be deemed to have made these procedural guidelines, as amended and in effect as of the date of filing of a request for mediation, a part of their agreement and designate the AAA as the administrator of their mediation.

The parties by mutual agreement may vary any part of these procedures including, but not limited to, agreeing to conduct the mediation via telephone or other electronic or technical means.

M-2. Initiation of Mediation

Any party or parties to a dispute may initiate mediation under the AAA's auspices by making a request for mediation to any of the AAA's regional offices or case management centers via telephone, email, regular mail or fax. Requests for mediation may also be filed online via AAA WebFile at **www.adr.org.**

The party initiating the mediation shall simultaneously notify the other party or parties of the request. The initiating party shall provide the following information to the AAA and the other party or parties as applicable:

(i) A copy of the mediation provision of the parties' contract or the parties' stipulation to mediate.

(ii) The names, regular mail addresses, email addresses and telephone numbers of all parties to the dispute and representatives, if any, in the mediation.

(iii) A brief statement of the nature of the dispute and the relief requested.

(iv) Any specific qualifications the mediator should possess.

Where there is no pre-existing stipulation or contract by which the parties have provided for mediation of existing or future disputes under the auspices of the AAA, a party may request the AAA to invite another party to participate in "mediation by voluntary submission." Upon receipt of such a request, the AAA will contact the other party or parties involved in the dispute and attempt to obtain a submission to mediation.

M-3. Representation

Subject to any applicable law, any party may be represented by persons of the party's choice. The names and addresses of such persons shall be communicated in writing to all parties and to the AAA.

M-4. Appointment of the Mediator

Parties may search the online profiles of the AAA's Panel of Mediators at **www.aaamediation.com** in an effort to agree on a mediator. If the parties have not agreed to the appointment of a mediator and have not provided any other method of appointment, the mediator shall be appointed in the following manner:

(i) Upon receipt of a request for mediation, the AAA will send to each party a list of mediators from the AAA's Panel of Mediators. The parties are encouraged to agree to a mediator from the submitted list and to advise the AAA of their agreement.

(ii) If the parties are unable to agree upon a mediator, each party shall strike unacceptable names from the list, number the remaining names in order of preference and return the list to the AAA. If a party does not return the list within the time specified, all mediators on the list shall be deemed acceptable. From among the mediators who have been mutually approved by the parties, and in accordance with the designated order of mutual preference, the AAA shall invite a mediator to serve.

(iii) If the parties fail to agree on any of the mediators listed, or if acceptable mediators are unable to serve, or if for any other reason the appointment cannot be made from the submitted list, the AAA shall have the authority to make the appointment from among other members of the Panel of Mediators without the submission of additional lists.

M-5. Mediator's Impartiality and Duty to Disclose

AAA mediators are required to abide by the *Model Standards of Conduct for Mediators* in effect at the time a mediator is appointed to a case. Where there is a conflict between the Model Standards and any provision of these Mediation Procedures, these Mediation Procedures shall govern. The Standards require mediators to (i) decline a mediation if the mediator cannot conduct it in an impartial manner, and (ii) disclose, as soon as practicable, all actual and potential conflicts of interest that are reasonably known to the mediator and could reasonably be seen as raising a question about the mediator's impartiality.

Prior to accepting an appointment, AAA mediators are required to make a reasonable inquiry to determine whether there are any facts that a reasonable individual would consider likely to create a potential or actual conflict of interest for the mediator. AAA mediators are required to disclose any circumstance likely to create a presumption of bias or prevent a resolution of the parties' dispute within the time-

frame desired by the parties. Upon receipt of such disclosures, the AAA shall immediately communicate the disclosures to the parties for their comments.

The parties may, upon receiving disclosure of actual or potential conflicts of interest of the mediator, waive such conflicts and proceed with the mediation. In the event that a party disagrees as to whether the mediator shall serve, or in the event that the mediator's conflict of interest might reasonably be viewed as undermining the integrity of the mediation, the mediator shall be replaced.

M-6. Vacancies

If any mediator shall become unwilling or unable to serve, the AAA will appoint another mediator, unless the parties agree otherwise, in accordance with section M-4.

M-7. Duties and Responsibilities of the Mediator

(i) The mediator shall conduct the mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome.

(ii) The mediator is authorized to conduct separate or *ex parte* meetings and other communications with the parties and/or their representatives, before, during and after any scheduled mediation conference. Such communications may be conducted via telephone, in writing, via email, online, in person or otherwise.

(iii) The parties are encouraged to exchange all documents pertinent to the relief requested. The mediator may request the exchange of memoranda on issues, including the underlying interests and the history of the parties' negotiations. Information that a party wishes to keep confidential may be sent to the mediator, as necessary, in a separate communication with the mediator.

(iv) The mediator does not have the authority to impose a settlement on the parties but will attempt to help them reach a satisfactory resolution of their dispute. Subject to the discretion of the mediator, the mediator may make oral or written recommendations for settlement to a party privately or, if the parties agree, to all parties jointly.

(v) In the event a complete settlement of all or some issues in dispute is not achieved within the scheduled mediation session(s), the mediator may continue to communicate with the parties, for a period of time, in an ongoing effort to facilitate a complete settlement.

(vi) The mediator is not a legal representative of any party and has no fiduciary duty to any party.

M-8. Responsibilities of the Parties

The parties shall ensure that appropriate representatives of each party, having authority to consummate a settlement, attend the mediation conference.

Prior to and during the scheduled mediation conference session(s) the parties and their representatives shall, as appropriate to each party's circumstances, exercise their best efforts to prepare for and engage in a meaningful and productive mediation.

M-9. Privacy

Mediation sessions and related mediation communications are private proceedings. The parties and their representatives may attend mediation sessions. Other persons may attend only with the permission of the parties and with the consent of the mediator.

M-10. Confidentiality

Subject to applicable law or the parties' agreement, confidential information disclosed to a mediator by the parties or by other participants (witnesses) in the course of the mediation shall not be divulged by the mediator. The mediator shall maintain the confidentiality of all information obtained in the mediation, and all records, reports or other documents received by a mediator while serving in that capacity shall be confidential.

The mediator shall not be compelled to divulge such records or to testify in regard to the mediation in any adversary proceeding or judicial forum.

The parties shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence in any arbitral, judicial or other proceeding the following, unless agreed to by the parties or required by applicable law:

(i) Views expressed or suggestions made by a party or other participant with respect to a possible settlement of the dispute,

(ii) Admissions made by a party or other participant in the course of the mediation proceedings,

(iii) Proposals made or views expressed by the mediator or

(iv) The fact that a party had or had not indicated willingness to accept a proposal for settlement made by the mediator.

M-11. No Stenographic Record

There shall be no stenographic record of the mediation process.

M-12. Termination of Mediation

The mediation shall be terminated:

(i) By the execution of a settlement agreement by the parties; or

(ii) By a written or verbal declaration of the mediator to the effect that further efforts at mediation would not contribute to a resolution of the parties' dispute; or

(iii) By a written or verbal declaration of all parties to the effect that the mediation proceedings are terminated; or

(iv) When there has been no communication between the mediator and any party or party's representative for 21 days following the conclusion of the mediation conference.

M-13. Exclusion of Liability

Neither the AAA nor any mediator is a necessary party in judicial proceedings relating to the mediation. Neither the AAA nor any mediator shall be liable to any party for any error, act or omission in connection with any mediation conducted under these procedures.

M-14. Interpretation and Application of Procedures

The mediator shall interpret and apply these procedures insofar as they relate to the mediator's duties and responsibilities. All other procedures shall be interpreted and applied by the AAA.

M-15. Deposits

Unless otherwise directed by the mediator, the AAA will require the parties to deposit in advance of the mediation conference such sums of money as it, in consultation with the mediator, deems necessary to cover the costs and expenses of the mediation and shall render an accounting to the parties and return any unexpended balance at the conclusion of the mediation.

M-16. Expenses

All expenses of the mediation, including required traveling and other expenses or charges of the mediator, shall be borne equally by the parties unless they agree otherwise. The expenses of participants for either side shall be paid by the party requesting the attendance of such participants.

M-17. Cost of the Mediation

There is no filing fee to initiate a mediation or a fee to request the AAA to invite parties to mediate.

The cost of mediation is based on the hourly mediation rate published on the mediator's AAA profile. This rate covers both mediator compensation and an allocated portion for the AAA's services. There is a four-hour minimum charge for a mediation conference. Expenses referenced in section M-16 may also apply.

If a matter submitted for mediation is withdrawn or cancelled or results in a settlement after the agreement to mediate is filed but prior to the mediation conference, the cost is $250 plus any mediator time and charges incurred.

The parties will be billed equally for all costs unless they agree otherwise.

If you have questions about mediation costs or services visit our website at **www.adr.org** or contact your local AAA office.

Conference Room Rental

The costs described do not include the use of AAA conference rooms. Conference rooms are available on a rental basis. Please contact your local AAA office for availability and rates

Commercial Arbitration Rules

R-1. Agreement of Parties*+

(a) The parties shall be deemed to have made these rules a part of their arbitration agreement whenever they have provided for arbitration by the American Arbitration Association (hereinafter AAA) under its Commercial Arbitration Rules or for arbitration by the AAA of a domestic commercial dispute without specifying particular rules. These rules and any amendment of them shall apply in the form in effect at the time the administrative requirements are met for a demand for arbitration or submission agreement received by the AAA. The parties, by written agreement, may vary the procedures set forth in these rules. After appointment of the arbitrator, such modifications may be made only with the consent of the arbitrator.

(b) Unless the parties or the AAA determines otherwise, the Expedited Procedures shall apply in any case in which no disclosed claim or counterclaim exceeds $75,000, exclusive of interest and arbitration fees and costs.

Parties may also agree to use these procedures in larger cases. Unless the parties agree otherwise, these procedures will not apply in cases involving more than two parties. The Expedited Procedures shall be applied as described in Sections E-1 through E-10 of these rules, in addition to any other portion of these rules that is not in conflict with the Expedited Procedures.

(c) Unless the parties agree otherwise, the Procedures for Large, Complex Commercial Disputes shall apply to all cases in which the disclosed claim or counterclaim of any party is at least $500,000, exclusive of claimed interest, arbitration fees and costs. Parties may also agree to use the procedures in cases involving claims or counterclaims under $500,000, or in nonmonetary cases. The Procedures for Large, Complex Commercial Disputes

shall be applied as described in Sections L-1 through L-4 of these rules, in addition to any other portion of these rules that is not in conflict with the Procedures for Large, Complex Commercial Disputes.

(d) All other cases shall be administered in accordance with Sections R-1 through R-54 of these rules.

* The AAA applies the Supplementary Procedures for Consumer-Related Disputes to arbitration clauses in agreements between individual consumers and businesses where the business has a standardized, systematic application of arbitration clauses with customers and where the terms and conditions of the purchase of standardized, consumable goods or services are nonnegotiable or primarily non-negotiable in most or all of its terms, conditions, features, or choices. The product or service must be for personal or household use. The AAA will have the discretion to apply or not to apply the supplementary procedures and the parties will be able to bring any disputes concerning the application or non-application to the attention of the arbitrator. Consumers are not prohibited from seeking relief in a small claims court for disputes or claims within the scope of its jurisdiction, even in consumer arbitration cases filed by the business.

+ A dispute arising out of an employer promulgated plan will be administered under the AAA's Employment Arbitration Rules and Mediation Procedures.

R-2. AAA and Delegation of Duties

When parties agree to arbitrate under these rules, or when they provide for arbitration by the AAA and an arbitration is initiated under these rules, they thereby authorize the AAA to administer the arbitration. The authority and duties of the AAA are prescribed in the agreement of the parties and in these rules, and may be carried out through such of the AAA's representatives as it may direct. The AAA may, in its discretion, assign the administration of an arbitration to any of its offices.

R-3. National Roster of Arbitrators

The AAA shall establish and maintain a National Roster of Commercial Arbitrators ("National Roster") and shall appoint arbitrators as provided in these rules. The term "arbitrator" in these rules refers to the arbitration panel, constituted for a particular case, whether composed of one or more arbitrators, or to an individual arbitrator, as the context requires.

R-4. Initiation under an Arbitration Provision in a Contract

(a) Arbitration under an arbitration provision in a contract shall be initiated in the following manner:

(i) The initiating party (the "claimant") shall, within the time period, if any, specified in the contract(s), give to the other party (the "respondent") written notice of its intention to arbitrate (the "demand"), which demand shall contain a statement setting forth the nature of the dispute, the names and addresses of all other parties, the amount involved, if any, the remedy sought, and the hearing locale requested.

(ii) The claimant shall file at any office of the AAA two copies of the demand and two copies of the arbitration provisions of the contract, together with the appropriate filing fee as provided in the schedule included with these rules.

(iii) The AAA shall confirm notice of such filing to the parties.

(b) A respondent may file an answering statement in duplicate with the AAA within 15 days after confirmation of notice of filing of the demand is sent by the AAA. The respondent shall, at the time of any such filing, send a copy of the answering statement to the claimant. If a counterclaim is asserted, it shall contain a statement setting forth the nature of the counterclaim, the amount involved, if any, and the remedy sought. If a counterclaim is made, the party making the counterclaim shall forward to the AAA with the answering statement the appropriate fee provided in the schedule included with these rules.

(c) If no answering statement is filed within the stated time, respondent will be deemed to deny the claim. Failure to file an answering statement shall not operate to delay the arbitration.

(d) When filing any statement pursuant to this section, the parties are encouraged to provide descriptions of their claims in sufficient detail to make the circumstances of the dispute clear to the arbitrator.

R-5. Initiation under a Submission

Parties to any existing dispute may commence an arbitration under these rules by filing at any office of the AAA two copies of a written submission to arbitrate under these rules, signed by the parties. It shall contain a statement of the nature of the dispute, the names and addresses of all parties, any claims and counterclaims, the amount involved, if any, the remedy sought, and the hearing locale requested, together with the appropriate filing fee as provided in the schedule included with these rules. Unless the parties state otherwise in the submission, all claims and counterclaims will be deemed to be denied by the other party.

R-6. Changes of Claim

After filing of a claim, if either party desires to make any new or different claim or counterclaim, it shall be made in writing and filed with the AAA. The party asserting such a claim or counterclaim shall provide a copy to the other party, who shall have 15 days from the date of such transmission within which to file an answering statement with the AAA. After the arbitrator is appointed, however, no new or different claim may be submitted except with the arbitrator's consent.

R-7. Jurisdiction

(a) The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.

(b) The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrator that the contract is null and void shall not for that reason alone render invalid the arbitration clause.

(c) A party must object to the jurisdiction of the arbitrator or to the arbitrability of a claim or counterclaim no later than the filing of the answering statement to the claim or counterclaim that gives rise to the objection. The arbitrator may rule on such objections as a preliminary matter or as part of the final award.

R-8. Mediation

At any stage of the proceedings, the parties may agree to conduct a mediation conference under the Commercial Mediation Procedures in order to facilitate settlement. The mediator shall not be an arbitrator appointed to the case. Where the parties to a pending arbitration agree to mediate under the AAA's rules, no additional administrative fee is required to initiate the mediation.

R-9. Administrative Conference

At the request of any party or upon the AAA's own initiative, the AAA may conduct an administrative conference, in person or by telephone, with the parties and/or their representatives. The conference may address such issues as arbitrator selection, potential mediation of the dispute, potential exchange of information, a timetable for hearings and any other administrative matters.

R-10. Fixing of Locale

The parties may mutually agree on the locale where the arbitration is to be held. If any party requests that the hearing be held in a specific locale and the other party files no objection thereto within 15 days after notice of the request has been sent to it by the AAA, the locale shall be the one requested. If a party objects to the locale requested by the other party, the AAA shall have the power to determine the locale, and its decision shall be final and binding.

