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10 Attorneys for Defendants

11
 12
 13 UNITED STATES DISTRICT COURT
 14 NORTHERN DISTRICT OF CALIFORNIA

15 STEVEN MCARDLE, an individual, on behalf of himself,
 16 the general public and those similarly situated

17 Plaintiff,

18 v.

19 AT&T MOBILITY LLC; NEW CINGULAR WIRELESS
 20 PCS LLC; NEW CINGULAR WIRELESS SERVICES,
 21 INC., AND DOES 1 THROUGH 50

22 Defendants

CASE NO. CV-09-01117 (CW)

JOINT STIPULATION FOR
 LEAVE TO FILE FIRST
 AMENDED COMPLAINT;
 23 ~~PROPOSED~~ ORDER

Dept: Courtroom 2, 4th Floor
 Judge: Hon. Claudia Wilken

24 Plaintiff Steven McArdle (“Plaintiff”) and Defendants AT&T Mobility LLC, New
 Cingular Wireless PCS LLC, and New Cingular Wireless Services, Inc. (“Defendants”)
 25 (collectively, the “Parties”), by and through their respective counsel of record, hereby stipulate as
 26 follows:
 27
 28

1 WHEREAS:

2 1. Plaintiff filed his Complaint in this action on February 10, 2009, in the Superior
3 Court for the State of California, County of Los Angeles. The Complaint pled, *inter alia*,
4 violations of the California Consumers Legal Remedies Act, Civil Code section 1750, et seq.
5 (“CLRA”).

6 2. On February 10, 2009, Plaintiff sent to Defendants a letter demanding that
7 Defendants take further action pursuant to the CLRA, Civil Code section 1782.

8 3. On March 10, 2009, Defendants answered the Complaint and asserted, as an
9 affirmative defense, that a contract between the parties requires this case to be arbitrated,

10 4. On March 13, 2009, Defendants removed this case to this Court.

11 5. On March 24, 2009, Plaintiff sent to Defendants a further letter demanding that
12 Defendants take further action pursuant to the CLRA, Civil Code section 1782.

13 6. On May 5, 2009, Plaintiff provided Defendants with a copy of his proposed First
14 Amended Complaint. A copy of that proposed First Amended Complaint is attached as Exhibit
15 A, and a redline comparing it to the Complaint is attached as Exhibit B.

16 7. The First Amended Complaint adds allegations under the CLRA, including an
17 allegation that the arbitration provision is unconscionable and a request for damages..

18 8. California Civil Code section 1782(d) provides in pertinent part:

19 Not less than 30 days after the commencement of an action for injunctive relief,
20 and after compliance with subdivision (a) [requiring written notice to the defen-
21 dant], the consumer may amend his or her complaint without leave of court to in-
 clude a request for damages.

22 NOW, THEREFORE, THE PARTIES JOINTLY STIPULATE AS FOLLOWS:

23 (1) Plaintiff should be granted leave to file the First Amended Complaint attached
24 hereto as Exhibit A.

25 (2) Upon entry of an order approving this stipulation, the First Amended Complaint
26 attached hereto as Exhibit A shall be deemed filed and served.

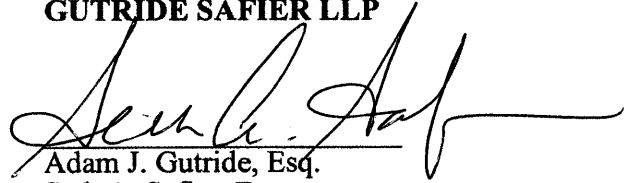
27 (3) Defendants shall retain any and all rights to move to dismiss, move to strike,
28 answer, or otherwise respond to the First Amended Complaint within the period

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provided by law.

Dated: May 22, 2009

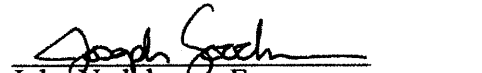
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Dated: May 20, 2009

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Attorneys for Defendants

IT IS SO ORDERED.

Dated: May 29, 2009

The Honorable Claudia Wilken
United States District Court

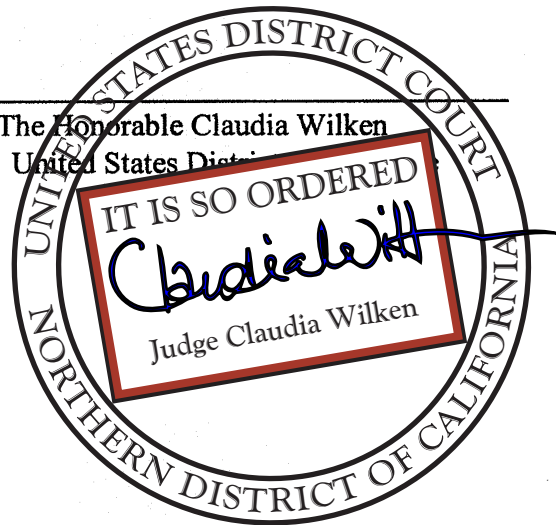


EXHIBIT A

1 **GUTRIDE SAFIER LLP**
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6

7 SUPERIOR COURT OF THE STATE OF CALIFORNIA
8 CITY AND COUNTY OF SAN FRANCISCO
9

10 STEVEN MCARDLE, an individual, on behalf of himself,
11 the general public and those similarly situated

12 Plaintiff,

13 v.

14 AT&T MOBILITY LLC; NEW CINGULAR WIRELESS
15 PCS LLC; NEW CINGULAR WIRELESS SERVICES,
INC.

16 Defendants
17

CASE NO. CV-09-01117 (CW)

FIRST AMENDED CLASS
ACTION COMPLAINT FOR
FALSE ADVERTISING; VIO-
LATION OF THE CALIFOR-
NIA CONSUMERS LEGAL
REMEDIES ACT; FRAUD,
DECEIT AND/OR MISREPRE-
SENTATION; AND
UNFAIR BUSINESS PRAC-
TICES

JURY TRIAL DEMANDED

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1 Steven McArdle, by and through his counsel, brings this First Amended Class Action
2 Complaint (“Class Action Complaint”) against Defendants, on behalf of himself and those
3 similarly situated, for violations of sections 17200 and 17500 *et seq.* of the California Business
4 and Professions Code, violation of the California Consumers Legal Remedies Act; and fraud,
5 deceit and/or misrepresentation. The following allegations are based upon information and belief,
6 including the investigation of Plaintiff’s counsel, unless stated otherwise.

