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CIVIL COVER SHEET

JS 44 (Rev. 12/07) (CAND Rev 1/10)

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by the local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON PAGE TWO OF THE FORM.)

I. (a) PLAINTIFFS: Robert Pepper, Stephen H. Schwartz, Edward W. Hayter, and Harry Bass, on behalf of themselves and all others similarly situated. DEFENDANTS: Apple Inc. (b) County of Residence of First Listed Plaintiff: Cook County, IL. County of Residence of First Listed Defendant: Santa Clara County, CA. (c) Attorney's (Firm Name, Address, and Telephone Number): Francis M. Gregorek, Wolf Haldenstein Adler Freeman & Herz LLP, 750 B St., Suite 2770, San Diego, CA 92101. Tel: 619/239-4599 Fax: 619/234-4599. Includes 'FAXED' stamp and 'MEJ' signature.

II. BASIS OF JURISDICTION (Place an "X" in One Box Only). III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant). Includes checkboxes for U.S. Government Plaintiff/Defendant, Federal Question, Diversity, Citizen of This State, Citizen of Another State, Citizen or Subject of a Foreign Country, and various incorporation and business location options. Includes 'ADR' stamp.

IV. NATURE OF SUIT (Place an "X" in One Box Only). Grid of categories: CONTRACT, REAL PROPERTY, PERSONAL INJURY, CIVIL RIGHTS, TORTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES. Includes handwritten '011-6744-MCJ' on the left side.

V. ORIGIN (Place an "X" in One Box Only). Transferred from:  1 Original Proceeding,  2 Removed from State Court,  3 Remanded from Appellate Court,  4 Reinstated or Reopened,  5 another district (specify),  6 Multidistrict Litigation,  7 Appeal to District Judge from Magistrate Judgment.

VI. CAUSE OF ACTION. Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): 15 U.S.C. § 2. Brief description of cause: Unlawful monopolization of the iPhone Applications Aftermarket and the iPhone Voice and Data Services Aftermarket.

VII. REQUESTED IN COMPLAINT:  CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23. DEMAND \$: CHECK YES only if demanded in complaint. JURY DEMAND:  Yes  No.

VIII. RELATED CASE(S) IF ANY: PLEASE REFER TO CIVIL L.R. 3-12 CONCERNING REQUIREMENT TO FILE "NOTICE OF RELATED CASE". In re Apple & AT&TM Antitrust Litigation, Case No. 07-CV-5152 JW.

IX. DIVISIONAL ASSIGNMENT (CIVIL L.R. 3-2) (PLACE AND "X" IN ONE BOX ONLY).  SAN FRANCISCO/OAKLAND,  SAN JOSE,  EUREKA.

DATE: December 29, 2011. SIGNATURE OF ATTORNEY OF RECORD: [Signature]

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15  
16 UNITED STATES DISTRICT COURT  
17 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
18  
19 SAN FRANCISCO DIVISION

20 ROBERT PEPPER, STEPHEN H.  
21 SCHWARTZ, EDWARD W. HAYTER,  
and HARRY BASS on behalf of themselves  
22 and all others similarly situated,

23 Plaintiffs,

24 v.

25 APPLE INC.,

26 Defendant.

27 ) CLASS ACTION COMPLAINT  
28 )

) DEMAND FOR JURY TRIAL

CLASS ACTION COMPLAINT

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2011 DEC 29 P 2 52  
COURT REPORTER  
FACSIMILE  
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1 Plaintiffs Robert Pepper, Stephen H. Schwartz, Edward W. Hayter and Harry Bass  
2 (“Plaintiffs”), for their class action complaint, allege upon personal knowledge as to themselves  
3 and their own actions, and upon information and belief, including the investigation of counsel, as  
4 follows:

5 **NATURE OF ACTION**

6 1. This is an antitrust class action pursuant to section 2 of the Sherman Antitrust Act  
7 of 1890, 15 U.S.C. § 2 (2004) (the “Sherman Act”), brought by Plaintiffs on their own behalf and  
8 on behalf of a class of persons similarly situated, those being persons who purchased an Apple  
9 iPhone from Defendant Apple Inc. (“Apple”) or non-party AT&T Mobility, LLC (“ATTM”), or  
10 elsewhere, and then purchased wireless voice and data services or applications for the iPhone from  
11 December 29, 2007 through February 3, 2011 (the “Class Period”)

12 **A. Summary Of Material Facts**

13 2. Apple launched its iPhone on or about June 29, 2007. Prior to launch, Apple  
14 entered into a secret five-year contract with ATTM that established ATTM as the exclusive  
15 provider of cell phone voice and data services for iPhone customers through some time in 2012  
16 (“Exclusivity Agreement”). As part of the contract, Apple shared in ATTM’s revenues and profits  
17 with respect to the first generation of iPhones launched, known as the iPhone 2G, which was a  
18 unique arrangement in the industry. The Plaintiffs and other class members who purchased  
19 iPhones did not agree to use ATTM for five years. Apple’s undisclosed five-year Exclusivity  
20 Agreement with ATTM, however, effectively locked iPhone users into using ATTM for five  
21 years, contrary to those users’ knowledge, wishes and expectations.