R-11. Appointment from National Roster

(a) If the parties have not appointed an arbitrator and have not provided any other method of appointment, the arbitrator shall be appointed in the following manner: The AAA shall send simultaneously to each party to the dispute an identical list of 10 (unless the AAA decides that a different number is appropriate) names of persons chosen from the National Roster. The parties are encouraged to agree to an arbitrator from the submitted list and to advise the AAA of their agreement.

(b) If the parties are unable to agree upon an arbitrator, each party to the dispute shall have 15 days from the transmittal date in which to strike names objected to, number the remaining names in order of preference, and return the list to the AAA. If a party does not return the list within the time specified, all persons named therein shall be deemed acceptable. From among the persons who have been approved on both lists, and in accordance with the designated order of mutual preference, the AAA shall invite the acceptance of an arbitrator to serve. If the parties fail to agree on any of the persons named, or if acceptable arbitrators are unable to act, or if for any other reason the appointment cannot be made from the submitted lists, the AAA shall have the power to make the appointment from among other members of the National Roster without the submission of additional lists.

(c) Unless the parties agree otherwise when there are two or more claimants or two or more respondents, the AAA may appoint all the arbitrators.

R-12. Direct Appointment by a Party

(a) If the agreement of the parties names an arbitrator or specifies a method of appointing an arbitrator, that designation or method shall be followed. The notice of appointment, with the name and address of the arbitrator, shall be filed with the AAA by the appointing party. Upon the request of any appointing party, the AAA shall submit a list of members of the National Roster from which the party may, if it so desires, make the appointment.

(b) Where the parties have agreed that each party is to name one arbitrator, the arbitrators so named must meet the standards of Section R-17 with respect to impartiality and independence unless the parties have specifically agreed pursuant to Section R-17(a) that the party-appointed arbitrators are to be non-neutral and need not meet those standards.

(c) If the agreement specifies a period of time within which an arbitrator shall be appointed and any party fails to make the appointment within that period, the AAA shall make the appointment.

(d) If no period of time is specified in the agreement, the AAA shall notify the party to make the appointment. If within 15 days after such notice has been sent, an arbitrator has not been appointed by a party, the AAA shall make the appointment.

R-13. Appointment of Chairperson by Party-Appointed Arbitrators or Parties

(a) If, pursuant to Section R-12, either the parties have directly appointed arbitrators, or the arbitrators have been appointed by the AAA, and the parties have authorized them to appoint a chairperson within a specified time and no appointment is made within that time or any agreed extension, the AAA may appoint the chairperson.

(b) If no period of time is specified for appointment of the chairperson and the party-appointed arbitrators or the parties do not make the appointment within 15 days from the date of the appointment of the last party-appointed arbitrator, the AAA may appoint the chairperson.

(c) If the parties have agreed that their party-appointed arbitrators shall appoint the chairperson from the National Roster, the AAA shall furnish to the party-appointed arbitrators, in the manner provided in Section R-11, a list selected from the National Roster, and the appointment of the chairperson shall be made as provided in that Section.

R-14. Nationality of Arbitrator

Where the parties are nationals of different countries, the AAA, at the request of any party or on its own initiative, may appoint as arbitrator a national of a country other than that of any of the parties. The request must be made before the time set for the appointment of the arbitrator as agreed by the parties or set by these rules.

R-15. Number of Arbitrators

If the arbitration agreement does not specify the number of arbitrators, the dispute shall be heard and determined by one arbitrator, unless the AAA, in its discretion, directs that three arbitrators be appointed. A party may request three arbitrators in the demand or answer, which request the AAA will consider in exercising its discretion regarding the number of arbitrators appointed to the dispute.

R-16. Disclosure

(a) Any person appointed or to be appointed as an arbitrator shall disclose to the AAA any circumstance likely to give rise to justifiable doubt as to the arbitrator's impartiality or independence, including any bias or any financial or personal interest in the

result of the arbitration or any past or present relationship with the parties or their representatives. Such obligation shall remain in effect throughout the arbitration.

(b) Upon receipt of such information from the arbitrator or another source, the AAA shall communicate the information to the parties and, if it deems it appropriate to do so, to the arbitrator and others.

(c) In order to encourage disclosure by arbitrators, disclosure of information pursuant to this Section R-16 is not to be construed as an indication that the arbitrator considers that the disclosed circumstance is likely to affect impartiality or independence.

R-17. Disqualification of Arbitrator

(a) Any arbitrator shall be impartial and independent and shall perform his or her duties with diligence and in good faith, and shall be subject to disqualification for:

(i) partiality or lack of independence,

(ii) inability or refusal to perform his or her duties with diligence and in good faith, and

(iii) any grounds for disqualification provided by applicable law. The parties may agree in writing, however, that arbitrators directly appointed by a party pursuant to Section R-12 shall be nonneutral, in which case such arbitrators need not be impartial or independent and shall not be subject to disqualification for partiality or lack of independence.

(b) Upon objection of a party to the continued service of an arbitrator, or on its own initiative, the AAA shall determine whether the arbitrator should be disqualified under the grounds set out above, and shall inform the parties of its decision, which decision shall be conclusive.

R-18. Communication with Arbitrator

(a) No party and no one acting on behalf of any party shall communicate ex parte with an arbitrator or a candidate for arbitrator concerning the arbitration, except that a party, or someone acting on behalf of a party, may communicate ex parte with a candidate for direct appointment pursuant to Section R-12 in order to advise the candidate of the general nature of the controversy and of the anticipated proceedings and to discuss the candidate's qualifications, availability, or independence in relation to the parties or to discuss the suitability of candidates for selection as a third arbitrator where the parties or party-designated arbitrators are to participate in that selection.

(b) Section R-18(a) does not apply to arbitrators directly appointed by the parties who, pursuant to Section R-17(a), the parties have agreed in writing are non-neutral. Where the parties have so agreed under Section R-17(a), the AAA shall as an administrative practice suggest to the parties that they agree further that Section R-18(a) should nonetheless apply prospectively.

R-19. Vacancies

(a) If for any reason an arbitrator is unable to perform the duties of the office, the AAA may, on proof satisfactory to it, declare the office vacant. Vacancies shall be filled in accordance with the applicable provisions of these rules.

(b) In the event of a vacancy in a panel of neutral arbitrators after the hearings have commenced, the remaining arbitrator or arbitrators may continue with the hearing and determination of the controversy, unless the parties agree otherwise.

(c) In the event of the appointment of a substitute arbitrator, the panel of arbitrators shall determine in its sole discretion whether it is necessary to repeat all or part of any prior hearings.

R-20. Preliminary Hearing

(a) At the request of any party or at the discretion of the arbitrator or the AAA, the arbitrator may schedule as soon as practicable a preliminary hearing with the parties and/or their representatives. The preliminary hearing may be conducted by telephone at the arbitrator's discretion.

(b) During the preliminary hearing, the parties and the arbitrator should discuss the future conduct of the case, including clarification of the issues and claims, a schedule for the hearings and any other preliminary matters.

R-21. Exchange of Information

(a) At the request of any party or at the discretion of the arbitrator, consistent with the expedited nature of arbitration, the arbitrator may direct

  (i) the production of documents and other information, and

  (ii) the identification of any witnesses to be called.

(b) At least five business days prior to the hearing, the parties shall exchange copies of all exhibits they intend to submit at the hearing.

(c) The arbitrator is authorized to resolve any disputes concerning the exchange of information.

R-22. Date, Time, and Place of Hearing

The arbitrator shall set the date, time, and place for each hearing. The parties shall respond to requests for hearing dates in a timely manner, be cooperative in scheduling the earliest practicable date, and adhere to the established hearing schedule. The AAA shall send a notice of hearing to the parties at least 10 days in advance of the hearing date, unless otherwise agreed by the parties.

R-23. Attendance at Hearings

The arbitrator and the AAA shall maintain the privacy of the hearings unless the law provides to the contrary. Any person having a direct interest in the arbitration is entitled to attend hearings. The arbitrator shall otherwise have the power to require the exclusion of any witness, other than a party or other essential person, during the testimony of any other witness. It shall be discretionary with the arbitrator to determine the propriety of the attendance of any other person other than a party and its representatives.

R-24. Representation

Any party may be represented by counsel or other authorized representative. A party intending to be so represented shall notify the other party and the AAA of the name and address of the representative at least three days prior to the date set for the hearing at which that person is first to appear. When such a representative initiates an arbitration or responds for a party, notice is deemed to have been given.

R-25. Oaths

Before proceeding with the first hearing, each arbitrator may take an oath of office and, if required by law, shall do so. The arbitrator may require witnesses to testify under oath administered by any duly qualified person and, if it is required by law or requested by any party, shall do so.

R-26. Stenographic Record

Any party desiring a stenographic record shall make arrangements directly with a stenographer and shall notify the other parties of these arrangements at least three days in advance of the hearing.

The requesting party or parties shall pay the cost of the record. If the transcript is agreed by the parties, or determined by the arbitrator to be the official record of the proceeding, it must be provided to the arbitrator and made available to the other parties for inspection, at a date, time, and place determined by the arbitrator.

R-27. Interpreters

Any party wishing an interpreter shall make all arrangements directly with the interpreter and shall assume the costs of the service.

R-28. Postponements

The arbitrator may postpone any hearing upon agreement of the parties, upon request of a party for good cause shown, or upon the arbitrator's own initiative.

R-29. Arbitration in the Absence of a Party or Representative

Unless the law provides to the contrary, the arbitration may proceed in the absence of any party or representative who, after due notice, fails to be present or fails to obtain a postponement. An award shall not be made solely on the default of a party. The arbitrator shall require the party who is present to submit such evidence as the arbitrator may require for the making of an award.

R-30. Conduct of Proceedings

(a) The claimant shall present evidence to support its claim. The respondent shall then present evidence to support its defense. Witnesses for each party shall also submit to questions from the arbitrator and the adverse party. The arbitrator has the discretion to vary this procedure, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case.

(b) The arbitrator, exercising his or her discretion, shall conduct the proceedings with a view to expediting the resolution of the dispute and may direct the order of proof, bifurcate proceedings and direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case.

(c) The parties may agree to waive oral hearings in any case.

R-31. Evidence

(a) The parties may offer such evidence as is relevant and material to the dispute and shall produce such evidence as the arbitrator may deem necessary to an understanding and determination of the dispute. Conformity to legal rules of evidence shall not be necessary. All evidence shall be taken in the presence of all of the arbitrators and all of the parties, except where any of the parties is absent, in default or has waived the right to be present.

(b) The arbitrator shall determine the admissibility, relevance, and materiality of the evidence offered and may exclude evidence deemed by the arbitrator to be cumulative or irrelevant.

(c) The arbitrator shall take into account applicable principles of legal privilege, such as those involving the confidentiality of communications between a lawyer and client.

(d) An arbitrator or other person authorized by law to subpoena witnesses or documents may do so upon the request of any party or independently.

R-32. Evidence by Affidavit and Post-hearing Filing of Documents or Other Evidence

(a) The arbitrator may receive and consider the evidence of witnesses by declaration or affidavit, but shall give it only such weight as the arbitrator deems it entitled to after consideration of any objection made to its admission.

(b) If the parties agree or the arbitrator directs that documents or other evidence be submitted to the arbitrator after the hearing, the documents or other evidence shall be filed with the AAA for transmission to the arbitrator. All parties shall be afforded an opportunity to examine and respond to such documents or other evidence.

R-33. Inspection or Investigation

An arbitrator finding it necessary to make an inspection or investigation in connection with the arbitration shall direct the AAA to so advise the parties. The arbitrator shall set the date and time and the AAA shall notify the parties. Any party who so desires may be present at such an inspection or investigation. In the event that one or all parties are not present at the inspection or investigation, the arbitrator shall make an oral or written report to the parties and afford them an opportunity to comment.

R-34. Interim Measures **

(a) The arbitrator may take whatever interim measures he or she deems necessary, including injunctive relief and measures for the protection or conservation of property and disposition of perishable goods.

(b) Such interim measures may take the form of an interim award, and the arbitrator may require security for the costs of such measures.

(c) A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate.

** The Optional Rules may be found on page 49.

R-35. Closing of Hearing

The arbitrator shall specifically inquire of all parties whether they have any further proofs to offer or witnesses to be heard. Upon receiving negative replies or if satisfied that the record is complete, the arbitrator shall declare the hearing closed. If briefs are to be filed, the hearing shall be declared closed as of the final date set by the arbitrator for the receipt of briefs. If documents are to be filed as provided in Section R-32 and the date set for their receipt is later than that set for the receipt of briefs, the later date shall be the closing date of the hearing. The time limit within which the arbitrator is required to make the award shall commence, in the absence of other agreements by the parties, upon the closing of the hearing.

R-36. Reopening of Hearing

The hearing may be reopened on the arbitrator's initiative, or upon application of a party, at any time before the award is made. If reopening the hearing would prevent the making of the award within the specific time agreed on by the parties in the contract(s) out of which the controversy has arisen, the matter may not be reopened unless the parties agree on an extension of time. When no specific date is fixed in the contract, the arbitrator may reopen the hearing and shall have 30 days from the closing of the reopened hearing within which to make an award.

R-37. Waiver of Rules

Any party who proceeds with the arbitration after knowledge that any provision or requirement of these rules has not been complied with and who fails to state an objection in writing shall be deemed to have waived the right to object.

R-38. Extensions of Time

The parties may modify any period of time by mutual agreement. The AAA or the arbitrator may for good cause extend any period of time established by these rules, except the time for making the award. The AAA shall notify the parties of any extension.

R-39. Serving of Notice

(a) Any papers, notices, or process necessary or proper for the initiation or continuation of an arbitration under these rules, for any court action in connection therewith, or for the entry of judgment on any award made under these rules may be served on a party by mail addressed to the party, or its representative at the last known address or by personal service, in or outside the state where the arbitration is to be held, provided that reasonable opportunity to be heard with regard to the dispute is or has been granted to the party.

(b) The AAA, the arbitrator and the parties may also use overnight delivery or electronic facsimile transmission (fax), to give the notices required by these rules. Where all parties and the arbitrator agree, notices may be transmitted by electronic mail (e-mail), or other methods of communication.

(c) Unless otherwise instructed by the AAA or by the arbitrator, any documents submitted by any party to the AAA or to the arbitrator shall simultaneously be provided to the other party or parties to the arbitration.

R-40. Majority Decision

When the panel consists of more than one arbitrator, unless required by law or by the arbitration agreement, a majority of the arbitrators must make all decisions.

R-41. Time of Award

The award shall be made promptly by the arbitrator and, unless otherwise agreed by the parties or specified by law, no later than 30 days from the date of closing the hearing, or, if oral hearings have been waived, from the date of the AAA's transmittal of the final statements and proofs to the arbitrator.

R-42. Form of Award

(a) Any award shall be in writing and signed by a majority of the arbitrators. It shall be executed in the manner required by law.

(b) The arbitrator need not render a reasoned award unless the parties request such an award in writing prior to appointment of the arbitrator or unless the arbitrator determines that a reasoned award is appropriate.

R-43. Scope of Award

(a) The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific performance of a contract.

(b) In addition to a final award, the arbitrator may make other decisions, including interim, interlocutory, or partial rulings, orders, and awards. In any interim, interlocutory, or partial award, the arbitrator may assess and apportion the fees, expenses, and compensation related to such award as the arbitrator determines is appropriate.

(c) In the final award, the arbitrator shall assess the fees, expenses, and compensation provided in Sections R-49, R-50, and R-51. The arbitrator may apportion such fees, expenses, and compensation among the parties in such amounts as the arbitrator determines is appropriate.

(d) The award of the arbitrator(s) may include:

(i) interest at such rate and from such date as the arbitrator(s) may deem appropriate; and

(ii) an award of attorneys' fees if all parties have requested such an award or it is authorized by law or their arbitration agreement.

