

1 REGINALD TERRELL
2 THE TERRELL LAW GROUP
3 P. O. BOX 13315, PMB #148
4 Oakland, CA 94661
5 Telephone: (510) 237-9700
6 Facsimile: (510) 237-4616
7 Email: reggiet2@aol.com

8 *Counsel for the Proposed Classes*

RECEIVED
JAN 17 2012
HONORABLE CLERK
CLERK OF THE COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND

10
15

9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA

11 ERIC TERRELL, JAMES BLACKWELL,
12 And CRYSTAL BOYKIN on behalf of
13 Themselves and All Others Similarly
14 Situated,

Case No.

12-00259

EDL

CLASS ACTION COMPLAINT

ADR

Plaintiffs,

v.

DEMAND FOR JURY TRIAL

APPLE INC.,

Defendant. /

19 Plaintiffs Eric Terrell, James Blackwell and Crystal Boykin (“Plaintiffs”), for their class
20 action complaint, allege upon personal knowledge as to themselves and their own actions, and
21 upon information and belief, including the investigation of counsel, as follows:

22 **NATURE OF THE ACTION**

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

1 **A. Summary of Material Facts**

2 2. Apple launched its iPhone on or about June 29, 2007. Prior to launch, Apple
3 entered into a secret five-year contract with ATTM that established ATTM as the exclusive
4 provider of cell phone voice and data services for iPhone customers through some time in 2012
5 (“Exclusivity Agreement”). As part of the contract, Apple shared in ATTM’s revenues and
6 profits with respect to the first generation of iPhones launched. The Plaintiffs and other class
7 members who purchased iPhones did not agree to use ATTM for five years. Apple’s undisclosed
8 five-year Exclusivity Agreement with ATTM, however, effectively locked iPhone users into
9 using ATTM for five years, contrary to those users’ knowledge, wishes and expectations.

10 3. To enforce ATTM’s exclusivity, Apple, among other things, programmed and
11 installed software locks on each iPhone it sold that prevented the purchaser from switching to
12 another carrier that competed with ATTM in the cell phone voice and data services industry.
13 Under an exemption to the Digital Millennium Copyright Act of 1998, 17 U.S.C. § 1201, *et seq.*
14 (2008) (the “DMCA”), cell phone consumers have an absolute legal right to modify their phones
15 to use the network carrier of choice. Apple prevented iPhone customers from exercising their
16 legal right by locking the iPhones and refusing to give customers the software codes necessary to
17 unlock them.

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

23 5. In March 2008, Apple released a “software development kit” (“SDK”) for the
24 stated purpose of enabling independent software developers to design applications for use on the
25 iPhone. For annual fee of \$99, the SDK allows developers to submit applications to be
26 distributed through Apple’s application market, the “iTunes App Store.” If the application is not
27 made available for free in the App Store, Apple collects 30% of the sale price for each
28 application and the developer receiving the remaining 70%. On information and belief,

1 throughout the class period, Apple refused to “approve” any application by a developer who did
2 not pay the annual fee, or agree to Apple’s apportionment scheme. Apple also unlawfully
3 discouraged iPhone customers from downloading competing applications software (hereafter
4 “Third Part Apps”) by telling customers it would void and refuse to honor the iPhone warranty of
5 any customer who downloaded Third Party Apps.

6 6. iPhone consumers were not provided a means download Third Party Apps that
7 were not approved by Apple for sale on the App Store.

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

11 **B. Summary Of Claims**

12 8. In pursuit and furtherance of its unlawful anticompetitive activities, Apple (a)
13 failed to obtain iPhone consumers’ contractual consent to the five-year Exclusivity Agreement
14 between Apple and ATTM, the effect of which was to lock consumers into using ATTM as their
15 voice and data service provider, even if they wished to discontinue their use of ATTM service;
16 (b) failed to obtain iPhone consumers’ contractual consent to having their iPhones “locked” to
17 only accept ATTM Subscriber Identity Modules (“SIM cards”), thereby preventing iPhone
18 purchasers from using any cell phone voice and data service provider other than ATTM; (c)
19 failed to obtain iPhone consumers’ contractual consent to make unavailable to them the “unlock
20 code” that would enable the consumers to use a service other than ATTM, even though ATTM
21 routinely provides such unlock codes for other types of cell phones; and (d) failed to obtain
22 iPhone consumers’ contractual consent to Apple prohibiting iPhone users from downloading
23 Third Party Apps.