7
8 **INTRODUCTION**

9 1. This case is about how Defendants unfairly, unlawfully, and deceptively charge
10 customers exorbitant, international roaming fees for (1) calls that they did not answer,
11 (2) voicemail they did not check and/or (3) calls they did not place, while they were traveling
12 abroad. Not only did Defendants unfairly, unlawfully, and deceptively impose such charges,
13 unlike other mobile phone companies, they affirmatively hid from their customers how they could
14 avoid such charges. Thereby, Defendants effectively forced customers into incurring these
15 undisclosed fees and charges.

16 2. Defendants also unfairly, unlawfully, and deceptively charge customers additional,
17 undisclosed “data transfer” fees for text, video and pictures messages they send while traveling
18 abroad.

19 **PARTIES**

20 3. Steven McArdle (“Plaintiff”) is, and at all times alleged in this Class Action
21 Complaint was, an individual and a resident of the City of San Francisco in San Francisco
22 County, California.

23 4. Defendant AT&T Mobility LLC is a limited liability company under the laws of
24 the state of Delaware, having its principal place of business in Atlanta, Georgia.

25 5. Defendant New Cingular Wireless PCS, LLC is a limited liability company under
26 the laws of the state of Delaware, having its principal place of business in Atlanta, Georgia.

27 6. Defendant New Cingular Wireless Services, Inc. is a corporation incorporated
28 under the laws of the state of Delaware, having its principal place of business in Atlanta, Georgia.

7. Defendants New Cingular Wireless PCS, LLC and New Cingular Wireless

1 Services, Inc. are referred to herein as “Cingular” or “Cingular Wireless.” In 2006, AT&T
2 purchased Cingular. Shortly thereafter, Cingular was renamed and rebranded as AT&T Wireless.
3 As used herein, “AT&T” refers collectively to AT&T Mobility LLC, its predecessors including
4 Cingular, and the brands Cingular Wireless and AT&T Wireless.

5 8. The true names and capacities of Defendants sued as Does 1 through 50 inclusive
6 are unknown to Plaintiff, who therefore sues said Defendants by such fictitious names pursuant to
7 section 474 of the California Code of Civil Procedure. Plaintiff will seek leave of Court to amend
8 this Class Action Complaint when said true names and capacities have been ascertained.

9 9. The Parties identified in paragraphs 4 through 8 of this Class Action Complaint are
10 collectively referred to hereafter as “Defendants.”

11 10. At all times herein mentioned, each of the Defendants was the agent, servant,
12 representative, officer, director, partner or employee of the other Defendants and, in doing the
13 things herein alleged, was acting within the scope and course of his/her/its authority as such
14 agent, servant, representative, officer, director, partner or employee, and with the permission and
15 consent of each Defendant.

16 11. At all times herein mentioned, Defendants, and each of them, were members of,
17 and engaged in, a joint venture, partnership and common enterprise, and acting within the course
18 and scope of, and in pursuance of, said joint venture, partnership and common enterprise.

19 12. At all times herein mentioned, the acts and omissions of Defendants, and each of
20 them, concurred and contributed to the various acts and omissions of each and all of the other
21 Defendants in proximately causing the injuries and damages as herein alleged.

22 13. At all times herein mentioned, Defendants, and each of them, ratified each and
23 every act or omission complained of herein. At all times herein mentioned, the Defendants, and
24 each of them, aided and abetted the acts and omissions of each and all of the other Defendants in
25 proximately causing the damages, and other injuries, as herein alleged.

26 **JURISDICTION AND VENUE**

27 14. This action is brought by Plaintiff pursuant, *inter alia*, to the California Business
28 and Professions Code, Sections 17200 *et. seq.* Plaintiff and Defendants are “persons” within the

1 meaning of the California Business and Professions Code, Sections 17201.

2 15. The injuries, damages and/or harm upon which this action is based, occurred or
3 arose out of activities engaged in by Defendants within, and affecting, the State of California.

4 16. Defendants have engaged, and continue to engage, in substantial and continuous
5 business practices in the State of California, including in the City and County of San Francisco.

6 17. Accordingly, Plaintiff alleges that jurisdiction and venue are proper in this Court.

7 **SUBSTANTIVE ALLEGATIONS**

8 **Defendants Market, Advertise and Sell Nationwide Wireless Phones And Related Services**

9 18. AT&T is a leading provider of mobile telephone products and services.

10 19. AT&T represents that all of their rate plans include basic voicemail and visual
11 voicemail at no extra charge. Customers are not charged for receiving voicemail, for calls they
12 do not answer, or for receiving visual notifications that a call was missed or that a voicemail was
13 left.

14 20. AT&T markets and advertises the international functionality of their mobile
15 phones and service plans. For example, AT&T markets and advertises, without limitation, the
16 following:

17 More wireless AT&T phones work in more places around the world than any other U.S.
18 carrier — over 200 countries. Stay connected while traveling to over 200 countries, plus
19 get discounted rates in over 85 of those countries when you sign up for AT&T World
20 Traveler.