R-44. Award upon Settlement

If the parties settle their dispute during the course of the arbitration and if the parties so request, the arbitrator may set forth the terms of the settlement in a "consent award." A consent award must include an allocation of arbitration costs, including administrative fees and expenses as well as arbitrator fees and expenses.

R-45. Delivery of Award to Parties

Parties shall accept as notice and delivery of the award the placing of the award or a true copy thereof in the mail addressed to the parties or their representatives at the last known addresses, personal or electronic service of the award, or the filing of the award in any other manner that is permitted by law.

R-46. Modification of Award

Within 20 days after the transmittal of an award, any party, upon notice to the other parties, may request the arbitrator, through the AAA, to correct any clerical, typographical, or computational errors in the award. The arbitrator is not empowered to redetermine the merits of any claim already decided. The other parties shall be given 10 days to respond to the request. The arbitrator shall dispose of the request within 20 days after transmittal by the AAA to the arbitrator of the request and any response thereto.

R-47. Release of Documents for Judicial Proceedings

The AAA shall, upon the written request of a party, furnish to the party, at the party's expense, certified copies of any papers in the AAA's possession that may be required in judicial proceedings relating to the arbitration.

R-48. Applications to Court and Exclusion of Liability

(a) No judicial proceeding by a party relating to the subject matter of the arbitration shall be deemed a waiver of the party's right to arbitrate.

(b) Neither the AAA nor any arbitrator in a proceeding under these rules is a necessary or proper party in judicial proceedings relating to the arbitration.

(c) Parties to an arbitration under these rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof.

(d) Parties to an arbitration under these rules shall be deemed to have consented that neither the AAA nor any arbitrator shall be liable to any party in any action for damages or injunctive relief for any act or omission in connection with any arbitration under these rules.

R-49. Administrative Fees

As a not-for-profit organization, the AAA shall prescribe an initial filing fee and a case service fee to compensate it for the cost of providing administrative services. The fees in effect when the fee or charge is incurred shall be applicable. The filing fee shall be advanced by the party or parties making a claim or counterclaim, subject to final apportionment by the arbitrator in the award. The AAA may, in the event of extreme hardship on the part of any party, defer or reduce the administrative fees.

R-50. Expenses

The expenses of witnesses for either side shall be paid by the party producing such witnesses. All other expenses of the arbitration, including required travel and other expenses of the arbitrator, AAA representatives, and any witness and the cost of any proof produced at the direct request of the arbitrator, shall be borne equally by the parties, unless they agree otherwise or unless the arbitrator in the award assesses such expenses or any part thereof against any specified party or parties.

R-51. Neutral Arbitrator's Compensation

(a) Arbitrators shall be compensated at a rate consistent with the arbitrator's stated rate of compensation.

(b) If there is disagreement concerning the terms of compensation, an appropriate rate shall be established with the arbitrator by the AAA and confirmed to the parties.

(c) Any arrangement for the compensation of a neutral arbitrator shall be made through the AAA and not directly between the parties and the arbitrator.

R-52. Deposits

The AAA may require the parties to deposit in advance of any hearings such sums of money as it deems necessary to cover the expense of the arbitration, including the arbitrator's fee, if any, and shall render an accounting to the parties and return any unexpended balance at the conclusion of the case.

R-53. Interpretation and Application of Rules

The arbitrator shall interpret and apply these rules insofar as they relate to the arbitrator's powers and duties. When there is more than one arbitrator and a difference arises among them concerning the meaning or application of these rules, it shall be decided by a majority vote. If that is not possible, either an arbitrator or a party may refer the question to the AAA for final decision. All other rules shall be interpreted and applied by the AAA.

R-54. Suspension for Nonpayment

If arbitrator compensation or administrative charges have not been paid in full, the AAA may so inform the parties in order that one of them may advance the required payment. If such payments are not made, the arbitrator may order the suspension or termination of the proceedings. If no arbitrator has yet been appointed, the AAA may suspend the proceedings.

Expedited Procedures

E-1. Limitation on Extensions

Except in extraordinary circumstances, the AAA or the arbitrator may grant a party no more than one seven-day extension of time to respond to the demand for arbitration or counterclaim as provided in Section R-4.

E-2. Changes of Claim or Counterclaim

A claim or counterclaim may be increased in amount, or a new or different claim or counterclaim added, upon the agreement of the other party, or the consent of the arbitrator. After the arbitrator is appointed, however, no new or different claim or counterclaim may be submitted except with the arbitrator's consent. If an increased claim or counterclaim exceeds $75,000, the case will be administered under the regular procedures unless all parties and the arbitrator agree that the case may continue to be processed under the Expedited Procedures.

E-3. Serving of Notices

In addition to notice provided by Section R-39(b), the parties shall also accept notice by telephone. Telephonic notices by the AAA shall subsequently be confirmed in writing to the parties. Should there be a failure to confirm in writing any such oral notice, the proceeding shall nevertheless be valid if notice has, in fact, been given by telephone.

E-4. Appointment and Qualifications of Arbitrator

(a) The AAA shall simultaneously submit to each party an identical list of five proposed arbitrators drawn from its National Roster from which one arbitrator shall be appointed.

(b) The parties are encouraged to agree to an arbitrator from this list and to advise the AAA of their agreement. If the parties are unable to agree upon an arbitrator, each party may strike two names from the list and return it to the AAA within seven days from the date of the AAA's mailing to the parties. If for any reason the appointment of an arbitrator cannot be made from the list, the AAA may make the appointment from other members of the panel without the submission of additional lists.

(c) The parties will be given notice by the AAA of the appointment of the arbitrator, who shall be subject to disqualification for the reasons specified in Section R-17. The parties shall notify the AAA within seven days of any objection to the arbitrator appointed. Any such objection shall be for cause and shall be confirmed in writing to the AAA with a copy to the other party or parties.

E-5. Exchange of Exhibits

At least two business days prior to the hearing, the parties shall exchange copies of all exhibits they intend to submit at the hearing. The arbitrator shall resolve disputes concerning the exchange of exhibits.

E-6. Proceedings on Documents

Where no party's claim exceeds $10,000, exclusive of interest and arbitration costs, and other cases in which the parties agree, the dispute shall be resolved by submission of documents, unless any party requests an oral hearing, or the arbitrator determines that an oral hearing is necessary. The arbitrator shall establish a fair and equitable procedure for the submission of documents.

E-7. Date, Time, and Place of Hearing

In cases in which a hearing is to be held, the arbitrator shall set the date, time, and place of the hearing, to be scheduled to take place within 30 days of confirmation of the arbitrator's appointment. The AAA will notify the parties in advance of the hearing date.

E-8. The Hearing

(a) Generally, the hearing shall not exceed one day. Each party shall have equal opportunity to submit its proofs and complete its case. The arbitrator shall determine the order of the hearing, and may require further submission of documents within two days after the hearing. For good cause shown, the arbitrator may schedule additional hearings within seven business days after the initial day of hearings.

(b) Generally, there will be no stenographic record. Any party desiring a stenographic record may arrange for one pursuant to the provisions of Section R-26.

E-9. Time of Award

Unless otherwise agreed by the parties, the award shall be rendered not later than 14 days from the date of the closing of the hearing or, if oral hearings have been waived, from the date of the AAA's transmittal of the final statements and proofs to the arbitrator.

E-10. Arbitrator's Compensation

Arbitrators will receive compensation at a rate to be suggested by the AAA regional office.

Procedures for Large, Complex Commercial Disputes

L-1. Administrative Conference

Prior to the dissemination of a list of potential arbitrators, the AAA shall, unless the parties agree otherwise, conduct an administrative conference with the parties and/or their attorneys or other representatives by conference call. The conference will take place within 14 days after the commencement of the arbitration. In the event the parties are unable to agree on a mutually acceptable time for the conference, the AAA may contact the parties individually to discuss the issues contemplated herein. Such administrative conference shall be conducted for the following purposes and for such additional purposes as the parties or the AAA may deem appropriate:

(a) to obtain additional information about the nature and magnitude of the dispute and the anticipated length of hearing and scheduling;

(b) to discuss the views of the parties about the technical and other qualifications of the arbitrators;

(c) to obtain conflicts statements from the parties; and

(d) to consider, with the parties, whether mediation or other non-adjudicative methods of dispute resolution might be appropriate.

L-2. Arbitrators

(a) Large, complex commercial cases shall be heard and determined by either one or three arbitrators, as may be agreed upon by the parties. If the parties are unable to agree upon the number of arbitrators and a claim or counterclaim involves at least $1,000,000, then three arbitrator(s) shall hear and determine the case. If the parties are unable to agree on the number of arbitrators and each claim and counterclaim is less than $1,000,000, then one arbitrator shall hear and determine the case.

(b) The AAA shall appoint arbitrator(s) as agreed by the parties. If they are unable to agree on a method of appointment, the AAA shall appoint arbitrators from the Large, Complex Commercial Case Panel, in the manner provided in the regular Commercial Arbitration Rules. Absent agreement of the parties, the arbitrator(s) shall not have served as the mediator in the mediation phase of the instant proceeding.

L-3. Preliminary Hearing

As promptly as practicable after the selection of the arbitrator(s), a preliminary hearing shall be held among the parties and/or their attorneys or other representatives and the arbitrator(s). Unless the parties agree otherwise, the preliminary hearing will be conducted by telephone conference call rather than in person. At the preliminary hearing the matters to be considered shall include, without limitation:

(a) service of a detailed statement of claims, damages and defenses, a statement of the issues asserted by each party and positions with respect thereto, and any legal authorities the parties may wish to bring to the attention of the arbitrator(s);

(b) stipulations to uncontested facts;

(c) the extent to which discovery shall be conducted;

(d) exchange and premarking of those documents which each party believes may be offered at the hearing;

(e) the identification and availability of witnesses, including experts, and such matters with respect to witnesses including their biographies and expected testimony as may be appropriate;

(f) whether, and the extent to which, any sworn statements and/or depositions may be introduced;

(g) the extent to which hearings will proceed on consecutive days;

(h) whether a stenographic or other official record of the proceedings shall be maintained;

(i) the possibility of utilizing mediation or other non-adjudicative methods of dispute resolution; and

(j) the procedure for the issuance of subpoenas.

By agreement of the parties and/or order of the arbitrator(s), the pre-hearing activities and the hearing procedures that will govern the arbitration will be memorialized in a Scheduling and Procedure Order.

L-4. Management of Proceedings

(a) Arbitrator(s) shall take such steps as they may deem necessary or desirable to avoid delay and to achieve a just, speedy and cost-effective resolution of large, complex commercial cases.

(b) Parties shall cooperate in the exchange of documents, exhibits and information within such party's control if the arbitrator(s) consider such production to be consistent with the goal of achieving a just, speedy and cost-effective resolution of a large, complex commercial case.

(c) The parties may conduct such discovery as may be agreed to by all the parties provided, however, that the arbitrator(s) may place such limitations on the conduct of such discovery as the arbitrator(s) shall deem appropriate. If the parties cannot agree on production of documents and other information, the arbitrator(s), consistent with the expedited nature of arbitration, may establish the extent of the discovery.

(d) At the discretion of the arbitrator(s), upon good cause shown and consistent with the expedited nature of arbitration, the arbitrator(s) may order depositions of, or the propounding of interrogatories to, such persons who may possess information determined by the arbitrator(s) to be necessary to determination of the matter.

(e) The parties shall exchange copies of all exhibits they intend to submit at the hearing 10 business days prior to the hearing unless the arbitrator(s) determine otherwise.

(f) The exchange of information pursuant to this rule, as agreed by the parties and/or directed by the arbitrator(s), shall be included within the Scheduling and Procedure Order.

(g) The arbitrator is authorized to resolve any disputes concerning the exchange of information.

(h) Generally hearings will be scheduled on consecutive days or in blocks of consecutive days in order to maximize efficiency and minimize costs.

Optional Rules for Emergency Measures of Protection

O-1. Applicability

Where parties by special agreement or in their arbitration clause have adopted these rules for emergency measures of protection, a party in need of emergency relief prior to the constitution of the panel shall notify the AAA and all other parties in writing of the nature of the relief sought and the reasons why such relief is required on an emergency basis. The application shall also set forth the reasons why the party is entitled to such relief. Such notice may be given by facsimile transmission, or other reliable means, but must include a statement certifying that all other parties have been notified or an explanation of the steps taken in good faith to notify other parties.

O-2. Appointment of Emergency Arbitrator

Within one business day of receipt of notice as provided in Section O-1, the AAA shall appoint a single emergency arbitrator from a special AAA panel of emergency arbitrators designated to rule on emergency applications. The emergency arbitrator shall immediately disclose any circumstance likely, on the basis of the facts disclosed in the application, to affect such arbitrator's impartiality or independence. Any challenge to the appointment of the emergency arbitrator must be made within one business day of the communication by the AAA to the parties of the appointment of the emergency arbitrator and the circumstances disclosed.

O-3. Schedule

The emergency arbitrator shall as soon as possible, but in any event within two business days of appointment, establish a schedule for consideration of the application for emergency relief. Such schedule shall provide a reasonable opportunity to all parties to be heard, but may provide for proceeding by telephone conference or on written submissions as alternatives to a formal hearing.

O-4. Interim Award

If after consideration, the emergency arbitrator is satisfied that the party seeking the emergency relief has shown that immediate and irreparable loss or damage will result in the absence of emergency relief, and that such party is entitled to such relief, the emergency arbitrator may enter an interim award granting the relief and stating the reasons therefore.

O-5. Constitution of the Panel

Any application to modify an interim award of emergency relief must be based on changed circumstances and may be made to the emergency arbitrator until the panel is constituted; thereafter such a request shall be addressed to the panel. The emergency arbitrator shall have no further power to act after the panel is constituted unless the parties agree that the emergency arbitrator is named as a member of the panel.

O-6. Security

Any interim award of emergency relief may be conditioned on provision by the party seeking such relief of appropriate security.

O-7. Special Master

A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate. If the AAA is directed by a judicial authority to nominate a special master to consider and report on an application for emergency relief, the AAA shall proceed as provided in Section O-1 of this article and the references to the emergency arbitrator shall be read to mean the special master, except that the special master shall issue a report rather than an interim award.

O-8. Costs

The costs associated with applications for emergency relief shall initially be apportioned by the emergency arbitrator or special master, subject to the power of the panel to determine finally the apportionment of such costs.

Administrative Fee Schedules (Standard and Flexible Fee)

The AAA has two administrative fee options for parties filing claims or counterclaims, the Standard Fee Schedule and Flexible Fee Schedule. The Standard Fee Schedule has a two payment schedule, and the Flexible Fee Schedule has a three payment schedule which offers lower initial filing fees, but potentially higher total administrative fees of approximately 12% to 19% for cases that proceed to a hearing. The administrative fees of the AAA are based on the amount of the claim or counterclaim. Arbitrator compensation is not included in this schedule. Unless the parties agree otherwise, arbitrator compensation and administrative fees are subject to allocation by the arbitrator in the award.

In an effort to make arbitration costs reasonable for consumers, the AAA has a separate fee schedule for consumer-related disputes. Please refer to Section C-8 of the Supplementary Procedures for Consumer-Related Disputes when filing a consumer-related claim. Note that the Flexible Fee Schedule is not available on cases administered under these supplementary procedures.

The AAA applies the Supplementary Procedures for Consumer-Related Disputes to arbitration clauses in agreements between individual consumers and businesses where the business has a standardized, systematic application of arbitration clauses with customers and where the terms and conditions of the purchase of standardized, consumable goods or services are non-negotiable or primarily non-negotiable in most or all of its terms, conditions, features, or choices. The product or service must be for personal or household use. The AAA will have the discretion to apply or not to apply the Supplementary Procedures and the parties will be able to bring any disputes concerning the application or non-application to the attention of the arbitrator. Consumers are not prohibited from seeking relief in a small claims court for disputes or claims within the scope of its jurisdiction, even in consumer arbitration cases filed by the business.