24 9. Apple violated section 2 of the Sherman Act by conspiring with ATTM to
25 monopolize the aftermarket for voice and data services for iPhones in a manner harmful to
26 competition and consumers by reducing output and increasing aftermarket prices.

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

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

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

11 19. Each Plaintiff and member of the class, in order to activate their iPhone, was
12 required to download and install iTunes software provided by Apple. In order to use this
13 program, Plaintiffs and all other class members were required to accept the "iTunes Store Terms
14 and Conditions" (the "Terms"). The Terms state, in pertinent part, that "You expressly agree that
15 exclusive jurisdiction for *any claim or dispute with Apple* or relating in any way to your use of
16 the iTunes Services resides in the courts in the State of California." (Emphasis added)

17 **FACTUAL ALLEGATIONS**

18 **A. Plaintiffs' Injuries**

19 20. In Spring 2007, Apple began a massive advertising campaign to market their new
20 wireless communication device, the iPhone. The iPhone was advertised as a mobile phone, iPod
21 and "breakthrough" internet communications device with desktop-class email, and "industry
22 first" "visual voicemail," web browsing, maps and searching capability.

23 21. The iPhone debuted on June 29, 2007, and despite its hefty \$499 or \$599 price
24 tag.²

25 22. Pursuant to the secret Exclusivity Agreement between Apple and ATTM
26 described more fully below, during the class period the iPhone was sold at both Apple's and
27 ATTM's retail and online stores, among other places.
28

1 23. Apple and ATTM entered into a five-year exclusive service provider agreement,
2 which on information and belief was originally scheduled to expire in 2012, although it appears
3 to have been terminated early by Apple before February 2011, when Verizon began selling voice
4 and data services for the iPhone.

5 24. Each Plaintiff purchased one or more iPhones. Each Plaintiff also purchased
6 wireless voice and data services from ATTM for their iPhones.

7 25. Prior to Plaintiffs' purchases of their iPhones and ATTM voice and data services,
8 Apple had not even disclosed – much less obtained the Plaintiffs' contractual consent to – either
9 (a) the existence of Apple's five-year Exclusivity Agreement with ATTM, or (b) that Apple's
10 five-year agreement would effectively lock Plaintiffs into using ATTM as their voice and data
11 service provider for the duration of the five-year agreement. In fact, neither Apple's nor ATTM's
12 sales nor customer service representatives were told about the length of the secret Exclusivity
13 Agreement.

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

18 27. On information and belief, ATTM provides unlock codes for cell phones other
19 than the iPhone if requested by a consumer.

20 28. Plaintiff Terrell wanted to have the option of switching a competing domestic
21 voice and data service provider other than ATTM.

22 29. Plaintiff Blackwell would like the ability to unlock his SIM card for international
23 travel and to switch to a competing domestic voice and data service provider other than ATTM.

24 30. Plaintiff Hayter wanted to have the option of switching to a competing domestic
25 voice and data service provider other than ATTM.

26 31. Plaintiff Bass wanted to have the option of switching to a competing domestic
27 voice and data service provider other than ATTM.

28 **B. The Cell Phone Industry**

1 32. Cellular telephone service began to be offered to consumers in 1983. Cellular
2 telephones operate using radio frequency channels allocated by the Federal Communications
3 Commission (“FCC”). Geographical service areas, sometimes known as “cells,” are serviced by
4 base stations using low-power radio telephone equipment, sometimes known as “cell towers.”
5 The cell towers connect to a Mobile Telephone Switching Office (“MTSO”), which controls the
6 switching between cell phones and land line phones, accessed through the public-switched
7 telephone network, and to other cell telephones.

8 33. In cellular service there are two main competing network technologies: Global
9 System for Mobile Communications (“GSM”) and Code Division Multiple Access (“CDMA”).
10 GSM is the product of an international organization founded in 1987 dedicated to providing,
11 developing, and overseeing a worldwide wireless standard. CDMA is an alternative
12 technological platform, developed by Qualcomm, Inc., used in much of North America and parts
13 of Asia.