20 Going on a trip outside the U.S.? See if you have coverage based on your device and
itinerary.

21 Next time you travel overseas, why not take your AT&T service with you?

22 21. For customers who wish to use their AT&T-enabled mobile telephones outside the
23 United States, AT&T offers on its website a “Wireless Travel Guide.” By using the Wireless
24 Travel Guide, customers can determine, based on their mobile phone device and itinerary,
25 whether they will have coverage in a certain country and what rates that they will pay (in each
26 country) for telephones calls that they make or receive and for sending text, picture and/or video
27 messages. For example, the Wireless Travel Guide informs AT&T customers traveling to Italy
28

1 that for calls placed and received in Italy they will be charged \$1.29 per minute,¹ \$.50 per sent
2 text message, and \$1.30 per sent picture or video message. The guide further informs customers
3 that receiving text messages is free.²

4 22. On its website, AT&T also informs customers that there are additional
5 international roaming charges for data transfer, such as sending/receiving email or surfing the
6 Internet. AT&T warns customers who have data-enabled mobile phones that, if they wish to
7 avoid these charges, they should turn their data roaming feature to “off” so that the phones will
8 not automatically check for emails or retrieve other data.

9 23. AT&T customers are provided with identical information when they telephone
10 AT&T with questions concerning international use of their phone and/or to activate their phones
11 for international use.

12 24. AT&T does not, however, adequately inform its customers that there will be, and
13 its affirmative statements mislead customers into thinking there will not be, international roaming
14 charges for incoming calls they do not accept, voicemails they do not retrieve and/or calls they do
15 not place while they are abroad.

16 25. For example, AT&T trains its representatives that, if customers inquire about
17 international usage, the representatives should inform them that they will incur charges for
18 sending international text messages and for making and receiving calls. AT&T does not train its
19 representatives to state, and the representatives do not state, that customers will incur charges for
20 (1) calls that they do not answer, (2) voicemail they do not check and/or (3) calls they do not
21 place while they are traveling abroad.

22 26. Similarly, when a customer arrives in a foreign country and turns on their phone,
23 they typically receive from AT&T a text message welcoming them to that country and informing
24 them that will incur charges for international text messages and phone usage. The text messages
25 also typically inform customers to turn off international data roaming. AT&T, however,
26 intentionally omits from the text message the fact that customers will incur charges for (1) calls

27 _____
28 ¹ The \$1.29 per minute is the standard international rate in Italy. For customers that purchase the
“AT&T World Traveler” plan, the rate for telephone calls is reduced to \$.99 per minute.

² The international roaming fees and charges vary by country and mobile phone device.

1 that they do not answer, (2) voicemail they do not check and (3) calls they do not place while they
2 are traveling abroad. AT&T's intentional omissions deceive reasonable customers into believing
3 that they will not incur additional charges for (1) calls that they do not answer, (2) voicemail they
4 do not check and/or (3) calls they do not place while they were traveling abroad.

5 27. Nor does AT&T adequately inform customers, either on their website, in a text
6 message, or verbally when they call a customer service representative, how they can avoid
7 incurring charges (1) calls that they do not answer, (2) voicemail they do not check and/or (3)
8 calls they do not place while traveling abroad. With respect to AT&T's website, the information
9 does not appear in the Wireless Travel Guide nor on numerous other pages dealing with
10 international services and international roaming charges and other fees. AT&T's intentional
11 failure to provide such information only compounds the deception because other mobile phone
12 carriers provide such information to their customers.

13 28. The only source of information about these additional charges that will be imposed
14 on international travelers is on a single "Frequently Asked Question" page buried deep in
15 AT&T's website. To navigate to this page, a customer would have to specifically click on
16 "Frequently Asked Questions" even though he or she has already seen detailed information about
17 international roaming charges and other fees that provides no indication of the additional
18 voicemail and unanswered call related charges. One of the Frequently Asked Questions states as
19 follows:

20 Q. How am I charged for Voicemail calls while roaming internationally?

21 A. Voicemail calls are charged as follows:

22 When your device is on:

23 * Calls that you do not answer that are routed to the AT&T voicemail system will be
24 charged as an international roaming incoming call to your device.

25 * In addition, the foreign carrier's routing of that call to the AT&T voicemail system
26 may generate an outgoing call charge from your device's location to the U.S.

27 * These charges apply even if the caller disconnects from the voice mail system without
28 leaving a message.

If your device is turned off or in flight mode and the wireless network is off:

* When someone tries to call you, the call will go directly to your personal voicemail

1 greeting.

2 * Since the network does not try to deliver the call to you in a foreign country, there are
3 no international roaming charges.

4 When receiving Visual Voicemail messages on your iPhone:

5 * Visual Voicemail messages received when roaming outside of the U.S. will be
6 charged at International roaming data rates, either at the International pay-per-use data
7 rate or against your iPhone International data package.

8 29. AT&T does not require customers to view the Frequently Asked Questions page
9 before using their phones internationally, nor does it make it likely that users will view this page,
10 as it is buried deep on AT&T's website, and customer service representatives are not trained to
11 tell customers who call AT&T to look at this page. Nor are customer service representatives
12 trained to provide this information. To the contrary, they are trained not to provide this
13 information unless a customer specifically requests it—i.e., asks if they will be charged for
14 unanswered calls, voicemail that they receive but do not check or, even, when people disconnect
15 from voicemail without leaving a message.

16 30. Defendants force customers to incur these additional charges if they wish to use
17 their telephones while traveling abroad. For example, if a customer wishes to be able to send and
18 receive text messages, there is no way to configure the phone so as to avoid the charges for
19 incoming calls and voicemail notifications, even if the calls are not answered and the voicemails
20 are not checked. Otherwise put, in order to use other functions that AT&T advertises, and for
21 which they are told how much they will be charged, customers are forced to incur additional
22 inadequately or undisclosed charges and fees.

23 31. Finally, even though, as set forth above, Defendants disclose to customers that
24 they will be charged additional amounts for text, video or pictures messages—e.g., \$.50 per text
25 message—while traveling abroad, Defendants charged approximately double the disclosed
26 amount. Specifically, as disclosed, Defendants charged customers for sending the text, video or
27 picture message. However, Defendants charged an additional data transfer fee, presumably for
28 the “data” transfer that was associated with sending the text, video or picture message. No where,
however, did Defendants disclose to their customers the existence or amount of any additional

1 “data transfer” fees associated with sending the text, video or picture messages while abroad.