Fees for incomplete or deficient filings: Where the applicable arbitration agreement does not reference the AAA, the AAA will attempt to obtain the agreement of the other parties to the dispute to have the arbitration administered by the AAA. However, where the AAA is unable to obtain the agreement of the parties to have the AAA administer the arbitration, the AAA will administratively close the case and will not proceed with the administration of the arbitration. In these cases, the AAA will return the filing fees to the filing party, less the amount specified in the fee schedule below for deficient filings.

Parties that file demands for arbitration that are incomplete or otherwise do not meet the filing requirements contained in these Rules shall also be charged the amount specified below for deficient filings if they fail or are unable to respond to the AAA's request to correct the deficiency.

Fees for additional services: The AAA reserves the right to assess additional administrative fees for services performed by the AAA beyond those provided for in these Rules which may be required by the parties' agreement or stipulation.

Standard Fee Schedule

An Initial Filing Fee is payable in full by a filing party when a claim, counterclaim, or additional claim is filed. A Final Fee will be incurred for all cases that proceed to their first hearing. This fee will be payable in advance at the time that the first hearing is scheduled. This fee will be refunded at the conclusion of the case if no hearings have occurred. However, if the Association is not notified at least 24 hours before the time of the scheduled hearing, the Final Fee will remain due and will not be refunded.

These fees will be billed in accordance with the following schedule:

Amount of Claim	Initial Filing Fee	Final Fee
Above $0 to $10,000	$775	$200
Above $10,000 to $75,000	$975	$300
Above $75,000 to $150,000	$1,850	$750
Above $150,000 to $300,000	$2,800	$1,250
Above $300,000 to $500,000	$4,350	$1,750
Above $500,000 to $1,000,000	$6,200	$2,500
Above $1,000,000 to $5,000,000	$8,200	$3,250
Above $5,000,000 to $10,000,000	$10,200	$4,000
Above $10,000,000	Base fee of $12,800 plus .01% of the amount above $10,000,000 Fee Capped at $65,000	$6,000
Nonmonetary Claims[1]	$3,350	$1,250
Deficient Claim Filing Fee[2]	$350	
Additional Services[3]		

[1]*This fee is applicable when a claim or counterclaim is not for a monetary amount. Where a monetary claim amount is not known, parties will be required to state a range of claims or be subject to a filing fee of $10,200.*

[2]*The Deficient Claim Filing Fee shall not be charged in cases filed by a consumer in an arbitration governed by the Supplementary Procedures for the Resolution of Consumer-Related Disputes, or in cases filed by an Employee who is submitting their dispute to arbitration pursuant to an employer promulgated plan.*

[3]*The AAA may assess additional fees where procedures or services outside the Rules sections are required under the parties' agreement or by stipulation.*

Fees are subject to increase if the amount of a claim or counterclaim is modified after the initial filing date. Fees are subject to decrease if the amount of a claim or counterclaim is modified before the first hearing.

The minimum fees for any case having three or more arbitrators are $2,800 for the Initial Filing Fee, plus a $1,250 Final Fee. Expedited Procedures are applied in any case where no disclosed claim or counterclaim exceeds $75,000, exclusive of interest and arbitration costs.

Parties on cases filed under either the Flexible Fee Schedule or the Standard Fee Schedule that are held in abeyance for one year will be assessed an annual abeyance fee of $300. If a party refuses to pay the assessed fee, the other party or parties may pay the entire fee on behalf of all parties, otherwise the matter will be administratively closed.

For more information, please contact your local AAA office, case management center, or our Customer Service desk at 1-800-778-7879.

Refund Schedule for Standard Fee Schedule

The AAA offers a refund schedule on filing fees connected with the Standard Fee Schedule. For cases with claims up to $75,000, a minimum filing fee of $350 will not be refunded. For all other cases, a minimum fee of $600 will not be refunded. Subject to the minimum fee requirements, refunds will be calculated as follows:

- 100% of the filing fee, above the minimum fee, will be refunded if the case is settled or withdrawn within five calendar days of filing.
- 50% of the filing fee, will be refunded if the case is settled or withdrawn between six and 30 calendar days of filing.
- 25% of the filing fee will be refunded if the case is settled or withdrawn between 31 and 60 calendar days of filing.

No refund will be made once an arbitrator has been appointed (this includes one arbitrator on a three-arbitrator panel). No refunds will be granted on awarded cases.

Note: The date of receipt of the demand for arbitration with the AAA will be used to calculate refunds of filing fees for both claims and counterclaims.

Flexible Fee Schedule

A non-refundable Initial Filing Fee is payable in full by a filing party when a claim, counterclaim, or additional claim is filed. Upon receipt of the Demand for Arbitration, the AAA will promptly initiate the case and notify all parties as well as establish the due date for filing of an Answer, which may include a Counterclaim. In order to proceed with the further administration of the arbitration and appointment of the arbitrator(s), the appropriate, non-refundable Proceed Fee outlined below must be paid.

If a Proceed Fee is not submitted within ninety (90) days of the filing of the Claimant's Demand for Arbitration, the Association will administratively close the file and notify all parties.

No refunds or refund schedule will apply to the Filing or Proceed Fees once received.

The Flexible Fee Schedule below also may be utilized for the filing of counterclaims. However, as with the Claimant's claim, the counterclaim will not be presented to the arbitrator until the Proceed Fee is paid.

A Final Fee will be incurred for all claims and/or counterclaims that proceed to their first hearing. This fee will be payable in advance when the first hearing is scheduled, but will be refunded at the conclusion of the case if no hearings have occurred. However, if the Association is not notified of a cancellation at least 24 hours before the time of the scheduled hearing, the Final Fee will remain due and will not be refunded.

All fees will be billed in accordance with the following schedule:

Amount of Claim	Initial Filing Fee	Proceed Fee	Final Fee
Above $0 to $10,000	$400	$475	$200
Above $10,000 to $75,000	$625	$500	$300
Above $75,000 to $150,000	$850	$1250	$750
Above $150,000 to $300,000	$1,000	$2125	$1,250
Above $300,000 to $500,000	$1,500	$3,400	$1,750
Above $500,000 to $1,000,000	$2,500	$4,500	$2,500
Above $1,000,000 to $5,000,000	$2,500	$6,700	$3,250
Above $5,000,000 to $10,000,000	$3,500	$8,200	$4,000
Above $10,000,000	$4,500	$10,300 plus .01% of claim amount over $10,000,000 up to $65,000	$6,000
Nonmonetary[1]	$2,000	$2,000	$1,250
Deficient Claim Filing Fee	$350		
Additional Services[2]			

[1]*This fee is applicable when a claim or counterclaim is not for a monetary amount. Where a monetary claim amount is not known, parties will be required to state a range of claims or be subject to a filing fee of $3,500 and a proceed fee of $8,200.*

[2]*The AAA reserves the right to assess additional administrative fees for services performed by the AAA beyond those provided for in these Rules and which may be required by the parties' agreement or stipulation.*

For more information, please contact your local AAA office, case management center, or our Customer Service desk at 1-800-778-7879. All fees are subject to increase if the amount of a claim or counterclaim is modified after the initial filing date. Fees are subject to decrease if the amount of a claim or counterclaim is modified before the first hearing.

The minimum fees for any case having three or more arbitrators are $1,000 for the Initial Filing Fee; $2,125 for the Proceed Fee; and $1,250 for the Final Fee.

Under the Flexible Fee Schedule, a party's obligation to pay the Proceed Fee shall remain in effect regardless of any agreement of the parties to stay, postpone or otherwise modify the arbitration proceedings. Parties that, through mutual agreement, have held their case in abeyance for one year will be assessed an annual abeyance fee of $300. If a party refuses to pay the assessed fee, the other party or parties may pay the entire fee on behalf of all parties, otherwise the matter will be closed.

Note: The date of receipt by the AAA of the demand for arbitration will be used to calculate the ninety (90) day time limit for payment of the Proceed Fee.

There is no Refund Schedule in the Flexible Fee Schedule.

Hearing Room Rental

The fees described above do not cover the cost of hearing rooms, which are available on a rental basis. Check with the AAA for availability and rates.

American Arbitration Association

Dispute Resolution Services Worldwide

Exhibit 37

American Arbitration Association
Dispute Resolution Services Worldwide

Consumer-Related Disputes Supplementary PROCEDURES

Rules Effective September 15, 2005
Fees Effective January 1, 2010

INTRODUCTION

Millions of consumer purchases take place each year. Occasionally, these transactions lead to disagreements between consumers and businesses. These disputes can be resolved by arbitration. Arbitration is usually faster and cheaper than going to court.

The AAA applies the Supplementary Procedures for Consumer-Related Disputes to arbitration clauses in agreements between individual consumers and businesses where the business has a standardized, systematic application of arbitration clauses with customers and where the terms and conditions of the purchase of

standardized, consumable goods or services are non-negotiable or primarily non-negotiable in most or all of its terms, conditions, features, or choices. The product or service must be for personal or household use. The AAA will have the discretion to apply or not to apply the Supplementary Procedures and the parties will be able to bring any disputes concerning the application or non-application to the attention of the arbitrator. Consumers are not prohibited from seeking relief in a small claims court for disputes or claims within the scope of its jurisdiction, even in consumer arbitration cases filed by the business.

About the AAA

The American Arbitration Association (AAA) is a not-for-profit, private organization. We offer a broad range of conflict management services to businesses, organizations and individuals. We also provide education, training and publications focused on ways of settling disputes out of court.

The AAA's Consumer Rules

The AAA has developed the Supplementary Procedures for Consumer-Related Disputes for consumers and businesses that want to have their disagreements resolved by arbitrators. People throughout the world can make use of our services.

Availability of Mediation

Mediation is also available to help parties resolve their disputes. Mediations are handled under AAA's Commercial Mediation Procedures.

Administrative Fees

The Association charges a fee for its services under these rules. The costs to the consumer and business depend on the size and nature of the claims. A fee schedule is included at the end of this Supplement. In certain cases, fees paid by the consumer are fully refundable if the dispute is settled before the arbitrator takes any action.

Arbitrator's Fees

Arbitrators get paid for the time they spend resolving disputes. The arbitrator's fee depends on the type of proceeding that is used and the time it takes. The parties make deposits as outlined in the fee schedule at the end of this Supplement. Unused deposits are refunded at the end of the case.

GLOSSARY OF TERMS

Claimant

A Claimant is the party who files the claim or starts the arbitration. Either the consumer or the business may be the Claimant.

Respondent

A Respondent is the party against whom the claim is filed. If a Respondent states a claim in arbitration, it is called a counterclaim. Either the consumer or the business may be the Respondent.

ADR Process

An ADR (Alternative Dispute Resolution) Process is a method of resolving a dispute out of court. Mediation and Arbitration are the most widely used ADR processes.

Arbitration

In arbitration, the parties submit disputes to an impartial person (the arbitrator) for a decision. Each party can present evidence to the arbitrator. Arbitrators do not have to follow the Rules of Evidence used in court.

Arbitrators decide cases with written decisions or "awards." An award is usually binding on the parties. A court may enforce an arbitration award, but the court's review of arbitration awards is limited.

Desk Arbitration

In a Desk Arbitration, the parties submit their arguments and evidence to the arbitrator in writing. The arbitrator then makes an award based only on the documents. No hearing is held.

Telephone Hearing

In a Telephone Hearing, the parties have the opportunity to tell the arbitrator about their case during a conference call. Often this is done after the parties have sent in documents for the arbitrator to review. A Telephone Hearing can be cheaper and easier than an In Person Hearing.

In Person Hearing

During an In Person Hearing, the parties and the arbitrator meet in a conference room or office and the parties present their evidence in a process that is similar to going to court. However, an In Person Hearing is not as formal as going to court.

Mediation

In Mediation, an impartial person (the mediator) helps the parties try to settle their dispute by reaching an agreement together. A mediator's role is to help the parties come to an agreement. A mediator does not arbitrate or decide the outcome.

Neutral

A Neutral is a word that is used to describe someone who is a mediator, arbitrator, or other independent, impartial person selected to serve as the independent third party in an ADR process.

Case Manager

The Case Manager is the AAA's employee assigned to handle the administrative aspects of the case. He or she does not decide the case. He or she only manages the case's administrative steps, such as exchanging documents, matching schedules, and setting up hearings. The Case Manager is the parties' contact point for almost all aspects of the case outside of any hearings.

ADR Agreement

An ADR Agreement is an agreement between a business and a consumer to submit disputes to mediation, arbitration, or other ADR processes.

ADR Program

An ADR Program is any program or service set up or used by a business to resolve disputes out of court.

Independent ADR Institution

An Independent ADR Institution is an organization that provides independent and impartial administration of ADR programs for consumers and businesses. The American Arbitration Association is an Independent ADR Institution.

SUPPLEMENTARY PROCEDURES FOR THE RESOLUTION OF CONSUMER-RELATED DISPUTES

C-1. Agreement of Parties and Applicability

(a) The Commercial Dispute Resolution Procedures and these Supplementary Procedures for Consumer-Related Disputes shall apply whenever the American Arbitration Association (AAA) or its rules are used in an agreement between a consumer and a business where the business has a standardized, systematic application of arbitration clauses with customers and where the terms and conditions of the purchase of standardized, consumable goods or services are non-negotiable or primarily non-negotiable in most or all of its terms, conditions, features, or choices. The product or service must be for personal or household use. The AAA will have the discretion to apply or not to apply the Supplementary Procedures and the parties will be able to bring any disputes concerning the application or non-application to the attention of the arbitrator. The AAA's most current rules will be used when the arbitration is started. If there is a difference between the Commercial Dispute Resolution Procedures and the Supplementary Procedures, the Supplementary Procedures will be used. The Commercial Dispute Resolution Procedures may be found on our Web site. They may also be obtained from the Case Manager.

(b) The Expedited Procedures will be used unless there are three arbitrators. In such cases, the Commercial Dispute Resolution Procedures shall apply.

(c) The AAA may substitute another set of rules, such as the Real Estate or the Wireless Industry Arbitration Rules, for the Commercial Dispute Resolution Procedures in some cases.

(d) Parties can still take their claims to a small claims court.

C-2. Initiation Under an Arbitration Agreement

(a) The filing party (the "claimant") must notify the other party (the "respondent"), in writing, that it wishes to arbitrate a dispute. This notification is referred to as the "demand" for arbitration. The demand should:

' briefly explain the dispute,

' list the names and addresses of the consumer and the business,

' specify the amount of money involved,

' state what the claimant wants.

The claimant must also send two copies of the demand to the AAA at the time it sends the demand to the respondent. When sending a demand to the AAA, the claimant must attach a copy of the arbitration agreement from the consumer contract with the business. The claimant must also send the appropriate administrative fees and deposits. A fee schedule can be found in Section C-8 at the end of this Supplement.

(b) The AAA shall confirm receipt of the demand to the parties.

(c) The respondent may answer the demand and may also file a counterclaim. The answer must be sent to the AAA within ten calendar days after the AAA acknowledges receipt of claimant's demand. The answer must:

' be in writing,

' be sent, in duplicate, to the AAA,

' be sent to the claimant at the same time.

' If the respondent has a counterclaim, it must state the nature of the counterclaim, the amount involved, and the remedy sought.

(d) If no answer is filed within the stated time, the AAA will assume that the respondent denies the claim.

(e) The respondent must also send the appropriate administrative fees and deposits. A fee schedule can be found in Section C-8 at the end of this Supplement. Payment is due ten calendar days after the AAA acknowledges receipt of claimant's demand.