22 3. To enforce ATTM’s exclusivity, Apple, among other things, programmed and  
23 installed software locks on each iPhone it sold that prevented the purchaser from switching to  
24 another carrier that competed with ATTM in the cell phone voice and data services industry.  
25 Under an exemption to the Digital Millennium Copyright Act of 1998, 17 U.S.C. § 1201, *et seq.*  
26 (2008) (the “DMCA”), cell phone consumers have an absolute legal right to modify their phones  
27 to use the network of their carrier of choice. Apple has prevented iPhone customers from  
28 exercising that legal right by locking the iPhones and refusing to give customers the software

1 codes needed to unlock them.

2 4. Under its Exclusivity Agreement with ATTM, Apple retained exclusive control  
3 over the design, features and operating software for the iPhone. To enhance its iPhone-related  
4 revenues, Apple enabled the creation of numerous software programs called “applications,” such  
5 as ringtones, instant messaging, Internet access, gaming, entertainment, video and photography  
6 enabling software that can be downloaded and used by iPhone owners.

7 5. In March 2008, Apple released a “software development kit” (“SDK”) for the  
8 stated purpose of enabling independent software developers to design applications for use on the  
9 iPhone. For an annual fee of \$99, the SDK allows developers to submit applications to be  
10 distributed through Apple’s applications market, the “iTunes App Store.” If the application is not  
11 made available for free in the App Store, Apple collects 30% of the sale of each application, with  
12 the developer receiving the remaining 70%. On information and belief, throughout the Class  
13 Period, Apple refused to “approve” any application by a developer who did not pay the annual fee,  
14 or agree to Apple’s apportionment scheme. Apple also unlawfully discouraged iPhone customers  
15 from downloading competing applications software (hereafter “Third Party Apps”) by telling  
16 customers that Apple would void and refuse to honor the iPhone warranty of any customer who  
17 downloaded Third Party Apps.

18 6. iPhone consumers were not provided a means by which they could download Third  
19 Party Apps that were not approved by Apple for sale on the App Store.

20 7. Through these actions, Apple has unlawfully stifled competition, reduced output  
21 and consumer choice, and artificially increased prices in the aftermarket for iPhone voice and  
22 data services and for iPhone software applications.

23 **B. Summary Of Claims**

24 8. In pursuit and furtherance of its unlawful anticompetitive activities, Apple (a) failed  
25 to obtain iPhone consumers’ contractual consent to the five-year Exclusivity Agreement between  
26 Apple and ATTM, the effect of which was to lock consumers into using ATTM as their voice and  
27 data service provider, even if they wished to discontinue their use of ATTM service; (b) failed to  
28 obtain iPhone consumers’ contractual consent to having their iPhones “locked” to only accept

1 ATTM Subscriber Identity Modules (“SIM cards”), thereby preventing iPhone purchasers from  
2 using any cell phone voice and data service provider other than ATTM; (c) failed to obtain iPhone  
3 consumers’ contractual consent to make unavailable to them the “unlock code” that would enable  
4 the consumers to use a service other than ATTM, even though ATTM routinely provides such  
5 unlock codes for other types of cell phones; and (d) failed to obtain iPhone consumers’ contractual  
6 consent to Apple prohibiting iPhone owners from downloading Third Party Apps.

7 9. Apple violated section 2 of the Sherman Act by conspiring with ATTM to  
8 monopolize the aftermarket for voice and data services for iPhones in a manner that harmed  
9 competition and injured consumers by reducing output and increasing prices in that aftermarket.

10 10. Apple also violated section 2 of the Sherman Act by monopolizing or attempting to  
11 monopolize the software applications aftermarket for iPhones in a manner that harmed  
12 competition and injured consumers by reducing output and increasing prices for those  
13 applications.

14 11. Plaintiffs seek declaratory and injunctive relief, treble and exemplary damages,  
15 costs and attorneys’ fees. As for equitable relief, Plaintiffs seek an order: (a) restraining Apple  
16 from selling iPhones that are programmed in any way to prevent or hinder consumers from  
17 unlocking their SIM cards or from downloading Third Party Apps; (b) requiring Apple to provide  
18 the iPhone SIM unlock codes to members of the class and other iPhone consumers immediately  
19 upon request; and (c) restraining Apple from selling or distributing locked iPhones without  
20 adequately disclosing the fact that they are locked to work only with ATTM SIM cards and  
21 without obtaining the consumers’ contractual consent to have their iPhones locked.<sup>1</sup>

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24 <sup>1</sup> Apple has released five models of the iPhone to date. From the earliest to most recent, the  
25 models are the iPhone 2G, the iPhone 3G, the iPhone 3GS, the iPhone 4 and the iPhone 4S. Apple  
26 created the first three iPhones to operate only on the ATTM wireless network, as part of the  
27 Exclusivity Agreement. One version of the iPhone 4 is locked to work only on ATTM’s network,  
28 while another version, which was released on February 3, 2011, works on Verizon’s network. The  
iPhone 4S is designed to be able to operate on *any* domestic carrier’s network. Despite this, Apple  
and ATTM *still refuse* to unlock any iPhone 4S purchased by an ATTM customer.