2 **Plaintiff Was Charged International Roaming Rates for Calls He Did Not Answer,**
3 **Voicemail He Did Not Check And Calls He Did Not Place. Plaintiff Was Also Charged**
4 **Undisclosed Data Transfer Fees For the Text Messages That He Sent.**

5 32. Plaintiff has been a mobile telephone customer of AT&T since the summer of
6 2004. Plaintiff had an LG mobile (flip) phone until recently when he purchased a BlackBerry
7 Pearl mobile phone.

8 33. Between March 20 and March 30, 2008, Plaintiff traveled to Italy. Prior to
9 departing, Plaintiff looked at Defendants’ website to gather information concerning international
10 use of his wireless phone. Plaintiff noticed on Defendants’ website that he would be charged
11 additional amounts to place and receive calls and send text messages. Plaintiff was not, however,
12 informed that he would be charged for voicemail that he did not check, calls that he did not
13 answer and/or calls that he did not make while traveling abroad.

14 34. On or about March 20, 2008, Plaintiff telephoned Defendants’ customer service
15 department in order to discuss his need for international text messaging. At that time, Plaintiff
16 purchased the 100INT’LTEXTMSGs Plan for an additional \$9.99 per month.³ It was Plaintiff’s
17 understanding that without this plan, he could not send text messages while traveling abroad.⁴
18 Defendants’ customer service agent informed Plaintiff that while traveling internationally, he
19 would be charged additional amounts to place and receive calls and send text messages. The
20 agent did not state, however, that Plaintiff would be charged for voicemail that he did not check,
21 calls that he did not answer and/or calls that he did not make while traveling abroad.

22 35. When he arrived in Germany (on a layover), Plaintiff received from AT&T a
23 welcome text message. That text message informed Plaintiff that he would be charged additional
24 amounts to place and receive calls and send text messages. Plaintiff was not, however, informed
25 in the text message that he would be charged for voicemail that he did not check, calls that he did
26 not answer and/or calls that he did not make while traveling abroad. Plaintiff received a similar

27 ³ The first month was pro-rated—i.e., Plaintiff paid \$2.00 for 3/20/08 – 3/25/08.

28 ⁴ Defendants’ customer service agent may have misinformed Plaintiff about the utility of the
100INT’LTEXTMSGs Plan. In fact, it may have been \$9.99 for Plaintiff to send 100 text mes-
sages from the US to an international phone number, a service that Plaintiff did not want or need.

1 text message when he arrived in Italy.

2 36. Despite the fact that Plaintiff did not place or answer any telephone calls while in
3 Italy, he was still charged a total of \$3.87 for telephone calls that he did not answer, voicemail he
4 did not receive and/or calls he did not place. Had he known he would be charged for the call
5 irrespective of whether or not he answered, he would have kept his phone off or informed friends,
6 family and business associates not to call but rather to text or email.

7 37. Though Plaintiff was informed that sending text messages from abroad would cost
8 \$.50 per text message, Plaintiff was never informed that there would be an additional “data
9 transfer” fee associated with sending text messages. Nonetheless, Defendants charged Plaintiff
10 \$.50 for each text message that he sent while traveling abroad and an additional (undisclosed)
11 \$10.04 “data transfer fee” for sending those text messages. Plaintiff’s mobile phone was not,
12 however, data enabled—i.e., he could not send or receive email on his phone. Nor could he
13 access the Internet.

14 38. Plaintiff’s experience was not an isolated incident. Rather, many other customers
15 have been charged for voicemail that they did not check, calls that they did not answer and calls
16 they did not place while traveling abroad.

17 39. For example, one customer posted this statement on an Internet complaint forum:

18 AT&T Roaming Charges.. on VOICEMAIL??

19 AAGH!

20 I need your help/input guys. I went to the caribbean for a week in June and I get a
21 bill for \$150 of roaming fees. The problem is, I only made *2* calls. Before I
22 went, I specifically asked an AT&T retail employee if I can carry my phone in the
23 caribbean without penalty. I was told specifically that if I turn off my data roaming
then I will only get charged for the calls that I make. That will be the only over-

24 ages.
25 They are charging me \$2.99/minute for every single voicemail call I receive while
there. I racked up about \$150 in overages!!
26 HUH??? :befuddled

27 Has anyone else experienced this? I am especially upset because I did my due dili-
28 gence and still got screwed. They offered to refund 1/2 the roaming charges as a
one time "courtesy"..

1 Uhm... No, they need to remove the whole thing. I am currently awaiting a call
2 back from a higher power that for some reason, takes 24-72 hours.

3 They must be busy with complaints.

4 <http://www.howardforums.com/printthread.php?t=1401697>, last visited January 30, 2009.

5 40. Another customer wrote:

6 Can an ATT employee PLEASE comment on the problems with voicemail while
7 roaming internationally? I just received a statement containing \$20 in charges for
8 unsuccessful attempts to leave me voicemail. For every attempt, there's \$1.29 for
9 an incoming call, and on the next line \$1.29 for forwarding it to a number in the
10 646 area code that turns out to be generic voicemail access.

11 Had callers known what to do, they could have re-entered my phone number and
12 left me a message, but, unsurprisingly (sic), none of them guessed this. I didn't re-
13 ceive any messages at all for the entire trip. Just charges.

14 In a tiny footnote, the ATTWS website does admit the double roaming charges for
15 voicemail, but nowhere does it disclose the near impossibility that you will ever
16 receive a message. Are there ANY plans to address, or even acknowledge (sic), this
17 issue

18 <http://forums.wireless.att.com/cng/board/message?board.id=gsmgprs&thread.id=3395>, last visited
19 January 30, 2009.

20 CLASS ALLEGATIONS

21 41. Plaintiff brings this action against Defendants on behalf of himself and all others
22 similarly situated, as a class action pursuant to section 382 of the California Code of Civil
23 Procedure and section 1781 of the California Civil Code. Plaintiff seeks to represent a group of
24 similarly situated persons. The group is defined as follows:

25 All California residents who, from February 6, 2005 through the present, paid
26 Defendants for (1) voicemails they did not retrieve, calls they did not answer
27 and/or calls they did not make while traveling abroad or (2) "data transfer"
28 fees for text, picture or video messages they sent while traveling abroad.