C-3. Initiation Under a Submission

Where no agreement to arbitrate exists in the contract between the consumer and the business, the parties may agree to arbitrate a dispute. To begin arbitration, the parties must send the AAA a submission agreement. The submission agreement must:

' be in writing,

' be signed by both parties,

' briefly explain the dispute,

' list the names and addresses of the consumer and the business,

' specify the amount of money involved,

' state the solution sought.

The parties should send two copies of the submission to the AAA. They must also send the administrative fees and deposits. A fee schedule can be found in Section C-8 at the end of this Supplement.

C-4. Appointment of Arbitrator

Immediately after the filing of the submission or the answer, or after the deadline for filing the answer, the AAA will appoint an arbitrator. The parties will have seven calendar days from the time the AAA notifies them, to submit any factual objections to that arbitrator's service.

C-5. Proceedings on Documents ("Desk Arbitration")

Where no claims or counterclaims exceed $10,000, the dispute shall be resolved by the submission of documents. Any party, however, may ask for a hearing. The arbitrator may also decide that a hearing is necessary.

The arbitrator will establish a fair process for submitting the documents. Documents must be sent to the AAA. These will be forwarded to the arbitrator.

C-6. Expedited Hearing Procedures

A party may request that the arbitrator hold a hearing. This hearing may be by telephone or in person. The hearing may occur even if the other party does not attend. A request for a hearing should be made in writing within ten calendar days after the AAA acknowledges receipt of a claimant's demand for arbitration. Requests received after that date will be allowed at the discretion of the arbitrator.

In a case where any party's claim exceeds $10,000, the arbitrator will conduct a hearing unless the parties agree not to have one.

Any hearings will be conducted in accordance with the Expedited Procedures of the Commercial Dispute Resolution Procedures. These procedures may be found on our Web site. They may also be obtained from the Case Manager.

C-7. The Award

(a) Unless the parties agree otherwise, the arbitrator must make his or her award within fourteen calendar days from the date of the closing of the hearing. For Desk Arbitrations, the arbitrator has fourteen calendar days from when the AAA sends the final documents to the arbitrator.

(b) Awards shall be in writing and shall be executed as required by law.

(c) In the award, the arbitrator should apply any identified pertinent contract terms, statutes, and legal precedents. The arbitrator may grant any remedy, relief or outcome that the parties could have received in court. The award shall be final and binding. The award is subject to review in accordance with applicable statutes governing arbitration awards.

C-8. Administrative Fees and Arbitrator Fees*

Administrative fees and arbitrator compensation deposits are due from the claimant at the time a case is filed. They are due from the respondent at the time the answer is due. The amounts paid by the consumer and the business are set forth below.

> *Pursuant to Section 1284.3 of the California Code of Civil Procedure, consumers with a gross monthly income of less than 300% of the federal poverty guidelines are entitled to a waiver of arbitration fees and costs, exclusive of arbitrator fees. This law applies to all consumer agreements subject to the California Arbitration Act, and to all consumer arbitrations conducted in California. If you believe that you meet these requirements, you must submit to the AAA a declaration under of oath regarding your monthly income and the number of persons in your household. Please contact the AAA's Western Case Management Center at 1-877-528-0879, if you have any questions regarding the waiver of administrative fees. (Effective January 1, 2003)

Administrative Fees

Administrative fees are based on the size of the claim and counterclaim in a dispute. They are based only on the actual damages and not on any additional damages, such as attorneys' fees or punitive damages. Portions of these fees are refundable pursuant to the Commercial Fee Schedule.

Arbitrator Fees

For cases in which no claim exceeds $75,000, arbitrators are paid based on the type of proceeding that is used. The parties make deposits as set forth below. Any unused deposits are returned at the end of the case.

Desk Arbitration or Telephone Hearing $250 for service on the case
In Person Hearing $750 per day of hearing

For cases in which a claim or counterclaim exceeds $75,000, arbitrators are compensated at the rates set forth on their panel biographies.

Fees and Deposits to be Paid by the Consumer:

If the consumer's claim or counterclaim does not exceed $10,000, then the consumer is responsible for one-half the arbitrator's fees up to a maximum of $125. This deposit is used to pay the arbitrator. It is refunded if not used.

If the consumer's claim or counterclaim is greater than $10,000, but does not exceed $75,000, then the consumer is responsible for one-half the arbitrator's fees up to a maximum of $375. This deposit is used to pay the arbitrator. It is refunded if not used.

If the consumer's claim or counterclaim exceeds $75,000, or if the consumer's claim or counterclaim is non-monetary, then the consumer must pay an Administrative Fee in accordance with the Commercial Fee Schedule. A portion of this fee is refundable pursuant to the Commercial Fee Schedule. The consumer must also deposit one-half of the arbitrator's compensation. This deposit is used to pay the arbitrator. This deposit is refunded if not used. The arbitrator's compensation rate is set forth on the panel biography provided to the parties when the arbitrator is appointed.

Fees and Deposits to be Paid by the Business:

Administrative Fees:

If neither party's claim or counterclaim exceeds $10,000, the business must pay $775 and a Case Service Fee of $200 if a hearing is held. A portion of this fee is refundable pursuant to the Commercial Fee Schedule.

If either party's claim or counterclaim exceeds $10,000, but does not exceed $75,000, the business must pay $975 and a Case Service Fee of $300 if a hearing is held. A portion of this fee is refundable pursuant to the Commercial Fee Schedule.

If the business's claim or counterclaim exceeds $75,000 or if the business's claim or counterclaim is non-monetary, the business must pay an Administrative Fee in accordance with the Commercial Fee Schedule. A portion of this fee is refundable pursuant to the Commercial Fee Schedule.

Arbitrator Fees:

The business must pay for all arbitrator compensation deposits beyond those that are the responsibility of the consumer. These deposits are refunded if not used.

If a party fails to pay its fees and share of the administrative fee or the arbitrator compensation deposit, the other party may advance such funds. The arbitrator may assess these costs in the award.

For more information please contact our customer service department at 1-800-778-7879

Rules, forms, procedures and guides are subject to periodic change and updating.

AAA236

Exhibit 38

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JOSE TRUJILLO, Plaintiff, vs. APPLE COMPUTER, INC., et al., Defendants.	Docket No. 07 C 4946 Chicago, Illinois September 29, 2008 9:40 a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE MATTHEW F. KENNELLY

APPEARANCES:

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For the Defendant: MAYER, BROWN, ROWE & MAW (DC)
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(The following proceedings were had in open court:)

THE CLERK: 07 C 4946, Trujillo v. Apple Computer, status.

MR. DRURY: Good morning, your Honor; Larry Drury on behalf of the plaintiff.

MS. COLLADO: Good morning, your Honor; Victoria Collado on behalf of defendant AT&T.

MR. TAGER: Evan Tager, your Honor, for AT&T.

THE COURT: Spell your last name.

MR. TAGER: T-a-g-e-r.

THE COURT: Thanks.

MS. BOMCHILL: Good morning, your Honor; Fern Bomchill. I'm here on behalf of Mayer Brown.

MS. BONINA: Diane Bonina, from AT&T Mobility.

THE COURT: When you say from AT&T, you don't mean -- you mean you're in-house people.

MR. TAGER: No, I'm sorry. I'm at Mayer Brown representing AT&T.

MS. BONINA: I'm an in-house lawyer.

THE COURT: You're an in-house person because that's what I kind of heard you to say.

MR. STANTON: Patrick Stanton on behalf of Apple, Inc.

THE COURT: Okay. Well, I mean, Apple is effectively out of the case at this point, but it's fine for you to be

here.

MR. STANTON: I came as a courtesy.

THE COURT: The question is where we go on the rest of this, and so I don't know if you all have had an opportunity to think about that or to discuss it with each other, as far as what happens next.

I suggested a couple of possible alternatives. Those are not the only possible alternatives, one alternative being striking the documents relating to the motion to compel arbitration, the other being some form of monetary sanction. But one of my questions is whether there are any further proceedings, hearings, whatever, that need to happen before I even get to that point, number one, and; number two, whether there's any other things, any developments, that, you know, that aren't within my control that could arguably render any of this moot.

MR. DRURY: Your Honor, we did have a brief discussion before we came into court today.

With respect to that, it's the plaintiff's position at this time -- there has been a stay with respect to discovery because of AT&T's motion to compel. The plaintiff would be requesting that the stay be vacated, that AT&T answer the complaint, and that we be allowed to proceed with merit and class discovery as to AT&T.

With respect to Apple and your Honor's summary

judgment decision in favor of Apple, I have not yet decided what particular motion or what further we're going to do.

THE COURT: I mean, that's not appealable until there is a 54(b) -- unless and until there is a 54(b) finding.

MR. DRURY: I understand, Judge.

THE COURT: That's what you have to think about, obviously.

Let me hear from you all, and then I will talk.

MS. COLLADO: Your Honor, all the attorneys on this case, both at Mayer Brown and AT&T, would like to think that we have a reputation for integrity and honesty and accuracy.

THE COURT: And at least from the Mayer Brown part of it, there is absolutely no question about that. I have not had prior dealings with AT&T's in-house people.

MS. COLLADO: We understand that we have shaken your belief, any belief that you may have had, in us, and we recognize that what all of the lawyers believed to be a reasonable investigation, in fact, did not unearth some mis-communications which led to some mistakes. And for this, we are very sorry, and the one thing we wanted to communicate today was to let the Court know that none of it was done by anyone with any intent to mislead the Court or any intent to deceive the Court.

We are also -- all of the lawyers take responsibility for the mistakes that were made. I also need to offer the

apology of Mr. Berinhout.

THE COURT: And I understood -- I heard from my clerk why he couldn't be here, and I am very sorry to hear about that.

MS. COLLADO: If the Court would permit, Evan Tager would like to discuss the events and answer any questions the Court may have.

THE COURT: Go ahead.

MR. TAGER: Thank you, your Honor.

THE COURT: You are a Mayer Brown person, not an AT&T person.

MR. TAGER: Yes.

MS. BOMCHILL: He's from Washington, D.C.

MR. TAGER: I am the senior lawyer on the team, and AT&T has been my client for about six years, and I have worked very closely with Neal Berinhout for all six years. So I was hoping just to talk to the Court a little bit about how we got to this place.

This is, to be clear, an explanation, not an excuse. We are not trying to evade responsibility, but I think, Judge, to put it in perspective, your Honor, for approximately four or five years before this happened, we --

Well, let me flip it around. This was the first time we have ever had a case involving an independent sort of co-defendant with a joint venture. The significance of that

fact, of that difference, between our typical practice of doing declarations in cases where the device was sold at an AT&T store or a store of a company under our control -- the significance of that wasn't immediately apparent to us at the time the declaration was prepared and reviewed because of our mistaken conclusion that this device was purchased at an AT&T store.

As the Court is very familiar from your opinion, there were two phones. We did substantial research. Having searched for Mr. Trujillo's name in our records, we came to the conclusion that he bought the phone at an AT&T store. And that is sort of where everything went off the rails. It was as a result of that, that when we prepared the declaration, the significance of the fact that we were -- that Mr. Berinhout was purporting to be speaking out of personal knowledge wasn't eminently clear at the time because everybody involved in the preparation of the declaration, from Kevin Ranlett, who was the junior associate with principal responsibility for drafting it and for communicating with Miss Bonina, who was helping us get the account information, from him all the way to Neal Berinhout and myself, we all were sort of -- our mind-set, the lens through which we were viewing everything, was that this phone was purchased at an AT&T store.

And so the significance of the broader statement

about retail stores and Mr. Berinhout's declaration wasn't immediately apparent to us at the time that Kevin prepared the declaration and that Diane and Neal reviewed it. And it's really from there that everything sort of went off the rails.

Again, I'm not trying to excuse it. It's just to put in context that people who have been practicing law for a long time, who have, you know, so much personal stock in their reputations and their integrity came to make the mistakes that were made here.

Now, we had a conversation -- Ms. Collado had a conversation with Mr. Drury earlier in the week after we received the opinion, and he said to Ms. Collado: I will bet there have been a lot of people who have had some sleepless nights since that order was issued.

THE COURT: And at least one who had a couple before it was issued.

MR. TAGER: Pardon me?

THE COURT: And at least one who had a couple before it was issued.

MR. TAGER: Understood, your Honor.

THE COURT: Because I certainly understand the gravity of some of the things that I said in that opinion, and I did not do it lightly.

MR. TAGER: I understand.

And what I'd like to just convey is that, you know,

as a result of that opinion, Mr. Berinhout, who has been practicing for over 20 years, and myself, who has been practicing for over 20 years, and everyone on the team, we have received the message. Mr. Berinhout had to report this to the very top of AT&T, the general counsel in San Antonio, as well as his direct boss in Atlanta. On Mayer Brown's end, this went all the way to the chairman of the firm. And as you can see, we have Ms. Bomchill, who is sort of like an in-house general counsel, has been involved in this since the outset. Mr. Ranlett felt so bad about it, he asked me whether he should tender his resignation to the firm.

So the message that -- and I appreciate that you didn't take it lightly when you did this. The message has been heard loud and clear, and I want to assure the Court, firstly, we have made an unconditional offer to Mr. Drury to make him whole for any expenses that occurred as a result of the errors. And that is without, you know, asking for him to make any promises about his position on all of this. We felt it was the right thing to do. We were instructed by AT&T to make that offer, and we did so.

Secondly, I can assure the Court that the errors that occurred here are never going to be repeated. We have been duly sensitized to the sort of core problem that things in Mr. Berinhout's declaration that purported to be from personal knowledge may not have been as a result of the overbreadth of

some of the language in the declaration. And steps have been taken already and will be taken in the future to ensure that that never happens again, that declarations, even if it has to be broken into five or six different pieces, will be limited to the direct personal knowledge of whoever the declarant is.

So those kinds of mistakes that resulted in the errors that the Court identified in its opinion have been corrected, and the message has been received, and we would urge the Court to let it end there.

As I said, the attorney's fees will be paid. The sting has been felt by everybody involved, and we submit, your Honor, that given the fact that nobody in this case ever intended any deception or misrepresentation -- and I know you don't know me, but as an officer of this Court, I would say to you, I have worked with Mr. Berinhout exceptionally closely for the last six years. I know him not just as a client, but as a person. I know that his integrity is his most important asset as a lawyer, and I can assure you that he never would have signed that intending to mislead anybody.

And so for all of those reasons, I would ask you to not proceed further with sanctions and to let sort of the sting of the opinion be sufficient for current purposes.

MR. DRURY: Your Honor, may I comment?

THE COURT: I was going to ask you.

MR. DRURY: With respect to AT&T's proposal

concerning sanctions or attorney's fees and costs, I want to be clear that I have not discussed any monetary sum or the recovery of any cost --

THE COURT: I understand.

MR. DRURY: -- with AT&T's counsel. And whether or not I will file a formal petition with leave of court, of course, or we will resolve it, that is for another day.

As far as Mr. Berinhout is concerned, I'm sure counsel speaks of him as best he can. I don't know him, but the fact is I have not had a chance to examine him or any of the other players in this situation.

So having said that, your order is clear. I know what direction that I probably want to go. I don't think I need to belabor the point. It's down in written word forever.

THE COURT: You want to move ahead with the case basically.

MR. DRURY: And I would like to move ahead with the case.

THE COURT: Well, let me just make a couple of comments in response to what was said. And, you know, I'm going to have to talk like a lawyer here for a second, I suppose. The fact that I am commenting on certain things doesn't mean that I don't have any comment on other things, but there is only a certain amount of time in the world.