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**THE PARTIES**

12. Plaintiff Robert Pepper is an individual residing in Chicago, Illinois who, on or about June 29, 2007, purchased an iPhone and paid for ATTM voice and data service for his iPhone at ATTM's stated rates during the Class Period.

13. Plaintiff Stephen H. Schwartz is an individual residing in Ardsley, New York who, in October 2010, purchased an iPhone and paid for ATTM voice and data service for his iPhone at ATTM's stated rates during the Class Period.

14. Plaintiff Edward W. Hayter is an individual residing in Brooklyn, New York who, in March 2008, purchased an iPhone and paid for ATTM voice and data service for his iPhone at ATTM's stated rates during the Class Period.

15. Plaintiff Harry Bass is an individual residing in Brooklyn, New York, who, in December 2008, purchased an iPhone and paid for ATTM voice and data service for his iPhone at ATTM's stated rates during the Class Period.

16. Defendant Apple is a California corporation with its principal place of business located at 1 Infinite Loop, Cupertino, California 95014. Apple regularly conducts and transacts business in this District, as well as throughout Illinois, New York and elsewhere in the United States. Apple manufactures, markets, and sells the iPhone, among other electronic devices.

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**JURISDICTION AND VENUE**

17. This Court has federal question jurisdiction pursuant to the Sherman Act, the Clayton Antitrust Act of 1914, 15 U.S.C. § 15 and pursuant to 26, 28 U.S.C. §§ 1331 and 1337.

18. This Court also has jurisdiction pursuant to 28 U.S.C. § 1332(d)(2) because sufficient diversity of citizenship exists between parties in this action, the aggregate amount in controversy exceeds \$5,000,000, and there are 100 or more members of the proposed class.

19. Venue is proper in this District pursuant to 28 U.S.C. § 1391 because some Plaintiffs purchased iPhones in this District, Apple has its principal place of business in this District, a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred here, and Apple is a corporation subject to personal jurisdiction in this District and, therefore, resides here for venue purposes.



1 (a) the existence of Apple's five-year Exclusivity Agreement with ATTM, or (b) that Apple's  
2 five-year agreement would effectively lock Plaintiffs into using ATTM as their voice and data  
3 service provider for the duration of the five-year agreement. In fact, neither Apple's nor ATTM's  
4 sales or customer service representatives were told about the length of the secret Exclusivity  
5 Agreement.

6 27. Prior to Plaintiffs' purchases of their iPhones and voice and data service, Apple had  
7 not disclosed – much less obtained Plaintiffs' contractual consent to – the fact (a) that Plaintiffs'  
8 iPhones were locked to only work with ATTM SIM cards, or (b) that the unlock codes would not  
9 be provided to them on request.

10 28. On information and belief, ATTM provides unlock codes for cell phones other than  
11 the iPhone if requested by a consumer.

12 29. Plaintiff Pepper wanted to have the option of switching to a competing domestic  
13 voice and data service provider other than ATTM.

14 30. Plaintiff Schwartz would like the ability to unlock his SIM card for international  
15 travel and to switch to a competing domestic voice and data service provider other than ATTM.

16 31. Plaintiff Hayter wanted to have the option of switching to a competing domestic  
17 voice and data service provider other than ATTM.

18 32. Plaintiff Bass wanted to have the option of switching to a competing domestic  
19 voice and data service provider other than ATTM.

20 **B. The Cell Phone Industry**

21 33. Cellular telephone service began to be offered to consumers in 1983. Cellular  
22 telephones operate using radio frequency channels allocated by the Federal Communications  
23 Commission ("FCC"). Geographical service areas, sometimes known as "cells," are serviced by  
24 base stations using low-power radio telephone equipment, sometimes known as "cell towers."  
25 The cell towers connect to a Mobile Telephone Switching Office ("MTSO"), which controls the  
26 switching between cell phones and land line phones, accessed through the public-switched  
27 telephone network, and to other cell telephones.

28 34. In cellular service there are two main competing network technologies: Global



1 System for Mobile Communications (“GSM”) and Code Division Multiple Access (“CDMA”).  
2 GSM is the product of an international organization founded in 1987 dedicated to providing,  
3 developing, and overseeing a worldwide wireless standard. CDMA is an alternative technological  
4 platform, developed by Qualcomm, Inc., used in much of North America and parts of Asia.

5 35. To enable cell phones to send and receive emails, stream video and provide other  
6 services requiring higher data transfer speeds, both CDMA and GSM carriers adopted  
7 technologies to comply with what the industry refers to as “3rd or 4th generation,” or “3G” or  
8 “4G” standards. These technologies require the cell phone to operate on a separate 3G or 4G  
9 network. The ATTM services provided to users of the first-generation iPhone were on ATTM’s  
10 2G network, whereas later versions of the iPhone operate on 3G and 4G networks.