42. This action has been brought and may properly be maintained as a class action
against the Defendants pursuant to the provisions of California Code of Civil Procedure section
382 because there is a well-defined community of interest in the litigation and the proposed class
is easily ascertainable.

43. Numerosity: Plaintiff does not know the exact size of the class, but it is estimated

1 that it is composed of more than 1,000 persons. The persons in the class are so numerous that the
2 joinder of all such persons is impracticable and the disposition of their claims in a class action
3 rather than in individual actions will benefit the parties and the courts.

4 44. Common Questions Predominate: This action involves common questions of law
5 and fact to the potential class because each Class Member's claim derives from the deceptive,
6 unlawful and/or unfair statements and omissions that led customers to believe that they would not
7 be charged, and failed to inform customers that they would be charged, for (1) calls that they did
8 not answer, (2) voicemail they did not check and (3) calls they did not place while traveling
9 abroad. Class Member claims also derive from common questions of law and fact related to the
10 undisclosed data transfer fees that Defendants assessed for text, video and picture messages that
11 customers placed while traveling abroad. The common questions of law and fact predominate
12 over individual questions, as proof of a common or single set of facts will establish the right of
13 each member of the Class to recover. Among the questions of law and fact common to the class
14 are:

15 a) Whether Defendants unfairly, unlawfully and/or deceptively charged Class
16 Members for (1) calls that they did not answer, (2) voicemail they did not check and (3) calls they
17 did not place while traveling abroad;

18 b) Whether Defendants adequately disclosed to Class Members that they
19 would be charged for (1) calls that they did not answer, (2) voicemail they did not check and (3)
20 calls they did not place while they were traveling abroad;

21 c) Whether Defendants unfairly, unlawfully and/or deceptively led Class
22 Members to believe that they would not be charged for (1) calls that they did not answer, (2)
23 voicemail they did not check and (3) calls they did not place while they were traveling abroad;

24 d) Whether Defendants unfairly, unlawfully and/or deceptively charged Class
25 Members data transfer fees for text, picture and/or video messages that they sent while they were
26 traveling abroad;

27 e) Whether Defendants' advertising and marketing regarding their
28 international telephone service and mobile phones was likely to deceive Class Members or was

1 unfair;

2 f) Whether Defendants engaged in the alleged conduct knowingly, recklessly,
3 or negligently;

4 g) The amount of revenues and profits Defendants received and/or the amount
5 of monies or other obligations lost by Class Members as a result of such wrongdoing;

6 h) Whether Class Members are entitled to injunctive and other equitable relief
7 and, if so, what is the nature of such relief; and

8 i) Whether Class Members are entitled to payment of actual, incidental,
9 consequential, exemplary and/or statutory damages plus interest thereon, and if so, what is the
10 nature of such relief.

11 45. Typicality: Plaintiff's claims are typical of the class because Plaintiff was charged
12 for (1) calls that he did not answer, (2) voicemail he did not check and/or (3) calls he did not
13 place while he was traveling abroad. Plaintiff was also charged undisclosed data transfer fees for
14 text messages he sent while traveling abroad. Thus, Plaintiff and Class Members sustained the
15 same injuries and damages arising out of Defendants' conduct in violation of the law. The
16 injuries and damages of each Class Member were caused directly by Defendants' wrongful
17 conduct in violation of law as alleged.

18 46. Adequacy: Plaintiff will fairly and adequately protect the interests of all Class
19 Members because it is in his best interests to prosecute the claims alleged herein to obtain full
20 compensation due to him for the unfair and illegal conduct of which he complains. Plaintiff also
21 has no interests that are in conflict with or antagonistic to the interests of Class Members.
22 Plaintiff has retained highly competent and experienced class action attorneys to represent his
23 interests and that of the class. No conflict of interest exists between Plaintiff and Class Members
24 hereby, because all questions of law and fact regarding liability of Defendants are common to
25 Class Members and predominate over any individual issues that may exist, such that by prevailing
26 on his own claim, Plaintiff necessarily will establish Defendants' liability to all Class Members.
27 Plaintiff and his counsel have the necessary financial resources to adequately and vigorously
28 litigate this class action, and Plaintiff and counsel are aware of their fiduciary responsibilities to

1 the Class Members and are determined to diligently discharge those duties by vigorously seeking
2 the maximum possible recovery for Class Members.

3 47. Superiority: There is no plain, speedy, or adequate remedy other than by
4 maintenance of this class action. The prosecution of individual remedies by members of the class
5 will tend to establish inconsistent standards of conduct for the Defendants and result in the
6 impairment of Class Members' rights and the disposition of their interests through actions to
7 which they were not parties. Class action treatment will permit a large number of similarly
8 situated persons to prosecute their common claims in a single forum simultaneously, efficiently,
9 and without the unnecessary duplication of effort and expense that numerous individual actions
10 would engender. Furthermore, as the damages suffered by each individual member of the class
11 may be relatively small, the expenses and burden of individual litigation would make it difficult
12 or impossible for individual members of the class to redress the wrongs done to them, while an
13 important public interest will be served by addressing the matter as a class action.

14 48. Nexus to California. The State of California has a special interest in regulating the
15 affairs of corporations that do business here and persons who live here. Defendants have more
16 mobile telephone customers in California than in any other state. Accordingly, there is a
17 substantial nexus between Defendants' unlawful behavior and California such that the California
18 courts should take cognizance of this action on behalf of a class of individuals who reside in
19 California.

20 49. Plaintiff is unaware of any difficulties that are likely to be encountered in the
21 management of this action that would preclude its maintenance as a class action.

22 CAUSES OF ACTION

23 PLAINTIFF'S FIRST CAUSE OF ACTION

24 (False Advertising, Business and Professions Code § 17500, et seq.)