I certainly appreciate everything that you said, and

I obviously appreciate the fact that you have come out here and Ms. Bomchill is here and that everything that has been said was said. And, you know, I'm certainly not in any position to say, nor did I suggest, or at least I wasn't intending to suggest, that anybody had engaged in some sort of a, you know, deliberate effort to conceal something or hide something or misrepresent something. But, you know, as the Supreme Court reminded people fairly recently in a case, I think, involving the Fair Credit Reporting Act, intent also includes recklessness. And in my humble estimation, there is a pretty decent argument that the misstatements in Mr. Berinhout's affidavit, and it is not just the stuff relating to Apple, which is something I'm going to comment on in a second, there's a pretty decent argument that it reached a level of recklessness. You know, where that gets you is an issue for another day or maybe not an issue for another day.

I certainly can understand on one level, I suppose, how it is that given the fact that AT&T was in this partnership relationship with Apple, how, you know, that's an unfamiliar situation, although we like to think that sort of the basic requirements aren't unfamiliar, but I get it, that maybe, you know, people didn't dot all the "i's" and cross all the "t's." But, I mean, if you read the decision carefully, and I just reconfirmed this to myself -- I pulled it up here -- I mean, there's a couple of things that were said that

are now conceded to be not true, that do not have anything to do with Apple. They concern AT&T's website and what was there and how it was there and so on. I mean, you could agree or disagree with my conclusions on that, but I'm pretty sure that all of that was eventually admitted to be incorrect.

You know, having said all of that, I'm not a fan -- and, frankly, I know of really no judges who are, although they are reputed to exist -- I am not a fan of sanctions. I believe that I have actually ordered sanctions under -- I have been a judge for nine years and three months. I have actually ordered sanctions under Rule 11 or 28 USC 1927, I believe, in four cases. Two of those involved pro se litigants who clearly went bonkers, for want of a better word.

One of them involved a lawyer who had a case, and the wheels came off at some point, and it became some sort of a personal cause for him, and it went crazily awry.

And then the fourth one involved a case that was on trial where a lawyer, in opening statement after we had picked the jury, violated a clear ruling on a motion in limine. After I called him on it, he did it again, and then he did it again, requiring a mistrial, more or less daring me, the way I saw it at least.

So those are the four cases in the nine years and three months. And like I say, I'm not a fan of doing that for a variety of reasons which I don't need to discuss with you.

The problem, though -- a problem, and one of the concerns I have in, I guess, just sort of doing the let's sort of call it a day and move on to the next issue is the following: You know, a denial of a motion to compel arbitration is an appealable order, and the defendant in this case could, and I'm choosing this word carefully, if it so chose, burden another court with this record in this case; and that is completely up to AT&T whether AT&T chooses to take an appeal of this issue or not. And I don't want to put carts before horses because one of the things that I might have to decide is whether to eventually strike the document, which obviously would have an impact on any particular appeal.

But, I mean, if what we are talking about here is kind of, for want of a better word, doing a settlement conference on the record between you all and me, I might be willing to, you know, give on my position if not you, but your client, were willing to say, fine, we're going to call it a day, too, and this issue isn't going to be raised any further before me or any other court in this case.

Now, I would not insist on somebody making that judgment on the spur of the moment, you know, without an opportunity to discuss it but -- and just to be clear, I'm not trying to, you know, arm-twist anybody out of doing an appeal because it's entirely possible that you might have a very good and decent appeal of a sanctions order if I ultimately entered

one, and I don't want to deprive anybody of any of that. But calling it a day is calling it a day, and I'll think about it if you will.

So let me suggest this, because it is a serious matter, and people ought to be able to think about it and ponder it. What I would like to do is maybe set this over for about 10 days or so to have everybody kind of think about what they want to do.

You do not have to come back here from Washington. It's not required. You know, the local people can very capably handle this. One way or another, whatever you choose to do. When I recall it 10 days or so from now, you will tell me what it is that you want to do, and then I will act accordingly.

MR. TAGER: Your Honor, if I could, we did not -- we do not intend to appeal.

THE COURT: Okay, all right. Well, then --

MR. TAGER: Just so we both understand, that would not --

THE COURT: And I have an in-house lawyer from AT&T standing in the room here.

MS. BONINA: I assure you it's accurate.

MR. TAGER: Mr. Berinhout gave me my instructions before he headed off to Florida.

THE COURT: We're not appealing this, in other words.

MR. TAGER: Right.

Just so we are all clear, there may be issues relating to arbitration as a defense to class certification which would be separate, you know, a separate fact investigation, separate issues. And, you know --

THE COURT: Of course, I can't anticipate what those are. Okay. Well, let's --

But what you are telling me is that no argument is going to be made on appeal, whether it's immediately or some point in the future, that the order denying the motion to compel arbitration was in error and the case should be sent to arbitration; am I correct about that?

MR. TAGER: That's right. I mean, if there is a class certification issue, it would have to do with members of -- with the absent members of the class potentially being subject to arbitration provisions that don't suffer from these same issues.

THE COURT: Well, okay.

MR. DRURY: Your Honor, if I may, I don't know whether the Court is planning on ruling now or maybe in 10 days with respect --

THE COURT: I'm planning to think about it a little bit.

MR. DRURY: All right.

THE COURT: So tell me what else you'd like me to

think about as I'm thinking.

MR. DRURY: Well, what I was going to say is that, if necessary, I do want to respond to the question of whether or not their affirmative defense of arbitration should indeed be struck by the Court as a sanction, and I don't just want to let that go by the wayside particularly right now before the Court on status.

THE COURT: The motion for class certification has not at present been filed; am I right about that?

MR. DRURY: Oh, I believe there is one on file, your Honor. I might be mistaken, but generally I file it.

THE COURT: You filed it at the beginning of the case.

MR. DRURY: At the beginning of the case, yes, your Honor.

THE COURT: Yes, but I think I --

MR. DRURY: You may have asked to take --

THE COURT: What I did back in January is I terminated it without prejudice to renew because at that point the summary judgment stuff was sort of in the pipeline.

MR. DRURY: I recall.

THE COURT: So there is not one currently pending. All right.

Well, honestly, what you're telling me is a wrinkle here, and I just -- it's hard for me to -- you know, sitting

where I sit and not knowing what the ins and outs of those issues are going to be until they are presented to me, it's kind of hard for me to get my arms around it right at the moment.

This is what I want you to do. I'm going to set it over. I'm going to set the case over to two weeks from Wednesday, the 15th of October, at 9:30. What I would like -- and I know that you have not seen a current motion for class certification, but there is one that was filed at some point. You know what it's going to say. Anybody who bought, put him in the class, okay.

What I would like to get a handle from -- what I'd like -- you can just call this a status report, or just pick a name -- is I'd like you to give me some sort of a succinct explanation of the way in which the arbitrability issue might come up. I mean, it kind of sounds like to me that what you're saying is don't certify a class because there are other people out there who would have had access to the arbitration agreement that arguably would be sufficient to make it binding on them. That's what I'm kind of getting you to say -- getting you to saying.

And I have just got to think through to what extent that's going to touch upon any of the issues that I had to deal with in this decision, and I would rather not do that sort of on a reactive mode, at least right now. So I'm going

to set it for a status on the 15th of October. I would like you to file that status report I'm talking about by the 8th of October, okay. The 15th will be at 9:30 in the morning.

MR. DRURY: Your Honor, as to the oral motion to vacate the stay and direct --

THE COURT: I'm going to enter and continue. The oral motion to vacate the stay of discovery is entered and continued to the 15th of October as well.

MR. DRURY: And the answer to the complaint?

THE COURT: I'm going to deal with everything then.

MR. DRURY: All right, thank you.

THE COURT: All right, take care.

MS. BOMCHILL: Thank you, your Honor.

MS. COLLADO: Thank you, your Honor.

MR. TAGER: Thank you.

(Which were all the proceedings had in the above-entitled cause on the day and date aforesaid.)

C E R T I F I C A T E

I hereby certify that the foregoing is a true and correct transcript of the above-entitled matter.

/s/ Laura M. Brennan

Laura M. Brennan
Official Court Reporter
Northern District of Illinois

Date

Exhibit 39

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

BURSOR & FISHER, P.A.,

Plaintiff,

v. 11 Civ. 5457 (LAK)

FEDERAL COMMUNICATIONS
COMMISSION,

Argument

Defendant.
----------x

New York, N.Y.
September 8, 2011
9:30 a.m.

Before:

HON. LEWIS A. KAPLAN

District Judge

APPEARANCES

BURSOR & FISHER, P.A.
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BY: SCOTT BURSOR
JOSEPH I. MARCHESE

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Southern District of New York
Attorney for Defendant
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Assistant United States Attorney

JOEL MARCUS
Attorney for defendant

WILER REIN LLP
Attorneys for Intervenor Defendant T-Mobile USA, Inc.
BY: JOSHUA S. TURNER

SIDLEY AUSTIN LLP (NY)
Attorneys for Intervenor Defendant AT&T Mobility LLC
BY: STEVEN M. BIERMAN

(Case called)
THE CLERK: Counsel for plaintiff, are you ready?
MR. MARCHESE: Yes.
THE CLERK: You are?
MR. MARCHESE: Joseph Marchese, Bursor & Fisher.
THE CLERK: Counsel for the FCC, are you ready?
MR. JONES: Yes. David Jones.
THE CLERK: Counsel for intervenor defendant T-Mobile, are you ready?
MR. TURNER: Joshua Turner on behalf of T-Mobile.
THE CLERK: Counsel for intervenor defendant AT&T Mobility, are you ready?
MR. BIERMAN: Yes. Steven Bierman from Sidley Austin. Good morning, your Honor.
THE COURT: Isn't there another intervenor, AT&T itself?
MR. BIERMAN: It is AT&T Mobility.
THE COURT: That is the only AT&T entity?
MR. BIERMAN: Yes.
THE COURT: I take it there is no objection to the intervention application of AT&T Mobility, is that right?
MR. MARCHESE: Your Honor, no, that's correct. As the Court knows, we have welcomed AT&T.
THE COURT: A simple answer would do. Thank you. That motion is granted.

MR. BIERMAN: Thank you, your Honor.
THE COURT: Is there any opposition to the T-Mobile application to intervene?
MR. MARCHESE: No, your Honor.
THE COURT: That motion is granted.
I looked at this pending motion to prepare a Herfindahl index, and I said to myself somebody is smoking a controlled substance. You want an index, Mr. Marchese, of one document, is that right?
MR. MARCHESE: We did request that, yes, your Honor.
THE COURT: Denied as frivolous.
I have a letter from the United States Attorney's office dated September 6th asking to postpone any response to the motion for a Herfindahl index. That is denied as moot, that application.
Mr. Marchese, I will hear you.
MR. MARCHESE: Good morning, your Honor. Your Honor, today we are here because of a FOIA request that we have made in connection with a declaration by Colin B. Weir which was filed in the FCC proceeding WT docket number 11-65.
THE COURT: He works for you, right?
MR. MARCHESE: He is an expert we have retained in connection with one of our client representations, yes.
THE COURT: This representation or another one?
MR. MARCHESE: He is actually working with us on

multiple representations, but this representation, yes.
THE COURT: As I understand it, therefore, your retained expert already has seen all of the information in question and indeed it is his massaging of that information which you are seeking to compel the FCC to turn over to you, and he hasn't turned it over because of the protective order, I take it. Is that about the size of it?
MR. MARCHESE: That is about the size of it, your Honor.
THE COURT: Your retained expert on behalf of your client has said whatever he thinks is appropriate, given his knowledge of the data in question to the FCC on the question of whether the FCC should approve the AT&T/T-Mobile transaction, is that correct?
MR. MARCHESE: Yes, your Honor.
THE COURT: So the dispute here is solely whether you, as counsel to your clients, should have the disaggregated data in addition to your retained expert having it and using it on behalf of your clients, is that an accurate statement?
MR. MARCHESE: Actually, we have requested the aggregated noncarrier-specific public information which has been redacted in the Weir declaration.
THE COURT: I'm sorry. Maybe I phrased the question poorly, and I accept your correction of, at least provisionally, the nature of the data. But the bottom line

here is that absolutely everything you want your retained expert has and has used on behalf of your clients in the proceeding in the commission, true?
MR. MARCHESE: That's true, your Honor.
THE COURT: So the only issue is whether you, as the lawyer for your clients, also get to see some of that information?
MR. MARCHESE: Yes, your Honor.
THE COURT: OK. Go ahead.
MR. MARCHESE: Your Honor, I would like to hand up a couple of exhibits that I have which are relevant to the data that Mr. Weir calculated. Mr. Weir's declaration contains HHI calculations, four-firm HHI calculations in 165 economic areas. This is the same type of information which is published on an annual basis by the FCC in a CMRS report to Congress and the same type of information which the Department of Justice has recently published as an appendix to their complaint opposing the proposed merger by AT&T and T-Mobile.
THE COURT: Is the information you are proposing to hand up in the record before me?
MR. MARCHESE: It is in the record before you, yes, your Honor.
THE COURT: You can just invite my attention to where I find it.
MR. MARCHESE: In our response to AT&T's motion to

intervene, it is attached as Exhibit A to that filing. Do you also have a copy of Mr. Weir's declaration, your Honor? We have only had access to the redacted version. However, we do have Mr. Weir here in court today, and he has brought an unredacted version, which you are invited to see. We have not seen it.

THE COURT: If it's necessary, I'll ask for it, but I doubt very much that it is going to be necessary. I have read Mr. Weir's redacted declaration, and I know what HHI numbers are, having practiced antitrust law for 25 years and been the liaison at the ABA in the antitrust section and having had more than a couple of antitrust cases. So it is not exactly terra incognita.

MR. MARCHESE: Our position, your Honor, is that this information which we are seeking is in fact not confidential. It is the same type of public information that is published on an annual basis by Congress and which the DOJ has released in connection with its suit against the proposed merger.

THE COURT: Is it your position that the information attached to the DOJ's complaint is in fact line for line, statistic for statistic identical to the data that you are seeking here?

MR. MARCHESE: It is not identical, your Honor. The DOJ calculated its HHI calculations on the cellular market area level, and we calculated it or Mr. Weir calculated it on an

economic area level.
In response to our FOIA request, the FCC produced a denial letter on July 20th, which was a month, a full month, after we had submitted our request. They basically ran out the entire statutory period, as you said, for our request for one document. I tried to short circuit the process.
THE COURT: Did you appeal the denial within the commission.
MR. MARCHESE: Informally I did, your Honor. Here the FCC actually admits in its opposition papers to our motion that, and I quote them, "The FCC's letter denying plaintiff's FOIA request states that the Weir declaration itself contains disaggregated carrier-specific data, which is not correct." That is in footnote 5 on page 18 of their memorandum in opposition to our motion for preliminary injunction.
THE COURT: Could we go back to the question I asked you. There is a procedure in the Code of Federal Regulations for appealing the denial of a FOIA request. It goes, if I remember correctly, to the office of general counsel. There are certain procedural and temporal requirements that have to be met, right?
MR. MARCHESE: Correct, your Honor.
THE COURT: Did you do it?
MR. MARCHESE: No. The reason that I did not do it is because in our view there are exigent circumstances in this

case.
THE COURT: Do you have any authority for the proposition that exhaustion of administrative remedies is excused if the applicant feels there are exigent circumstances?
MR. MARCHESE: There are exceptions to the --
THE COURT: Answer my question.
MR. MARCHESE: I don't, your Honor.
THE COURT: Why isn't that absolutely fatal not just to your motion but to the case?
MR. MARCHESE: If I have a chance to explain myself.
THE COURT: I asked the question. I'm inviting an answer.
MR. MARCHESE: Your Honor, in this case there is a shot clock that is running. The FCC can basically make a decision at any time.
THE COURT: The shot clock, as I understand it from the papers, is stopped at 180 days.
MR. MARCHESE: That's incorrect. Actually, the FCC's letter of September 6th I believe makes note of the fact that the shot clock is running right now.
THE COURT: All right, go ahead.
MR. MARCHESE: Your Honor, while the shot clock is a prescribed 180-day period, as we have seen with the DOJ, the FCC can make a decision at any point. If we were to follow the prescribed administrative process, then we would be taken out

to the end of this month, at which point objectors AT&T and T-Mobile would have a chance to apply for a stay if in fact the FCC reversed itself.