11 36. While there are a number of cellular phone service providers in the United States,  
12 only four have substantial national networks: ATTM, T-Mobile USA, Inc. (“T-Mobile”), Sprint  
13 Corporation (“Sprint”), and Cellco Partnership d/b/a Verizon Wireless (“Verizon”) (collectively,  
14 the “Major Carriers”). Other suppliers may in effect be “resellers” of cellular telephone service  
15 which they purchase from the Major Carriers. ATTM and T-Mobile operate GSM networks,  
16 while Sprint and Verizon operate CDMA networks.

17 37. ATTM and the other wireless carriers have long dominated and controlled the cell  
18 phone industry in the United States in a manner that, according to a *Wall Street Journal* article,  
19 “severely limits consumer choice, stifles innovation, crushes entrepreneurship, and has made the  
20 U.S. the laughingstock of the mobile-technology world, just as the cellphone is morphing into a  
21 powerful hand-held computer.” Walter S. Mossberg, *Free My Phone*, WALL STREET JOURNAL,  
22 Oct. 22, 2007, at R3, col. 1.

23 38. Unlike the personal computer market in general – where computer manufacturers  
24 and software developers can offer products directly to consumers without having to gain the  
25 approval of Internet service providers, and without paying those providers a penny – the wireless  
26 carriers have used their ability to grant or deny access to their wireless networks to control both  
27 the type of cell phone hardware and software that can be manufactured and to extract payments  
28 from manufacturers granted access to their networks and customers. *Id.*

1           39.    The anticompetitive nature of the wireless telephone market the carriers have  
2 created and facilitated gave rise to the commercial context in which Apple was able to commit the  
3 wrongs and offenses alleged herein.

4    **C.    The Cell Phone Industry's History Of Misusing Locked SIM Cards**

5           40.    In the United States, as a general rule, only GSM phones use SIM cards.  The  
6 removable SIM card allows phones to be instantly activated, interchanged, swapped out and  
7 upgraded, all without carrier intervention.  The SIM card itself is tied to the network rather than  
8 the actual phone.  Phones that are SIM card-enabled generally can be used with any GSM carrier.

9           41.    Thus, the hardware of all GSM compatible cell phones give consumers some  
10 degree of choice to switch among GSM carriers' wireless networks by enabling them to replace  
11 their SIM card, a process that the average individual consumer easily can do with no training by  
12 following a few simple instructions in a matter of minutes.  SIM cards are very inexpensive, now  
13 typically costing a few dollars.  When the card is changed to the SIM card of another carrier, the  
14 cell phone is immediately usable on the other carrier's network.  To switch from ATTM to  
15 T-Mobile, or the other way around, all that is required is this simple change of the SIM card.

16           42.    For telephone users who travel, particularly to Europe, the ability to change SIM  
17 cards to a European carrier such as Orange, Vodaphone or TIM, allows the user of a GSM  
18 American phone to "convert it" to a "local" phone in the country where they have traveled.  
19 Absent a conversion to local service, a consumer using an American GSM cell phone abroad must  
20 pay both for the American service and for "roaming" charges, that is, the right to call or retrieve  
21 data from outside of the customer's primary calling area.  Roaming charges are typically very high,  
22 often a dollar or more a minute.  As a result, U.S.-based cell phone users traveling abroad can  
23 yield very substantial savings by switching the SIM card and paying for local service rather than  
24 using the U.S.-based GSM carrier.

25           43.    In an effort to minimize consumers' ability to switch carriers or avoid roaming  
26 charges by simply switching SIM cards, the Major Carriers, acting in concert through trade  
27 associations and standards setting organizations such as the CDMA Development Group, the  
28 Telecommunications Industry Association, the Third Generation Partnership Project, the Alliance

1 for Telecommunications, the Open Mobile Alliance, the CSM Association, the Universal Wireless  
2 Communications Consortium, and the Cellular Telephone Industry Association, and otherwise,  
3 agreed to implement "Programming Lock" features which effectively "locked" individual handsets  
4 so that they could not be used without the "unlocking" code. GSM carriers obtain a locking code  
5 (normally only six digits long) unique to each cell phone from the cell phone manufacturer.  
6 Absent obtaining the unlocking code from their GSM carrier, consumers who purchase a  
7 telephone manufactured to work with one of the two GSM Major Carriers can not switch to  
8 another carrier, even temporarily while traveling abroad, without buying an entirely new phone.

9 44. The two GSM carriers, ATTM and T-Mobile, adopted a SIM-lock standard that  
10 locked each GSM phone to a particular SIM card, thereby preventing consumers from simply  
11 changing their SIM cards to switch carriers. However, throughout the Class Period both T-Mobile  
12 and ATTM (for cell phones other than the iPhone) typically unlocked SIM cards on request for  
13 international travel, or even if customers wanted to cancel their accounts and switch to another  
14 carrier. In most cases, the unlock code was given on request, almost instantly, over the telephone.

15 45. Accordingly, ATTM unlocked SIM cards on telephones sold exclusively through  
16 them, such as the Blackberry Torch and the Samsung Blackjack. There is but one exception: the  
17 iPhone. Even today, ATTM refuses to provide the unlock code for iPhones for international travel  
18 or otherwise.<sup>3</sup> On information and belief, that is because, as described more fully below, Apple  
19 and ATTM unlawfully agreed as part of the Exclusivity Agreement that the iPhone would not be  
20 unlocked under any circumstances.