25 On Behalf Of Himself And The California Subclasses

26 50. Plaintiff realleges and incorporates by reference the paragraphs of this Class
27 Action Complaint as if set forth herein.

28 51. Beginning at an exact date unknown to Plaintiff, but within three (3) years
preceding the filing of the Class Action Complaint, Defendants have made untrue, false,

1 deceptive and or misleading statements in connection with the advertising and marketing of their
2 wireless services and mobile phones throughout the State of California, including in the City and
3 County of San Francisco.

4 52. Defendants have made representations and statements that lead reasonable
5 customers to believe that they will not incur charges when using their phones abroad. Defendants
6 inform customers that, when using their phones in the United States, they will not incur charges
7 for (1) calls that they do not answer, (2) voicemail they do not check and/or (3) calls they do not
8 place. Defendants also inform customers that, while using their phones in the United States, they
9 will not incur data transfer charges for text, video and/or picture messages that they send.
10 Defendants inform customers that, when using their phones abroad, they will incur additional
11 charges for making or receiving calls, sending text messages and sending picture or video
12 messages. Defendants, however, deceptively did (and do) not adequately inform customers that,
13 when traveling abroad, they will incur charges for (1) calls that they did not answer, (2) voicemail
14 they did not check and/or (3) calls they did not place while they were traveling abroad.
15 Defendants also deceptively do not inform customers that, when traveling abroad, they will incur
16 data transfer fees for text, video and/or picture messages that they send.

17 53. Plaintiff and those similarly situated relied to their detriment on Defendants' false,
18 misleading and deceptive advertising and marketing practices. Had Plaintiff and those similarly
19 situated been adequately informed and not intentionally deceived by Defendants, they would have
20 acted differently by, without limitation, (1) keeping their phones off, (2) forwarding all calls, and
21 (3) informing friends, family and business associates not to call them while they were traveling.
22 They would also have sent fewer or no text, video and/or picture messages.

23 54. Defendants engaged in these false, misleading and deceptive advertising and
24 marketing practices to increase their profits. Accordingly, Defendants have engaged in false
25 advertising, as defined and prohibited by section 17500, *et seq.* of the California Business and
26 Professions Code.

27 55. The aforementioned practices, which Defendants have used, and continue to use,
28 to their significant financial gain, also constitute unlawful competition and provide an unlawful

1 advantage over Defendants' competitors as well as injury to the general public.

2 56. Plaintiff seeks, on behalf of those similarly situated, full restitution of monies, as
3 necessary and according to proof, to restore any and all monies acquired by Defendants from
4 Plaintiff, the general public, or those similarly situated by means of the unfair and/or deceptive
5 trade practices complained of herein, plus interest thereon.

6 57. Plaintiff seeks, on behalf of those similarly situated, an injunction to prohibit
7 Defendants from continuing to engage in the false, misleading and deceptive advertising and
8 marketing practices complained of herein. The acts complained of herein occurred, at least in
9 part, within three (3) years preceding the filing of this Class Action Complaint.

10 58. Plaintiff and those similarly situated are further entitled to and do seek both a
11 declaration that the above-described practices constitute false, misleading and deceptive
12 advertising, and injunctive relief restraining Defendants from engaging in any such advertising
13 and marketing practices in the future. Such misconduct by Defendants, unless and until enjoined
14 and restrained by order of this Court, will continue to cause injury in fact to the general public
15 and the loss of money and property in that the Defendants will continue to violate the laws of
16 California, unless specifically ordered to comply with the same. This expectation of future
17 violations will require current and future customers to repeatedly and continuously seek legal
18 redress in order to recover monies paid to Defendants to which Defendants are not entitled.
19 Plaintiff, those similarly situated and/or other consumers nationwide have no other adequate
20 remedy at law to ensure future compliance with the California Business and Professions Code
21 alleged to have been violated herein.

22 59. As a direct and proximate result of such actions, Plaintiff and the other members of
23 the Class have suffered, and continue to suffer, injury in fact and have lost money and/or property
24 as a result of such false, deceptive and misleading advertising in an amount which will be proven
25 at trial, but which is in excess of the jurisdictional minimum of this Court.

26 60. As a direct and proximate result of such actions, Defendants have enjoyed, and
27 continue to enjoy, significant financial gain in an amount which will be proven at trial, but which
28 is in excess of the jurisdictional minimum of this Court.

PLAINTIFF’S SECOND CAUSE OF ACTION
(Violation of the Consumers Legal Remedies Act, California Civil Code § 1750, et seq.)
On Behalf of Himself And The California Subclasses

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3 61. Plaintiff realleges and incorporates the paragraphs of this Class Action Complaint
4 as if set forth herein.

5 62. This cause of action is brought pursuant to the California Consumers Legal
6 Remedies Act, California Civil Code § 1750, et seq. (“CLRA”).

7 63. Defendants’ actions, representations and conduct have violated, and continue to
8 violate the CLRA, because they extend to transactions that are intended to result, or which have
9 resulted, in the sale or lease of goods or services to consumers.

10 64. Plaintiff and other Class Members are “consumers” as that term is defined by the
11 CLRA in California Civil Code § 1761(d).

12 65. The provision of mobile telephone services that Plaintiff (and others similarly
13 situated Class Members) purchased from Defendants were “services” within the meaning of
14 California Civil Code § 1761.

15 66. By engaging in the actions, representations and conduct set forth in this Class
16 Action Complaint, Defendants have violated, and continue to violate, § 1770(a)(5) and
17 § 1770(a)(7) of the CLRA. In violation of California Civil Code § 1770(a)(5), Defendants’ acts
18 and practices constitute improper representations that the goods or services that they sell have
19 sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities, which they do not
20 have. In violation of California Civil Code § 1770(a)(7), Defendants’ acts and practices constitute
21 improper representations that the goods or services that they sell are of a particular standard,
22 quality, or grade, or that goods are of a particular style or model, when they were not.
23 Specifically, Defendants acts and practices lead customers to believe that there is no charge,
24 while traveling internationally, for (1) calls that they did not answer, (2) voicemail they did not
25 check and (3) calls they did not place, when in fact there are such charges. Similarly, Defendants
26 acts and practices lead customers to believe that they would only incur a single charge for text,
27 video and/or picture messages that they sent while traveling abroad and that there would be no
28 additional charges for data transfer.