14 34. To enable cell phones to send and receive emails, stream video and provide other
15 services requiring higher data transfer speeds, both CDMA and GSM carriers adopted
16 technologies to comply with what the industry refers to as “3rd or 4th generation,” or “3G” or
17 “4G” standards. These technologies require the cell phone to operate on a separate 3G or 4G
18 network. The ATTM services provided to users of the first-generation iPhone were on ATTM’s
19 2G network, whereas later versions of the iPhone operate on 3G and 4G networks.

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

26 36. ATTM and the other wireless carriers have long dominated and controlled the cell
27 phone industry in the United States in a manner that, according to a *Wall Street Journal* article,
28 “severely limits consumer choice, stifles innovation, crushes entrepreneurship, and has made the

1 U.S. the laughingstock of the mobile-technology world, just as the cellphone is morphing into a
2 powerful hand-held computer.” Walter S. Mossberg, *Free My Phone*, Wall Street Journal, Oct.
3 22, 2007, at R3, col. 1.

4 37. Unlike the personal computer market in general – where computer manufacturers
5 and software developers can offer products directly to consumers without having to gain the
6 approval of internet service providers, and without paying those providers a penny – the wireless
7 carriers have used their ability to grant or deny access to their wireless networks to control both
8 the type of cell phone hardware and software that can be manufactured and to extract payments
9 from manufacturers granted access to their networks and customers. *Id.*

10 38. The anticompetitive nature of the wireless telephone market the carriers have
11 created and facilitated gave rise to the commercial context in which Apple was able to commit
12 the wrongs and offenses alleged herein.

13 **C. The Cell Phone Industry’s History Of Misusing Locked SIM Cards**

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

18 40. Thus, the hardware of all GSM compatible cell phones give consumers some
19 degree of choice to switch among GSM carriers’ wireless networks by enabling them to replace
20 their SIM card, a process that the average individual consumer easily can do with no training by
21 following a few simple instructions in a matter of minutes. SIM cards are very inexpensive, now
22 typically costing a few dollars. When the card is changed to the SIM card of another carrier, the
23 cell phone is immediately usable on the other carrier’s network. To switch from AT&T to T-
24 Mobile, or the other way around, all that is required is this simple change of the SIM card.

25 41. For telephone users who travel, particularly to Europe, the ability to change SIM
26 cards to a European carrier such as Orange, Vodaphone or TIM, allows the user of a GSM
27 American phone to “convert it” to a “local” phone in the country where they have traveled.
28 Absent a conversion to local service, a consumer using an American GSM cell phone abroad

1 must pay both for the American service and for “roaming” charges, that is, the right to call or
2 retrieve data from outside of the customer’s primary calling area. Roaming charges are typically
3 very high, often a dollar or more a minute. As a result, U.S.-based cell phone users traveling
4 abroad can yield very substantial savings by switching the SIM card and paying for local service
5 rather than using the U.S.-based GSM carrier.

6 42. In an effort to minimize consumers’ ability to switch carriers or avoid roaming
7 charges by simply switching SIM cards, the Major Carriers, acting in concert through trade
8 associations and standards setting organizations such as the CDMA Development Group, the
9 Telecommunications Industry Association, the Third Generation Partnership Project, the
10 Alliance agreed to implement “Programming Lock” features which effectively “locked”
11 individual handsets so that they could not be used without the “unlocking” code. GSM carriers
12 obtaining a locking code (normally only six digits long) unique to each cell phone from the cell
13 phone manufacturer. Absent obtaining the unlocking code from their GSM carrier, consumers
14 who purchase a telephone manufactured to work with one of the two GSM Major Carriers cannot
15 switch to another carrier, even temporarily while traveling abroad, without buying an entirely
16 new phone.

17 43. The two GSM carriers, AT&T and T-Mobile, adopted a SIM-lock standard that
18 locked each GSM phone to a particular SIM card, thereby preventing consumers from simply
19 changing their SIM cards to switch carriers. However, throughout the class period both T-Mobile
20 and AT&T (for cell phones other than the iPhone) typically unlocked SIM cards on request for
21 international travel, or even if customers wanted to cancel their accounts and switch to another
22 carrier. In most cases, the unlock code was given on request, almost instantly, over the telephone.