21 **D. Apple's Misuse Of Other Locked Program Codes**

22 46. The iPhone operating system also contains "security measures" which are, in effect,  
23 Program Locks designed to restrict the consumer from using programs or services on the iPhone  
24 other than those sanctioned by, and which generate revenue for, Apple. By design, Apple  
25

26 <sup>3</sup> Despite the fact that the iPhone 4S can be operated on either a GSM or CDMA network,  
27 ATTM appears to still refuse to provide unlock codes for any iPhones. See [http://www.att.com/  
28 esupport/article.jsp?sid=55002&cv=820&title=What+is+the+unlock+code+for+my+phone%3F#fbid=s-46\\_WT1tko](http://www.att.com/esupport/article.jsp?sid=55002&cv=820&title=What+is+the+unlock+code+for+my+phone%3F#fbid=s-46_WT1tko) ("iPhone(R) cannot be unlocked, even if you are out of contract.").

1 programmed the iPhone in a manner that prevented iPhone purchasers from downloading any  
2 Third Party Apps offered by software manufacturers who did not share their revenues with Apple  
3 or pay a fee to Apple to sell through iTunes.

4 47. However, because of the design of the Apple operating system, which is based on  
5 the widely available Unix platform, Apple's initial efforts to eliminate Third Party Apps and to  
6 prevent iPhone customers from unlocking their SIM cards were ineffective, as clever consumers  
7 and programmers of Third Party Apps quickly circumvented Apple's locking codes and made both  
8 "unlocked" iPhones and "unlocking" software for iPhones available for sale on the Internet.

9 **E. Apple Knows It Cannot Legally Prevent Consumers From Unlocking iPhones**

10 48. Several years ago, the Major Carriers were subject to lawsuits that sought to  
11 impose liability based on the existence of Program Locks. Carriers had claimed that Program  
12 Locks were necessary to protect their copyrighted intellectual property and claimed then, as Apple  
13 has done, that the reason for the locks was to benefit consumers and protect against fraud.  
14 Carriers had also sought to assert that under the terms of the DMCA, disabling the Program Locks  
15 or unlocking a SIM card would be a violation of law.

16 49. The DMCA was enacted in 1998 to prohibit third parties from circumventing  
17 technological measures (called "access controls") that copyright owners had employed to control  
18 access to their protected intellectual property. However, in November 2006, the Librarian of  
19 Congress, who by statute has authority to create exemptions to the restrictions in § 1201 of the  
20 DMCA to ensure the public is able to engage in noninfringing uses of copyrighted works,  
21 announced a three-year exemption from the prohibition against circumvention of access controls  
22 for "[c]omputer programs in the form of firmware that enable wireless telephone handsets to  
23 connect to a wireless telephone communication network, when circumvention is accomplished for  
24 the sole purpose of lawfully connecting to a wireless telephone communication network." The  
25 exemption stemmed from a recommendation by the Register of Copyrights, which concluded that  
26 "the access controls [on cell phones] do not appear to actually be deployed in order to protect the  
27 interests of the copyright owner or the value or integrity of the copyrighted work; rather, *they are*  
28 *used by wireless carriers to limit the ability of subscribers to switch to other carriers, a business*

1 *decision that has nothing whatsoever to do with the interests protected by copyright.”* 71 Fed.  
2 Reg. 68472, 68476 (Nov. 27, 2006).

3 50. In 2009, the Librarian of Congress extended the initial three-year exemption  
4 applicable to cell phone access controls on an interim basis. 74 Fed. Reg. 55138, 55139 (Oct. 27,  
5 2009). On July 27, 2010, the Librarian of Congress issued a final rule to this effect. 75 Fed. Reg.  
6 43825, 43832 (July 27, 2010).

7 51. Because Apple was unable to enforce its SIM card Program Locks through legal  
8 means, it engaged in a scheme to enforce them unlawfully as to the iPhone.

9 **F. The Apple – ATTM Exclusivity Agreement**

10 52. On January 9, 2007, a little over a month after the initial adverse Librarian of  
11 Congress ruling, Apple announced that it had entered into an exclusive agreement making ATTM  
12 the only authorized provider of wireless voice and data services for iPhones in the United States.  
13 Apple did not announce that the duration of that exclusive agreement was five years.

14 53. While the terms of that Exclusivity Agreement and any related agreements  
15 (collectively, the “Agreement”) still have not been made public, some rumored details emerged.  
16 First, ATTM and Apple agreed to share ATTM’s voice service and data service revenue received  
17 from iPhone customers. This was a unique arrangement in the industry and gave Apple strong  
18 motivation to force iPhone consumers to continue purchasing voice and data services from ATTM  
19 for as long as possible.

20 54. Second, while ATTM offered iPhone purchasers industry standard monthly voice  
21 and data service that could be terminated at any time prior to two years for a fee, Apple had  
22 secretly agreed to give ATTM iPhone exclusivity for five years, so that iPhone customers would  
23 have no choice but to continue purchasing voice and data services from ATTM until sometime in  
24 2012 in order for their iPhone to continue to operate – even if the customers wanted to terminate  
25 their ATTM service early to switch to a less expensive carrier, such as T-Mobile in the United  
26 States.