1 67. By engaging in the actions, representations and conduct set forth in this Class
2 Action Complaint, Defendants have violated, and continue to violate, § 1770(a)(19) of the CLRA.
3 In violation of California Civil Code §1770(a)(19), Defendants unlawfully inserted, and have
4 enforced, in their terms of service agreements unconscionable provisions. Specifically,
5 Defendants have inserted in their terms of service agreement mandatory arbitration and class
6 action waiver provisions, which they have unlawfully sought to enforce against the Plaintiff and
7 those similarly situated, by filing an affirmative defense in this case and motions to compel
8 arbitration in similar cases.

9 68. Plaintiff requests that this Court enjoin Defendants from continuing to employ the
10 unlawful methods, acts and practices alleged herein pursuant to California Civil Code
11 § 1780(a)(2). If Defendants are not restrained from engaging in these types of practices in the
12 future, Plaintiff and the other members of the Class will continue to suffer harm.

13 69. On February 10 and March 24, 2009, Plaintiff sent to Defendants certified letters,
14 return receipt requested, demanding that they comply with the CLRA, including California Civil
15 Code § 1782. Defendants acknowledged receipt of each of those demand letters on February 23
16 and March 30, 2009. Defendants have failed to comply with the requirements of California Civil
17 Code § 1782 with respect to the Class.

18 70. Pursuant to California Civil Code § 1780, on behalf of similarly situated Class
19 Members, Plaintiff seeks actual damages of at least \$1000, punitive damages, an award of \$5000
20 for each Class Member who is a disabled person or senior citizen, and restitution of any ill-gotten
21 gains due to Defendants' acts and practices.

22 71. Plaintiff also requests that this Court award him his costs and reasonable attorneys'
23 fees pursuant to California Civil Code § 1780(d).

24 **PLAINTIFF'S THIRD CAUSE OF ACTION**
25 **(Fraud, Deceit and/or Misrepresentation)**
26 **On Behalf of Himself and The Class**

27 72. Plaintiff realleges and incorporates by reference the paragraphs of this Class
28 Action Complaint as if set forth herein.

 73. On or about March 20, 2008, Defendants fraudulently and deceptively failed to

1 inform Plaintiff that (1) calls that he did not answer, (2) voicemail he did not check and/or (3)
2 calls he did not place while he was abroad would be charged at \$1.29 per minute. Defendants
3 fraudulently and deceptively failed to inform that he would be charged additional data transfer
4 fees for text, video and/or picture messages that he sent while traveling abroad.

5 74. These omissions were material at the time they were made. They concerned
6 material facts that were essential to the analysis undertaken by Plaintiff as to whether and how to
7 use his mobile phone while traveling abroad.

8 75. At the time of his purchase of mobile phone services, activation of international
9 phone services and his arrival abroad, Defendants omitted to inform Plaintiff that (1) calls that he
10 did not answer, (2) voicemail he did not check and/or (3) calls he did not place while he was
11 abroad would be charged at \$1.29 per minute. Defendants also failed to inform Plaintiff that he
12 would be charged additional data transfer fees for text, video and/or picture messages that he sent
13 while traveling abroad. Defendants had a fiduciary duty to provide this information.

14 76. In not so informing Plaintiff, Defendants breached their duty to him. Defendants
15 also gained financially from, and as a result of, their breach.

16 77. Plaintiff and those similarly situated relied to their detriment on Defendants'
17 fraudulent omissions. Had Plaintiff and those similarly situated been adequately informed and
18 not intentionally deceived by Defendants, they would have acted differently by, without
19 limitation, (1) keeping their phones off, (2) forwarding all calls, and/or (3) informing friends,
20 family and business associates not to call them while they were traveling abroad. They would
21 have also sent fewer (or no) text, video and/or picture messages while they were traveling abroad.

22 78. Defendants had a fiduciary duty to inform Class Members at the time of their
23 purchase of mobile phone services, activation of international phone services and their arrival
24 abroad, of the additional charges that would be imposed on (1) calls that they did not answer, (2)
25 voicemail they did not check and (3) calls they did not place while they were abroad. Defendants
26 omitted to provide this information to Class Members. Class Members relied to their detriment
27 on Defendants' omissions. These omissions were material to the decisions of the Class Members
28 to use their phones while traveling abroad. In making these omissions, Defendants breached their

1 duty to Class Members. Defendants also gained financially from, and as a result of, their breach.

2 79. Defendants had a fiduciary duty to inform Class Members at the time of their
3 purchase of mobile phone services, activation of international phone services and their arrival
4 abroad, of the additional data transfer charges that would be imposed on text, video and/or picture
5 messages they sent when they were abroad. Defendants omitted to provide this information to
6 Class Members. Class Members relied to their detriment on Defendants' omissions. These
7 omissions were material to the decisions of the Class Members to use their phones while traveling
8 abroad. In making these omissions, Defendants breached their duty to Class Members.

9 Defendants also gained financially from, and as a result of, their breach.

10 80. By and through such fraud, deceit, misrepresentations and/or omissions,
11 Defendants intended to induce Plaintiff and those similarly situated to alter their position to their
12 detriment.

13 81. Plaintiff and those similarly situated justifiably and reasonably relied on
14 Defendants' omissions, and, accordingly, were damaged by the Defendants.

15 82. As a direct and proximate result of Defendants' misrepresentations, Plaintiff and
16 those similarly situated have suffered damages in an amount equal to the amount that Defendants
17 billed them for calls that they did not answer, voicemail they did not check, calls they did not
18 place and data transfer fees for text, video and picture messages they sent while they were abroad.

19 83. Defendants' conduct as described herein was willful and malicious and was
20 designed to maximize Defendants' profits even though Defendants knew that it would cause loss
21 and harm to Plaintiff.