23 44. Accordingly, AT&T unlocked SIM cards on telephones sold exclusively through
24 them, such as the Blackberry Torch and the Samsung Blackjack. There is but one exception: the
25 iPhone. Even today, AT&T refuses to provide the unlock code for iPhones for international
26 travel or otherwise.³ On information and belief, that is because, as described more fully below,
27 Apple and AT&T unlawfully agreed as part of the Exclusivity Agreement that the iPhone would
28 not be unlocked under any circumstances.

1 **D. Apple's Misuse of Other Locked Program Codes**

2 45. The iPhone operating system also contains "security measures" which are, in
3 effect, Program Locks designed to restrict the consumer from using programs or services on the
4 iPhone other than those sanctioned by, and which generate revenue for, Apple. By design, Apple
5 programmed the iPhone in a manner that prevented iPhone purchasers from downloading any
6 Third Party Apps offered by software manufacturers who did not share their revenues with Apple
7 or pay a fee to Apple to sell through iTunes.

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

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

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

20 48. The DMCA was enacted in 1998 to prohibit third parties from circumventing
21 technological measures (called "access controls") that copyright owners had employed to control
22 access to their protected intellectual property. However, in November 2006, the Librarian of
23 Congress, who by statute has authority to create exemptions to the restrictions in § 1201 of the
24 DCMA to ensure the public is able to engage in non-infringing uses of copyrighted works,
25 announced a three-year exemption from the prohibition uses of copyrighted works, announced a
26 three-year exemption from the prohibition against circumvention of access controls for
27 "[c]omputer programs in the form of firmware that enable wireless telephone handsets to connect
28 to a wireless telephone communication network, when circumvention is accomplished for the

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

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

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

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

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

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

23 54. Third, on information and belief, Apple and ATTM agreed to enforce ATTM’s
24 exclusivity by installing SIM card Program Locks on all iPhones and agreeing never to disclose
25 unlock codes to iPhone consumers who wished to replace the iPhone SIM card, either for
26 international travel or to lawfully switch to another carrier.

27 55. Fourth, the Agreement allowed Apple to control the features, content, software
28 programming and design of the iPhone.

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

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

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

25 59. Finally, on information and belief, Apple and ATTM agreed that Apple would be
26 restrained for a period of time from developing a CDMA version of the iPhone to suppress
27 competition by Sprint and Verizon. Apple and ATTM agreed to this restraint notwithstanding
28 that Apple could easily develop an iPhone for use on CDMA networks. In fact, Apple originally

1 approached Verizon to be the iPhone exclusive service provider before Apple approached
2 ATTM.

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

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

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

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

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

1 **All persons, exclusive of Apple and its employees, who purchased an iPhone**
2 **anywhere in the United States at any time, and who then also paid for voice**
3 **and data service from ATTM or purchased applications from Apple from**
4 **December 29, 2007 through February 3, 2011 (the “class period”).**

5 70. The class for whose benefit this action is brought are so numerous that joinder of
6 all members is impractical.

7 71. Plaintiffs are unable to state the exact number of class members without discovery
8 of Apple and ATTM’s records but, on information and belief, state that tens of millions of
9 iPhones were sold for use on the ATTM network during the class period.

10 72. There are questions of law and fact common to the class which predominates over
11 any questions affecting only individual members. The common questions of law and fact
12 affecting the rights of the class members include the following:

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

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

74. Plaintiffs are class members they seek to represent, and their claims arise from the
same factual and legal basis as those of the class; they assert the same legal authorities as do all
class members.

1 users who download Third Party Apps. Apple did not have a legitimate business justification for
2 any of these actions.

3 91. Apple's anticompetitive actions have created a dangerous probability that Apple
4 will achieve monopoly power in the applications aftermarket because Apple has already
5 unlawfully achieved an economically significant degree of market power in that market and has
6 effectively foreclosed new and potential entrants from entering the market or gaining their
7 naturally competitive market shares.

8 92. Apple's attempted acquisition of monopoly power has reduced output and
9 competition and resulted in increased prices for products sold in the iPhone applications
10 aftermarket and, thus, harms competition generally in that market.