27 55. Third, on information and belief, Apple and ATTM agreed to enforce ATTM’s  
28 exclusivity by installing SIM card Program Locks on all iPhones and agreeing never to disclose

1 the unlock codes to iPhone consumers who wished to replace the iPhone SIM card, either for  
2 international travel or to lawfully switch to another carrier.

3 56. Fourth, the Agreement allowed Apple to control the features, content, software  
4 programming and design of the iPhone.

5 57. Fifth, since both Apple and ATTM recognized that the iPhone would create a  
6 unique product for which consumers would pay a premium price compared to other cell phones,  
7 the pricing structure of the ATTM exclusivity deal was different than a typical agreement between  
8 a carrier and a handset manufacturer. Typically, the carrier subsidizes the purchase price of the  
9 handset (that is, sells the cell phone to the consumer at a substantial discount off the list price) in  
10 return for the consumer purchasing wireless service from the carrier for a period of time. This  
11 arrangement, the carriers argue, benefits the consumer by lowering the cell phone's price. The  
12 carriers, however, charge an early termination fee if consumers wish to discontinue their purchase  
13 of wireless service prior to the agreed upon length of time, which fee the carriers argue is justified  
14 by their subsidization of the cell phone price. Upon termination, the cell phone customer can  
15 obtain cell phone service from any carrier using the same network protocol (*i.e.*, GSM or CDMA).

16 58. In Apple's and ATTM's Agreement, ATTM did not agree to subsidize the purchase  
17 of the iPhone handset initially but nevertheless still charged iPhone consumers a fee for  
18 terminating their voice and data service within the first two years. The early termination fee by  
19 ATTM was not justifiable absent subsidization of the handset price. The benefits of the  
20 termination fee were also illusory because even those iPhone consumers who discontinued their  
21 ATTM voice and data services by paying the early termination fee were prevented from obtaining  
22 wireless service for their iPhone from one of ATTM's competitors domestically or abroad.

23 59. Sixth, on information and belief, ATTM and Apple agreed that they would take  
24 action, legal or otherwise, to prevent users from circumventing the SIM card locks. A central  
25 purpose of this agreement was to suppress lawful competition domestically by T-Mobile against  
26 ATTM in the iPhone aftermarket for voice and data services.

27 60. Finally, on information and belief, Apple and ATTM agreed that Apple would be  
28 restrained for a period of time from developing a CDMA version of the iPhone to suppress

1 competition by Sprint and Verizon. Apple and ATTM agreed to this restraint notwithstanding that  
2 Apple could easily develop an iPhone for use on CDMA networks. In fact, Apple originally  
3 approached Verizon to be the iPhone exclusive service provider before Apple approached ATTM.

4 61. None of the above details of the Exclusivity Agreement were disclosed to  
5 purchasers of the iPhone, by representatives of Apple and ATTM or otherwise. Nor did any  
6 iPhone purchaser ever contractually consent to any of those terms upon purchasing their iPhone.

7 62. On information and belief, Apple and ATTM ceased sharing ATTM's revenues,  
8 and reverted to a more traditional carrier-handset manufacturer arrangement whereby ATTM  
9 simply purchases the hand-sets from Apple without kicking back its future revenues to Apple,  
10 with respect to the iPhone 3G, iPhone 3GS, iPhone 4 and iPhone 4S. Apple and ATTM, however,  
11 continued to abide by and enforce the other anticompetitive terms of their Agreement, such as the  
12 Program Locks and their refusal to give consumers the unlock codes for their iPhones, in order to  
13 continue to suppress competition in the voice and data service aftermarket and to continue to enjoy  
14 the supracompetitive profits stemming from their Agreement.

15 **G. Apple And ATTM Quickly Faced Unwanted Competition In The iPhone**  
16 **Aftermarkets**

17 63. Almost immediately after the iPhone 2G was launched, Third Party Apps for the  
18 iPhone started to appear that generated competition for Apple in the applications aftermarket and  
19 for ATTM in the cellular voice and data service aftermarket. For example, Mobile Chat and  
20 FlickIM gave iPhone users access to instant messaging programs from which Apple derived no  
21 revenues.

22 64. Apple also faced competition for iPhone ringtones. When a customer purchased a  
23 song for \$1 from the Apple iTunes store, Apple charged the customer an additional 99 cents to  
24 convert any portion of that song into a ringtone. A number of competing programmers promptly  
25 offered a variety of ringtone programs that enabled iPhone consumers to download both for free.  
26 Some of these programs allowed customers to use samples of popular songs lawfully downloaded  
27 from Apple's iTunes store as a ringtone for their iPhone. Other programs, such as I-Toner from  
28 Ambrosia Software, and iPhone RingToneMaker from Efiko software, allowed customers to  
"clip" portions of songs purchased by them from iTunes for use as ringtones.





1 **and data service from ATTM or purchased applications from Apple from**  
2 **December 29, 2007 through February 3, 2011 (the "Class Period").**

3 71. The Class for whose benefit this action is brought are so numerous that joinder of  
4 all members is impractical.