Essentially, like I said, every day of delay that is going forward is a day where our client is deprived of this information with which AT&T and T-Mobile are going out every day lobbying government representatives, lobbying the public about their transaction.

We want to take this information and we want to give it to our government representatives. We want to put it out there and do whatever we want with it. As I said, our view is the information is public and not confidential.

THE COURT: If it were public, you wouldn't be here, right?

MR. MARCHESE: I disagree. We are here to resolve this dispute. I say it's public, they say it's not.

THE COURT: Obviously, it isn't public, or you would pick up the book that has it in it and you would use it, right?

MR. MARCHESE: I respectfully disagree. I don't have access to it right now. It was redacted by Mr. Weir.

THE COURT: So it's not public, right?

MR. MARCHESE: By that definition.

THE COURT: You would like it to be, but it isn't, isn't that true?

MR. MARCHESE: That is true, your Honor.

THE COURT: OK. There is a whole lot to be said for accuracy in advocacy.
MR. MARCHESE: Your Honor, one thing that we do have here, however, are affidavits that were submitted on behalf of experts at the FCC and experts of AT&T. These affidavits are by Dr. Singer of the FCC and Dr. -- I believe it is pronounced "sham pine," I'm not sure, your Honor. It is our contention that the math that is proffered in these affidavits is false and faulty.
I would like to, having made that argument, point your Honor specifically to what I'm talking about in the Singer affidavit.
THE COURT: I have a question. You have had those affidavits since when? August 26th?
MR. MARCHESE: That's correct, your Honor.
THE COURT: During all that time you could have filed an affidavit of a qualified person --
MR. MARCHESE: Right. Just to correct --
THE COURT: Would you not interrupt me, counsel. Throughout that period of time you could have filed an affidavit from a qualified person attempting to raise an issue of fact as to the accuracy of those two affidavits, is that right?
MR. MARCHESE: Yes, that's right.
THE COURT: And you didn't do it, right?

MR. MARCHESE: That's right.
THE COURT: The first time you suggested that there was any problem with those affidavits was the day before yesterday, is that true?
MR. MARCHESE: That's true, your Honor.
THE COURT: It was in a memorandum in response to a motion by AT&T to intervene, is that true?
MR. MARCHESE: That's true, your Honor.
THE COURT: Whether you meant to or not, this is what I would call a sandbagging. Hold it back and spring it at the last second. I don't regard it as appropriate practice. What I have before me are uncontradicted affidavits by Singer and the other person and no issue of fact to try.
MR. MARCHESE: The declaration submitted by Mr. Weir in support of our motion for a preliminary injunction in fact does contradict the math.
THE COURT: Show me where, please.
MR. MARCHESE: Sure. Can I do that by reference, for example, to the FCC declaration of Singer? Obviously, if there is a contradiction --
THE COURT: If you say it's in Weir's affidavit, that might be the best place to start.
MR. MARCHESE: Sure. On page 6 of 11, paragraph 11, Mr. Weir begins talking about how to calculate the HHI for the value of an EA and talks about the steps that he goes through.

The heading on the next page, "It is not possible to reverse-engineer underlying market shares from aggregated four-firm HHI values." Mr. Weir then goes through his calculations basically saying there is not enough information available.

THE COURT: Then Dr. Singer's affidavit makes clear that the assumption that there is not enough information available is incorrect, that if you have information that permits you to formulate -- I may misstate the math slightly, but I think I have the general idea -- four simultaneous equations, you can then solve for any of the four variables. You may in some instances get some indeterminate results where you have more than one possible solution, but that's about the size of it. I see nothing that contradicts that in Weir's affidavit.

MR. MARCHESE: Your Honor, at paragraph 14 of Dr. Singer's declaration, she puts forth several mathematical equations which are assumptions that she is founding her conclusion upon. I'd like to point out that equation number 1, A plus B plus C plus D equals 100, is simply false in 90 percent of the economic areas simply because there are not only four carriers that are competing.

THE COURT: What she says here is not false. What she is doing is making an illustration with respect to the extension of her reasoning to a four-firm market. In other words, the paragraph speaks about a four-firm market, and A

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plus B plus C plus D in a four-firm market does equal 100.

MR. MARCHESE: The calculations in Mr. Weir's declaration take the top four carriers. So in fact this assumption is incorrect.

Moving down to the third equation, where it says the sum of A squared plus B squared plus C squared plus D squared equals HHI plus 200, this is also false because Dr. Singer purports this to be a four-carrier HHI calculation. The difference here is that when Mr. Weir did the four-carrier HHI calculations in his declaration, he added another carrier, which would be, for example, E squared here. So in fact what Dr. Singer is proposing is a three-carrier calculation and not a four-carrier calculation, and that is a material difference.

THE COURT: Let's get to the other ground that the FCC mentioned in shooting you down. That is to say that you are representing any number of clients in matters against AT&T, and they are pretty much persuaded that your real interest in all of this is to use this information in other litigation you are handling that has nothing to do with the AT&T/T-Mobile acquisition.

MR. MARCHESE: Your Honor, number one, that's not the issue that is before the Court. The Court is deciding the FOIA request on this issue.

THE COURT: One issue before me is whether you are likely to suffer irreparable injury. I certainly have to

consider it on that basis.
MR. MARCHESE: Sure. Your Honor, I have actually explained to the FCC on a conference call that we have been privy to private information subject to protective orders on previous actions and we have acted in compliance with those orders, and we feel that this case is no different. There is no difference here, no indication that we are going to use the information improperly.
Of course, our contention is that this information is public. Quite frankly, we could shout it from the mountaintops once we get it because, once again, it is not confidential, according to our information. It is admittedly aggregated and it is admittedly not carrier-specific.
THE COURT: Anything else you want to say?
MR. MARCHESE: No. Thank you, your Honor.
THE COURT: Thank you.
I'll hear from the government. I'd like to know, first of all, counselor, where the Department of Justice stands with the lawsuit.
MR. JONES: Your Honor, there are, of course, multiple components. I assume you're getting into the antitrust division lawsuit that has been filed.
THE COURT: Yes.
MR. JONES: I have not had direct communication with the antitrust division. FCC counsel has communicated and has

determined that the data underlying in the Weir declaration that is at issue here, specifically the NRUF data, was not used in preparing the justice department's complaint. So it is not the case that identical information has now been made public through that lawsuit. Quite simply, your Honor, we are proceeding on different tracks.

THE COURT: Is the antitrust division going to seek inductive relief in D.C.?

MR. JONES: They filed their complaint. Procedurally, your Honor, I don't know that I can give you an accurate answer other than to say my understanding is the suit that they filed is intended to block the proposed merger. So yes, I assume that's them seeking an injunction to block the merger, but I don't know that to be correct.

Your Honor, for purposes of this case, when we learned of that lawsuit, my mind immediately turned to the fact that that makes irreparable harm all the more speculative and not imminent.

THE COURT: Sure. Let me ask you another question, has the Hart-Scott-Rodino period run out on the acquisition?

MR. JONES: Your Honor, I have FCC counsel here who may know the answer. I don't know the answer. If I may have a moment to consult.

Your Honor, I am advised that the period was extended for purposes of the DOJ review so that it had not expired as of

the filing, and we are not sure exactly how that was worded. The extension may have been simply until the date of filing, which has now occurred. We are not sure precisely.

THE COURT: If the waiting period expired with the filing, then they are free to close the transaction in the absence of a restraining order.

MR. JONES: Sorry, your Honor. Again, your Honor, my understanding, I'm told that they are not free to close the transaction, that whatever mechanism they used preserved a bar on filing pending some appropriate order or judgment of the court hearing the antitrust division's action. So what we have is a proposed transaction that justice has sued to block and that cannot be effectuated until that lawsuit is resolved.

THE COURT: What you have just said is the substantial equivalent of telling me that, whether by agreement or otherwise, there is a preliminary injunction or its equivalent in D.C. that will block that transaction until the lawsuit is finally concluded. Is that right? If they decide to go to trial and the trial is in 2013, that transaction has gone nowhere, is that what you are telling me?

MR. JONES: Your Honor, I don't have personal knowledge, and I'm reticent to represent to the Court that that's correct. My understanding is that the current posture is that the closing cannot occur pending further action in the lawsuit.

I would note, and perhaps in the spirit of huminah-huminah, your Honor, that it is the plaintiff's burden to show irreparable harm that is imminent and nonspeculative, and they haven't identified any potential imminence or said a single word regarding the likelihood of delay that will flow from the antitrust division's lawsuit. My understanding is that at a minimum that lawsuit will delay effectuation of the merger, if indeed it ever happens, and plaintiffs have not said anything to the contrary.

Moreover, your Honor, even were it not for the antitrust division lawsuit, there has been no showing of nonspeculative and imminent irreparable harm such that the immediate application for preliminary injunction should be denied. The case law is clear that in the absence of such harm, courts won't even look further to likelihood of success, and a preliminary injunction simply is not appropriate.

Our papers detail a number of shortcomings in plaintiff's assertion of irreparable harm. The Court is obviously thoroughly familiar with the papers. Basically, this is a lawsuit that seeks an unredacted copy of a document. The document itself will remain in existence and can be produced whenever this litigation is resolved should the Court order it, which obviously we believe it should not.

As to the subject matter of this lawsuit itself, there simply is no irreparable harm anywhere to be found. Moreover,

the less direct types of irreparable harm asserted by plaintiffs also are not significant and not irreparable. As colloquy established, the document at issue in unredacted form has been provided to the FCC. The articulated desire that plaintiffs have is to use it in connection with the FCC proceedings, but that is nonsensical, because it is already being used for that purpose.

THE COURT: They want to lobby with it is what I heard.

MR. JONES: Yes. We are hearing that now. Your Honor, that is not an irreparable harm. The approach they are taking is simply an end run around both the protective order procedures. They were denied direct access through the FCC proceedings, and they could have appealed that but did not.

Also, it's an end run around the orderly processing of FOIA applications. They could have but did not pursue the formal administrative appeal route specified in the C.F.R. for FCC FOIA requests. Now they are simply too impatient to let the government even file an answer under the ordinary course and litigate this as an ordinary FOIA matter.

Courts are reluctant to grant preliminary injunctions in FOIA matters, particularly providing the ultimate relief sought, which is release of the document at issue in the litigation. There is simply no showing of irreparable harm to warrant short circuiting the process in the way that is being

proposed here.
Your Honor, as to likelihood of success, I want to set aside the topic of the declarations and their mathematical showings, but we stand by the Singer declaration. I believe it is correct and believe it is more than a sufficient showing. It certainly causes plaintiff to have failed to make a showing of likelihood of success on the merits.
More importantly and as a threshold matter, their failure to exhaust administrative remedies on the FOIA request simply makes this suit subject to dismissal, and for that very clearcut reason, which plaintiff I believe stated they have no authority to contravene, the action is subject to dismissal and there is no likelihood of success.
THE COURT: Is it correct that the information the plaintiff seeks would in the ordinary course be published by the FCC about a year from now?
MR. JONES: Yes but. It would likely in the ordinary course, at least similar information, perhaps in a less specific and somewhat watered down form, be made public. There is a periodic report made concerning market share, and what is at issue is more currentl data that is on a more granular level that is not available.
Also, your Honor, I'm reminded that what is made public does not include, quite critically, the change in HHI and is not done for four-firm markets. So there are

limitations to what is eventually made public. In addition, of course, the time lag is significant.
THE COURT: When you say it is not done for four-firm markets, do you mean to say markets with four or fewer firms? Is that what you mean?
MR. JONES: Yes, that's correct, your Honor. In other words, what is made public has less commercial sensitivity for several reasons. It is less current and therefore less sensitive simply for that reason. It doesn't reflect change in HHI, which reflects market concentration and trends and is significant.
THE COURT: Isn't that calculatable from the previous year's report?
MR. JONES: Your Honor, I'm not smart enough to be able to -- actually, I think the answer is it would --
THE COURT: I used to know this like I know my middle name. The HHI is the sum of the squares of the individual market shares, right?
MR. JONES: Correct.
THE COURT: If you have the 2009 report and you've got a market which is five or more firms so that the information is disclosed, you can readily calculate it. Even my very humanities- oriented daughter would readily calculate the HHI for 2009. And if you have the 2010 information, you do the same process all over again, and then you see the delta HHI.

MR. JONES: Your Honor, I'm told that the number of firms at issue in an FCC report is not made public, certainly on a market-by-market basis. So you would have uncertainty in calculations. Simply there is a lack of data points. Basically, you are going to have data information with too many unknowns to generate the type of information that Dr. Singer tells us can be generated from this more current and more specific data that is at issue here.
THE COURT: Thank you.
MR. JONES: Your Honor, I am happy to answer any questions the Court has to the best of my ability, acknowledging your Honor's superior knowledge of antitrust law compared to my own.
THE COURT: But mine is more dated.
MR. JONES: For purposes of this motion, plaintiff has simply made no showing whatsoever of either irreparable harm or likelihood of success, and for that reason their motion should be denied.
THE COURT: Thank you.
MR. JONES: Thank you.
THE COURT: Does AT&T or T-Mobile want to be heard?
MR. BIERMAN: Thank you, your Honor. Steven Bierman for AT&T, intervenor. I'll be very brief given the previous arguments and colloquy and your Honor's familiarity with the papers.

Based on everything we have heard and everything your Honor has read, I think there are two gatekeeper issues that require denial of preliminary injunctive relief. On the issue of irreparable harm, as your Honor elicited in colloquy, the very information that Bursor seeks is in fact before the FCC, will be used by the FCC, analyzed by the FCC, whatever they are going to do with it. It has been submitted in the unredacted Weir declaration.

It is a misnomer to suggest, as they do in their papers, that they need somehow to effectively represent their clients, whoever they are, by getting this information. And they have admitted in open court that they intend to use the information that is at issue here for a purpose that is improper under the protective order that is in place in the FCC proceeding.

So, as a matter of the threshold issue of will they be harmed at all, much less irreparably, I think on the record before you the answer is no. The context in which that issue arises should not be lost in the shuffle, and that is why should not this case be permitted to proceed as a case, if there is a case.

Your Honor raised a couple of issues about whether the case is viable, and we would submit it is not. In any event, why should they get up-front mandatory injunctive relief, being the relief they ultimately seek on the record they have made,

given the standard that applies to such a request?
The second gatekeeper issue that requires denial of the motion outright has to do with likelihood of success. Whatever the formulation of the alternate test within the Second Circuit, there is not only not a likelihood of success, there are not significant issues that create fair grounds for litigation. They admit that they have not exhausted administrative remedies.
One thing that counsel for Mr. Bursor did not mention to you is that the FCC's letter that triggered the 30-day period under, as your Honor pointed out, the regulations for seeking review by the office of general counsel is dated July 19th. With all of plaintiff's complaints about the clock is moving, the train is leaving, whatever, they did nothing, and that time has passed. That time is gone. They can't now fix that and they can't now do an end run around that administrative legal requirement.
THE COURT: What they did is they sat on their hands for a month during which they could have pursued the administrative appeal and then filed a lawsuit instead.
MR. BIERMAN: That's right, your Honor. They did more than that. They went out trolling for potential clients or plaintiffs in these hundreds or I think they said up to a thousand arbitrations they are bringing against AT&T as yet another end run. So they didn't use their time as the law

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requires, which is to exhaust administrative remedies. That again is a show stopper.

On the additional aspect of likelihood of success on the merits, I want to comment briefly on the subject matter, the substance of the information at issue. I think the record is very clear. There was some back-and-forth about the declarations and such.