11 93 Plaintiffs have been injured in fact by Apple's attempted monopolization because
12 they have (a) been deprived of lower cost alternatives for applications, (b) been forced to pay
13 higher prices for Apple "approved" applications, and/or (c) had their iPhones disabled or
14 destroyed.

15 94. Apple's attempted monopolization of the iPhone applications aftermarket violates
16 section 2 of the Sherman Act and its anticompetitive practices are continuing and will continue
17 unless they are permanently enjoined. Plaintiffs and class members have suffered economic
18 injury to their property as a direct and proximate result of Apple's attempted monopolization,
19 and Apple is therefore liable for treble damages, costs and attorneys' fees in amounts to be
20 proven at trial.

21 **COUNT III**

22 **Conspiracy to Monopolize the iPhone voice and data services Aftermarket**

23 **In Violation of Section 2 of the Sherman Act**

24 **(Seeking Damages and Equitable Relief)**

25 95. Plaintiffs reallege and incorporate paragraphs 1 through 95 above as if set forth
26 fully herein.

27 96. Apple knowingly and intentionally conspired with ATTM with the specific intent
28 to monopolize the iPhone voice and data services aftermarket. In furtherance of the conspiracy,

1 Apple and its co-conspirator agreed without Plaintiffs' knowledge or consent to make ATTM the
2 exclusive provider of voice and data services for the iPhone for five years, contrary to Plaintiffs'
3 reasonable expectations that they could switch at any time to another carrier in the first two years
4 that they owned their iPhone after paying the \$175 early termination fee, and without charge
5 after that period.

6 97. ATTM unlawfully achieved an economically significant degree of market power
7 in the iPhone voice and data services aftermarket as a result of the conspiracy and effectively
8 foreclosed new and potential entrants from entering the market or gaining their naturally
9 competitive market shares.

10 98. Apple and ATTM's conspiracy reduced output and competition and resulted in
11 increased prices in the iPhone voice and data services aftermarket and, thus, harmed competition
12 generally in that market.

13 99. Plaintiffs were injured in fact by Apple ATTM's conspiracy because they were (a)
14 deprived of alternatives for voice and data services domestically, and (b) forced to pay supra-
15 competitive prices for iPhone voice and data services.

16 100. Apple's conspiracy to monopolize the iPhone voice and data services aftermarket
17 violated Section 2 of the Sherman Act and its anticompetitive practices are continuing and will
18 continue unless they are permanently enjoined. Plaintiffs and class members have suffered
19 economic injury to their property as a direct and proximate result of Apple's conspiracy, and
20 Apple is therefore liable for treble damages, costs and attorneys' fees in amounts to be proven at
21 trial.

22 **PRAYER FOR RELIEF**

23 **WHEREFORE**, Plaintiffs respectfully request that the court enter judgment against
24 Apple as follows:

- 25 a. Permanently enjoining Apple from selling locked iPhones that can only be used
26 with ATTM SIM cards unless such information is adequately disclosed to
27 consumers prior to sale.
28

- 1 b. Ordering Apple to provide the unlock code upon request to all members of the
2 class who purchased an iPhone prior to the disclosures described above;
3 c. Permanently enjoining Apple from monopolizing or attempting to monopolize the
4 iPhone applications aftermarket;
5 d. Permanently enjoining Apple from conspiring to monopolize the iPhone voice
6 and data services aftermarket.
7 e. Awarding Plaintiffs and the class treble damages for injuries caused by Apple's
8 violations of the federal antitrust laws;
9 f. Awarding Plaintiffs and the class reasonable attorneys' fees and costs; and
10 g. Granting such other and further relief as the court may deem just and proper.

11 **XII. DEMAND FOR JURY TRIAL**

12 Plaintiffs on behalf of themselves and all others similarly situated hereby request a jury
13 trial on any and all claims so triable.

14
15 Respectfully submitted,

16 Dated: January 09, 2012

THE TERRELL LAW GROUP

17
18 
19 _____
REGINALD TERRELL, ESQ.

20 REGINALD TERRELL, ESQ.
21 THE TERRELL LAW GROUP
22 Post Office Box 13315, PMB #148
23 Oakland, California 94661
24 Telephone: (510) 237-9700
25 Facsimile: (510) 237-4616
26
27
28