5 72. Plaintiffs are unable to state the exact number of class members without discovery  
6 of Apple and ATTM's records but, on information and belief, state that tens of millions of iPhones  
7 were sold for use on the ATTM network during the Class Period.

8 73. There are questions of law and fact common to the Class which predominate over  
9 any questions affecting only individual members. The common questions of law and fact  
10 affecting the rights of all members of the Class include the following:

- 11 a. Whether Apple failed to obtain consumers' contractual consent to the fact  
12 that Apple had entered into the five-year Exclusivity Agreement with  
13 ATTM whereby consumers would be unable to switch to a competing voice  
14 and data service provider during the period of the Exclusivity Agreement;
- 15 b. Whether Apple failed to obtain consumers' contractual consent to the fact  
16 that the iPhones would be locked to only accept ATTM SIM cards;
- 17 c. Whether Apple failed to obtain consumers' contractual consent to the fact  
18 that they would not provide consumers with the unlock codes for their  
19 iPhones so that the iPhones could be used with non-ATTM SIM cards;
- 20 d. Whether Apple failed to obtain consumers' contractual consent to the fact  
21 that Apple would seek to prohibit iPhone owners from downloading Third  
22 Party Apps;
- 23 e. Whether Apple violated section 2 of the Sherman Act by monopolizing or  
24 attempting to monopolize the aftermarket for iPhone software applications;  
25 and
- 26 h. Whether Apple violated section 2 of the Sherman Act by conspiring to  
27 monopolize the aftermarket for iPhone wireless voice and data services.

28 74. Each of these enumerated common questions of law and fact is identical for each  
and every member of the Class.



1 such functions as ringtones, instant messaging, photographic capability and Internet applications  
2 (the “Applications Aftermarket”).

3 83. The iPhone Voice and Data Services Aftermarket came into existence immediately  
4 upon the sale of the first iPhones, because (a) the iPhone Voice and Data Services Aftermarket is  
5 derivative of the iPhone market; (b) no Plaintiff or member of the Class contractually agreed to  
6 permit Apple to impose any restrictions in this aftermarket; (c) the Plaintiffs and members of the  
7 Class were entitled to terminate service with ATTM at any time upon payment of a termination  
8 fee; and (d) no Plaintiffs or members of the Class agreed with anyone to not purchase and use  
9 voice and data services from providers other than ATTM.

10 84. Similarly, the Applications Aftermarket came into existence immediately upon the  
11 sale of the first iPhones because (a) the Applications Aftermarket is derivative of the iPhone  
12 market; and (b) no Plaintiff or member of the Class agreed to any restrictions on their access to the  
13 Applications Aftermarket.

14 **COUNT I**  
15 **Unlawful Monopolization of the Applications Aftermarket**  
16 **in Violation of Section 2 of the Sherman Act**  
17 **(Seeking Damages and Equitable Relief)**

18 85. Plaintiffs reallege and incorporate paragraphs 1 through 84 above as if set forth  
19 fully herein.

20 86. Apple has acquired monopoly power in the iPhone Applications Aftermarket  
21 through unlawful willful acquisition or maintenance of that power. Specifically, Apple has  
22 unlawfully acquired monopoly power by: (a) “approving” only applications that generate  
23 revenues for Apple, and/or that are submitted to Apple for approval after the developer pays Apple  
24 an annual fee of \$99; (b) discouraging iPhone customers from using competing Third Party Apps  
25 by spreading misinformation; and (c) programming the iPhone operating system in a way that  
26 prevents iPhone customers from downloading Third Party Apps, disables Third Party Apps and/or  
27 disables or destroys the full functionality of the iPhones of users who download Third Party Apps.

28 87. Apple’s unlawful acquisition of monopoly power has reduced output and  
competition and resulted in increased prices for products sold in the iPhone Applications  
Aftermarket and, thus, harms competition generally in that market.

1 88. Plaintiffs have been injured in fact by Apple's unlawful monopolization because  
2 they have (a) been deprived of lower cost alternatives for applications, (b) been forced to pay  
3 higher prices for Apple "approved" applications, and/or (c) had their iPhones disabled or  
4 destroyed.

5 89. Apple's unlawful monopolization of the iPhone Applications Aftermarket violates  
6 section 2 of the Sherman Act, and its unlawful monopolization practices are continuing and will  
7 continue unless they are permanently enjoined. Plaintiffs and members of the Class have suffered  
8 economic injury to their property as a direct and proximate result of Apple's unlawful  
9 monopolization, and Apple is therefore liable for treble damages, costs and attorneys' fees in  
10 amounts to be proved at trial.

11 **COUNT II**  
12 **Attempted Monopolization of the Applications Aftermarket in**  
13 **Violation of Section 2 of the Sherman Act**  
14 **(Seeking Damages and Equitable Relief)**

15 90. Plaintiffs reallege and incorporate paragraphs 1 through 89 above as if set forth  
16 fully herein.