It is undisputed that Mr. Weir derived his calculations that are in the redacted submitted declaration from information that was submitted by AT&T on a confidential basis pursuant to the protective order before the FCC. And there is no question on this record that AT&T zealously protects that information for the good business reasons and important considerations that are set forth in the Andrew Wilson declaration that accompanied our opposition to the PI motion.

The question becomes whether somehow that information can be backed out of the Weir declaration. Your Honor is exactly right that on the points that Dr. Singer and Dr. Shampine make in their declarations opposing this motion are just uncontested on this record. Counsel is drawing your attention to an aspect of Dr. Singer's declaration that I think was shown to be unavailing because of the nature of the illustration that he was pointing to in that declaration.

It simply is the case, and it is undisputed, that Mr.

Weir omitted to disclose to the Court the various kinds of additional information that an informed and interested reader would have in order to make the kind of calculations that he says are impossible. Both Dr. Singer and Dr. Shampine identified those kinds of information that anyone would have.

THE COURT: He doesn't even say they are impossible. He posits an information universe and says given his premise as to what the information universe is, it's impossible. But it is perfectly obvious that his premise as to what the information universe is simply imaginary.

MR. BIERMAN: That's correct, your Honor. It is self-fulfilling. Because he declares, it's impossible, it's impossible. The universe is broader than what he says, and the various examples of the kind of information that any informed reader, meaning a potential competitor or others who would get this information disclosed to them, would have is replete and set forth in the declarations.

Also, Dr. Shampine identifies several ways that anyone who does this for a living, as opposed to me, your Honor, could back out these numbers in terms of mathematical calculations and application of computer programs. So it is simply false that the information cannot be reverse-engineered.

But your Honor need not reach any of that, because as a matter of law the failure to identify irreparable harm and the failure to exhaust administrative remedies preclude this

motion. Therefore, we, too, would join in asking that your Honor deny the motion for a preliminary injunction in its entirety.
THE COURT: Thank you.
MR. BIERMAN: Thank you.
THE COURT: T-Mobile, anything?
MR. TURNER: Unless your Honor has questions for me, I will rest on the arguments that my co-counsel have made.
THE COURT: Thank you.
Mr. Marchese, anything? Brief.
MR. MARCHESE: Very briefly, your Honor. Given that accuracy and advocacy is important, I believe that counsel for FCC stated that in the FCC CMRS reports the deltas in HHI's were not reported. However, I have here Table C3 of the 15th annual CMRS, report which was published this past June, which in fact has a column for the 2009 HHI values and the 2008 HHI values. I'd like to hand that up to you so you can take a look for yourself.
THE COURT: I can get it through our library. Anything else?
MR. MARCHESE: No, your Honor. Thank you.
THE COURT: Thank you.
I am going to rule on this now.
The plaintiff in this case is a law firm the practice of which includes bringing various arbitrations against AT&T in

relation to the cellular business. I have no idea how big that practice is, but there is some suggestion they may have as many as a thousand arbitrations pending against AT&T.

AT&T is a party to a proposed merger with or acquisition of T-Mobile. They are both significant competitors in the cellular telephone business.

The plaintiff law firm has retained a consultant named Weir. He apparently acts for them in some undefined way with respect to some or all of these arbitrations. He has also on behalf of the plaintiff law firm, and presumably his clients have been involved in administrative proceedings before the Federal Communications Commission with respect to the proposed AT&T/T-Mobile transaction.

In that connection, Mr. Weir, though not the plaintiff's lawyer, was given access by the FCC to various information that I need not detail, subject to the terms of a protective order. The information is regarded by those who provided it and by the FCC as confidential business information, hence the protective order.

Mr. Weir, acting on behalf of the law firm and/or its clients, prepared an affidavit or a declaration that he submitted to the Federal Communications Commission in connection with its review of the T-Mobile/AT&T transaction that has been proposed. That document contains information that either is or was derived from confidential information to

which Mr. Weir was given access under the protective order within the FCC.

Mr. Weir, in observance of the protective order, has not made a good part of his affidavit or declaration, whichever it is, available to the plaintiff law firm. Obviously, he deserves credit to the extent he has observed his obligations. The law firm then filed a Freedom of Information Act request with the FCC seeking an unredacted copy of the paper submitted on their behalf by their own consultant to the FCC with respect to the AT&T/T-Mobile transaction.

The FCC denied the Freedom of Information Act request on July 19, 2001. It advised the plaintiff's law firm of its right to appeal the FOIA denial within the FCC in accordance with 47 C.F.R. section 0.461.

The plaintiff did not avail itself of its right to appeal within the FCC. For a month it did nothing relevant at all. It let that month just slide by. Then, on August 18th it brought this action for a mandatory injunction requiring the FCC to turn over to the law firm the unredacted declaration or affidavit of the law firm's own consultant. Some relatively short period later, it filed this motion for a mandatory preliminary injunction requiring the FCC immediately to turn over the unredacted Weir declaration.

The practicality of what has happened is that the plaintiff law firm, confronted with the FOIA denial, rather

than avail itself of its right to appeal to the general counsel of the FCC, did nothing for a month despite the claim of threatened immediate and irreparable injury, and then bypassed the agency administrative procedure for appeals of FOIA denials altogether and came running to this Court with this application.

In order to prevail on a motion for preliminary injunction in which, as is the case here, the applicant seeks mandatory relief which, if granted, would provide it with all or substantially all of the relief to which it would be entitled if it ultimately won the case, it has to demonstrate a clear or substantial likelihood of success in addition to a clear threat of imminent irreparable injury. That standard is all the more applicable where, as here, the injunction would affect government action taken in the public interest pursuant to a statutory or regulatory scheme. That is precisely what we have here.

Among the multitude of cases that support this standard, which I note the plaintiff's counsel has not even alluded to in their papers, are Jolly v. Coughlin, 76 F.3d 468; Tom Doherty Associates v. Saban Entertainment, 60 F.3d 27; and Krispy Kreme Doughnut Corp. v. Satellite Donuts, 725 F.Supp.2d 389.

Right at the outset, this motion fails because the plaintiff, far from showing any clear or substantial or for

that matter even arguable likelihood of success, has shown none. A party seeking injunctive relief in a FOIA case must demonstrate exhaustion of administrative remedies. Indeed, regardless of whether that is viewed as a jurisprudential or jurisdictional requirement, the failure to exhaust is fatal, at least in all circumstances relevant here. Among the cases to that effect are Wilbur v. CIA, 355 F.3d 675; Taylor v. Appleton, 30 F.3d 1365; Gaudert v. Napolitano, 2010 WL 6634572; and Manfredonia v. SEC, 2009 WL 4505510.

Since it is absolutely undisputed in this case that the plaintiff failed to exhaust available administrative remedies, it probably can't prevail in this case at all. But for present purposes it's enough to say that it surely has not demonstrated the requisite likelihood of success on the merits, and that would be true under the standard that I believe applies or any other standard that anybody has ever applied in this circuit in a preliminary injunction matter.

Secondly, in order to obtain a preliminary injunction, the applicant must show, as I have indicated, a clear threat of imminent irreparable injury. That is just not present here. To begin with, the ostensible basis for this application -- and I'll assume that the only basis for the purpose of these remarks is the contention that the plaintiff's law firm would be irreparably injured without this information because they could not effectively advocate before the FCC on the question

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of whether the FCC should approve the AT&T/T-Mobile transaction.

In fact, however, it is undisputed that each and every shred of information in question already has been furnished to the FCC on behalf of this law firm by its retained consultant Mr. Weir. What is truly bizarre about this case is that the plaintiffs are seeking under the Freedom of Information Act request information prepared by their expert and submitted by their expert to the government.

I suppose that it is theoretically possible that the plaintiff law firm are such stupendously spectacular advocates that if they only had the data that appears in the redacted cells of the document filed by their expert with the FCC in support of their contention that the FCC shouldn't approve the transaction, there would be some brilliant insight or piece of advocacy not present in what the expert has said already and not present in other arguments made by the law firm without benefit to those data cells that would sweep the FCC from one side of the ledger to the other, from approving, which may never happen, the transaction to disapproving the transaction.

I may win the Power Ball lottery this weekend. Those things are possible. I'm not even going to hazard a guess as to which is more likely, but it doesn't matter. We are talking about likelihoods in the range of dramatic improbabilities. Common sense makes that crystal clear. A wild improbability is

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not a clear and specific showing of a threat of imminent irreparable injury.

What we come down to is the FCC has all the data, they will make out of it what they will. And we are, after all, not talking about rocket science here. The data in question are schedules of Herfindahl index calculations on a geographic area by geographic area, some hundred or more of them. Anybody who takes introductory antitrust law in law school knows what that is. It's a statistical calculation.

It gives rise under the horizontal merger guidelines that have been published by the FCC and the justice department to what one might call, without using the term in the technical sense, a presumption, an indication, depending on where the levels are and what the effect of a transaction on the levels would be, that there either is or is not likely to be an anti-competitive effect sufficient to trigger a violation of Clayton Act section 7, which triggered an FCC denial of whatever authority they have over the proposed transaction.

But it is at best a rule of thumb. Any sophisticated antitrust analysis takes account of the multiple circumstances. I don't mean to suggest these are facts of this marketplace -- I don't know -- but Lord knows that there have been transactions in marketplaces that have had Herfindahl indexes that on the face of it looked troublesome but where the mergers ultimately were determined -- and I use "merger" here in a

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nontechnical sense also -- not to present a section 7 problem or some other anticompetition policy problem, because there was great ease of entry, because there was imminent potential entry, because there were substantial economies of scale to be achieved, because there was a failing firm in the industry and the merger saved the failing firm, and on and on and on.

You can take down a copy or read on antitrust law and read I think literally volumes but certainly chapters on all of the factors that go into these analyses above and beyond the Herfindahl index. The likelihood that this information is really important given that the FCC already has it, to the plaintiff lawyers here is just de minimis.

There is another problem with the irreparable injury showing, more than one. The second problem that comes to mind is: Where have they been, the plaintiffs? The FOIA request was turned down on July 19th. For a month no appeal was taken, no FOIA suit was filed, and so forth. There is an abundance of case law in this circuit that a failure to move with alacrity in circumstances where injunctive relief might be appropriate, particularly where unexplained, which is the case here, tends to undermine any claim of irreparable injury. At a certain point it may, and probably does, becomes inconsistent with any claim of irreparable injury.

I don't go so far as to say it's inconsistent here. But in evaluating the sufficiency for showing of irreparable

injury, I do take some account, some modest account, of this unexplained month before the plaintiff's counsel decided to do an end run around the administrative process in the hope of a better result in the federal district court.

A lot more could be said on the subject of the threatened irreparable injury, but the only other thing that I will mention is this. At this moment it doesn't appear that this proposed transaction is in imminent danger of going anywhere in a hurry. The FCC has not cleared it. The Department of Justice has brought suit in the district court for the District of Columbia to enjoin it. I am not aware that it has sought a preliminary injunction yet, but the way these things go, there will either be some kind of a settlement or there will be such a motion in relatively short order.

I must say that in referring to the possibility of settlement, I don't mean to imply any knowledge of what's going on between the government and the companies, none whatsoever. I simply bring to bear the common-sense proposition that the government didn't bring this case with the intention that they wouldn't move for a preliminary injunction and would just let the transaction close despite their objections. Obviously, they are going to move for relief unless they get what they regard as some satisfactory resolution. That's all I mean to suggest.

I am going to ask that the United States Attorney's

office inform me fully by the close of business tomorrow of exactly what the state of play with respect to the justice department's situation is. I want to know exactly the status of whether the Hart-Scott-Rodino waiting period has expired and, if not, when it would expire absent some further extension. And I want to be kept apprised on a real-time basis of developments in the case in the district court in Washington.

I do want to be clear that in making the comments I have made about the situation with the justice department and the litigation in Washington, these are common-sense observations, I would reach exactly the same result on all the other grounds to which I have alluded without regard to any of that. I add that really only for emphasis, I suppose, and interest.

If, of course, the circumstances change in Washington and there were an imminent threat that the transaction would close, those comments would become outdated. Nonetheless, it would not overcome the plaintiff's lack of any showing of any real threat of irreparable injury, and it certainly wouldn't overcome their failure to exhaust administrative remedies.

The final point that I would refer to briefly, although it is not anything I'm going to rely on in this ruling at this time, though I reserve the right to do so later if it becomes appropriate, is this contretemps over the affidavits

and what could or couldn't be backed out of the data. I'm troubled, as I think my remarks indicated, by the way this issue surfaced.

The plaintiff moved by order to show cause for a preliminary injunction on August 18th. Judge Daniels in my absence required the filing of answering papers no later than eight days before today. On August 26th the FCC filed its answering papers, including the affidavits of Dr. Singer and also another I think economist.

The burden at least of Dr. Singer's affidavit, I guess it is actually a declaration, now that I look at it, was, at least in part, that a great deal of commercially sensitive information, individual firm-sensitive information, could be backed out of the data that the FCC has withheld and that this is at least in part justification for the FCC's determination that exemption 4 to the FOIA statute justifies withholding those parts of the Weir declaration that were redacted.

Rather than filing any reply papers in support of the preliminary injunction or any affidavits or declarations challenging the declarations submitted by the FCC, the plaintiff waited until September 6th, two days ago, and then filed a document titled "Plaintiff's response to AT&T Mobility's motion to intervene." Apart from saying they had no problem with AT&T intervening, this was not a response to AT&T's motion at all. Not at all. Rather, it was, to use

their word, a challenge to AT&T and to Dr. Singer to show how they can back out carrier-specific market share data from in this case the Department of Justice complaint.

"We say," quoting the plaintiff, "it is mathematically impossible," and they say they are going to call Mr. Weir as a witness today to say so. That surely was not the way to go about it, to put it charitably. If Mr. Weir in fact contends that on the math Dr. Singer is wrong, the thing to have done would have been to submit an affidavit or declaration showing in detail why that is so. And if there were, on a reading of the two affidavits, an issue of fact and if that issue of fact's resolution had been material to the disposition of the motion, a hearing would have been held. But that simply isn't what happened.

As things turn out, the question of who is correct, if anyone, about what can be backed out of the data is immaterial to the disposition of this motion because the plaintiff loses here for failure to exhaust administrative remedies and failure to show a threat of irreparable injury. Nonetheless, if the issue had been material, I would have come out in the same place because a hearing is appropriate where there is a genuine issue of fact framed by affidavits or other sworn proof.

You don't get a hearing because you say in your memorandum, I challenge the party who does not have the burden of proof to show that I'm wrong. That just doesn't fly. It

was the plaintiff's burden to put evidence before this Court that the exemption for determination by the FCC was incorrect, and this they failed to do. They failed to raise an issue of fact in an appropriate way with respect to the Singer declaration.

The position is very much like what happens in criminal cases all the time. Defendants make motions to suppress evidence that were seized in what the government claims were consent searches of apartments or automobiles or whatever. The law is absolutely crystal clear that if there is an affidavit from a person with knowledge that says there was a search and I did not consent and nobody else with authority to do so consented, you get a hearing. If you put in a brief alone, without that affidavit, you do not get a hearing. The same deal, folks, applies here, too. But, as I say, that is all immaterial.

The motion for a preliminary injunction is denied.

I think I will wait to hear from counsel as to what they want to do in terms of scheduling the case more generally. There is no reason why this case can't move promptly if there is really a need. I doubt there is a need right now, but I may be just not fully informed about that.

My law clerk has passed me a note saying that I said the Freedom of Information Act request was denied on July 19, 2001. This is because we are having a commemoration of

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9/11/2001 here and I have some remarks to give, so I have 2001 on the brain today. It was actually July 19, 2011.

I look forward to being kept up to date on what is happening with the transaction. Thanks, folks.

(Adjourned)