17 91. Defendant Apple has engaged in exclusionary, predatory and anticompetitive  
18 conduct with a specific intent to monopolize the iPhone Applications Aftermarket. Specifically,  
19 Apple has attempted unlawfully to acquire monopoly power by (a) "approving" only applications  
20 that generate revenues for Apple, and/or that are submitted to Apple for approval after the  
21 developer pays Apple an annual fee of \$99; (b) discouraging iPhone customers from using  
22 competing Third Party Apps by spreading misinformation; and (c) programming the iPhone  
23 operating system in a way that prevents iPhone customers from downloading Third Party Apps,  
24 disables Third Party Apps and/or disables or destroys the full functionality of the iPhones of users  
25 who download Third Party Apps. Apple did not have a legitimate business justification for any of  
26 these actions.

27 92. Apple's anticompetitive actions have created a dangerous probability that Apple  
28 will achieve monopoly power in the Applications Aftermarket because Apple has already  
unlawfully achieved an economically significant degree of market power in that market and has

1 effectively foreclosed new and potential entrants from entering the market or gaining their  
2 naturally competitive market shares.

3 93. Apple's attempted acquisition of monopoly power has reduced output and  
4 competition and resulted in increased prices for products sold in the iPhone Applications  
5 Aftermarket and, thus, harms competition generally in that market.

6 94. Plaintiffs have been injured in fact by Apple's attempted monopolization because  
7 they have (a) been deprived of lower cost alternatives for applications, (b) been forced to pay  
8 higher prices for Apple "approved" applications, and/or (c) had their iPhones disabled or  
9 destroyed.

10 95. Apple's attempted monopolization of the iPhone Applications Aftermarket violates  
11 section 2 of the Sherman Act and its anticompetitive practices are continuing and will continue  
12 unless they are permanently enjoined. Plaintiffs and members of the Class have suffered  
13 economic injury to their property as a direct and proximate result of Apple's attempted  
14 monopolization, and Apple is therefore liable for treble damages, costs and attorneys' fees in  
15 amounts to be proved at trial.

16 **COUNT III**  
17 **Conspiracy to Monopolize the iPhone Voice and Data Services Aftermarket**  
18 **in Violation of Section 2 of the Sherman Act**  
19 **(Seeking Damages and Equitable Relief)**

20 96. Plaintiffs reallege and incorporate paragraphs 1 through 95 above as if set forth  
21 fully herein.

22 97. Apple knowingly and intentionally conspired with ATTM with the specific intent  
23 to monopolize the iPhone Voice and Data Services Aftermarket. In furtherance of the conspiracy,  
24 Apple and its co-conspirator agreed without Plaintiffs' knowledge or consent to make ATTM the  
25 exclusive provider of voice and data services for the iPhone for five years, contrary to Plaintiffs'  
26 reasonable expectations that they could switch at any time to another carrier in the first two years  
27 that they owned their iPhone after paying the \$175 early termination fee, and without charge after  
28 that period.

98. ATTM unlawfully achieved an economically significant degree of market power in  
the iPhone Voice and Data Services Aftermarket as a result of the conspiracy and effectively

CLASS ACTION COMPLAINT

1 foreclosed new and potential entrants from entering the market or gaining their naturally  
2 competitive market shares.

3 99. Apple and ATTM's conspiracy reduced output and competition and resulted in  
4 increased prices in the iPhone Voice and Data Services Aftermarket and, thus, harmed competition  
5 generally in that market.

6 100. Plaintiffs were injured in fact by Apple and ATTM's conspiracy because they were  
7 (a) deprived of alternatives for voice and data services domestically, and (b) forced to pay  
8 supracompetitive prices for iPhone voice and data services.

9 101. Apple's conspiracy to monopolize the iPhone Voice and Data Services Aftermarket  
10 violated Section 2 of the Sherman Act and its anticompetitive practices are continuing and will  
11 continue unless they are permanently enjoined. Plaintiffs and members of the Class have suffered  
12 economic injury to their property as a direct and proximate result of Apples' conspiracy, and  
13 Apple is therefore liable for treble damages, costs and attorneys' fees in amounts to be proven at  
14 trial.

15 **WHEREFORE**, Plaintiffs respectfully request that the Court enter judgment against  
16 Apple as follows:

- 17 a. Permanently enjoining Apple from selling locked iPhones that can only be used  
18 with ATTM SIM cards unless such information is adequately disclosed to  
19 consumers prior to sale;
- 20 b. Ordering Apple to provide the unlock code upon request to all members of the  
21 Class who purchased an iPhone prior to the disclosures described above;
- 22 c. Permanently enjoining Apple from monopolizing or attempting to monopolize the  
23 iPhone Applications Aftermarket;
- 24 d. Permanently enjoining Apple from conspiring to monopolize the iPhone Voice and  
25 Data Services Aftermarket;
- 26 e. Awarding Plaintiffs and the Class treble damages for injuries caused by Apple's  
27 violations of the federal antitrust laws;
- 28 f. Awarding Plaintiffs and the Class reasonable attorneys' fees and costs; and


1 g. Granting such other and further relief as the Court may deem just and proper.

2 **DEMAND FOR TRIAL BY JURY**

3 Plaintiffs hereby demand a trial by jury.

4 DATED: December 29, 2011

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28 CLASS ACTION COMPLAINT