22 **PLAINTIFF'S FOURTH CAUSE OF ACTION**
23 **(Unfair, Unlawful and Deceptive Trade Practices, Business and Professions Code § 17200,**
24 **et seq.)**
25 **On Behalf of Himself and the California Subclasses**

26 84. Plaintiff realleges and incorporates by reference the above paragraphs of this Class
27 Action Complaint as if set forth herein.

28 85. Within four (4) years preceding the filing of this Class Action Complaint, and at
all times mentioned herein, Defendants have engaged, and continue to engage, in unfair, unlawful

1 and deceptive trade practices in California by engaging in the unfair, deceptive and unlawful
2 business practices outlined in this Class Action Complaint. In particular, Defendants have
3 engaged, and continue to engage, in unfair, unlawful and deceptive trade practices by without
4 limitation

- 5 a. failing to properly inform their customers that they would be charged for (1) calls
6 that they did not answer, (2) voicemail they did not check and (3) calls they did not
7 place while they were traveling abroad;
- 8 b. affirmatively deceiving their customers into believing that they would not be
9 charged for (1) calls that they did not answer, (2) voicemail they did not check and
10 (3) calls they did not place while they were traveling abroad;
- 11 c. marketing, advertising and selling international wireless services and mobile
12 phones without disclosing to customers the true costs associated with such
13 international services and phone usage;
- 14 d. failing to properly inform their customers how they can use abroad their mobile
15 phones without incurring charges for (1) calls that they did not answer, (2)
16 voicemail they did not check and (3) calls they did not place; and
- 17 e. assessing undisclosed “data transfer” fees for sending text, picture and/or video
18 messages while traveling abroad.

19 86. Plaintiff and those similarly situated relied to their detriment on Defendants’
20 unfair, deceptive and unlawful business practices. Had Plaintiff and those similarly situated been
21 adequately informed and not intentionally deceived by Defendants, they would have acted
22 differently by, without limitation, (1) keeping their phones off, (2) forwarding all calls, and/or (3)
23 informing friends, family and business associates not to call them while they were traveling
24 abroad. They would have also sent fewer (or not) text, video and picture message while they
25 were traveling abroad.

26 87. Defendants engage in these unfair practices to increase their profits. Accordingly,
27 Defendants have engaged in unlawful trade practices, as defined and prohibited by section 17200,
28 et seq. of the California Business and Professions Code.

1 88. The aforementioned practices, which Defendants have used, and continue to use,
2 to their significant financial gain, also constitute unlawful competition and provide an unlawful
3 advantage over Defendants' competitors as well as injury to the general public.

4 89. Plaintiff seeks, on behalf of those similarly situated, full restitution of monies, as
5 necessary and according to proof, to restore any and all monies acquired by Defendants from
6 Plaintiff, the general public, or those similarly situated by means of the unfair and/or deceptive
7 trade practices complained of herein, plus interest thereon.

8 90. Plaintiff seeks, on behalf of those similarly situated, an injunction to prohibit
9 Defendants from continuing to engage in the unfair trade practices complained of herein. The
10 acts complained of herein occurred, at least in part, within four (4) years preceding the filing of
11 this Class Action Complaint.

12 91. Plaintiff and those similarly situated are further entitled to and do seek both a
13 declaration that the above-described trade practices are unfair, unlawful and/or fraudulent and
14 injunctive relief restraining Defendants from engaging in any of such deceptive, unfair and/or
15 unlawful trade practices in the future. Such misconduct by Defendants, unless and until enjoined
16 and restrained by order of this Court, will continue to cause injury in fact to the general public
17 and the loss of money and property in that the Defendants will continue to violate the laws of
18 California, unless specifically ordered to comply with the same. This expectation of future
19 violations will require current and future customers to repeatedly and continuously seek legal
20 redress in order to recover monies paid to Defendants to which Defendants are not entitled.
21 Plaintiff, those similarly situated and/or other consumers nationwide have no other adequate
22 remedy at law to ensure future compliance with the California Business and Professions Code
23 alleged to have been violated herein.

24 92. As a direct and proximate result of such actions, Plaintiff and the other members of
25 the Class have suffered and continue to suffer injury in fact and have lost money and/or property
26 as a result of such deceptive, unfair and/or unlawful trade practices and unfair competition in an
27 amount which will be proven at trial, but which is in excess of the jurisdictional minimum of this
28 Court.

1 93. As a direct and proximate result of such actions, Defendants have enjoyed, and
2 continue to enjoy, significant financial gain in an amount which will be proven at trial, but which
3 is in excess of the jurisdictional minimum of this Court.

4 **PRAYER FOR RELIEF**

5 WHEREFORE, Plaintiff prays for judgment as follows:

6 A. On Causes of Action Numbers 1 and 4 against Defendants and in favor of
7 Plaintiff and the other members of the class:

- 8 1. For the greater of actual or compensatory damages according to
9 proof;
- 10 2. For restitution pursuant to, without limitation, the California Busi-
11 ness & Professions Code §§ 17200, et seq. and 17500, et seq;
- 12 3. For injunctive relief pursuant to, without limitation, the California
13 Business & Professions Code §§ 17200, et seq and 17500, et seq;
14 and

15 B. On Cause of Action Number 2 against Defendants and in favor of Plaintiff
16 and the other members of the class:

- 17 1. For restitution and injunctive relief pursuant to California Civil
18 Code section 1780;
- 19 2. For actual damages and punitive damages for each Class Member;
20 and
- 21 3. For statutory damages in the amount of \$5000 for each Class Mem-
22 ber who is a disabled person or senior citizen.

23 C. On Cause of Action Number 3 against Defendants and in favor of Plaintiff
24 and the other members of the class:

- 25 1. An award of compensatory damages, the amount of which is to be
26 determined at trial; and
- 27 2. An award of punitive damages, the amount of which is to be deter-
28 mined at trial; and

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D. On all causes of action against Defendants and in favor of Plaintiff, class members and the general public:

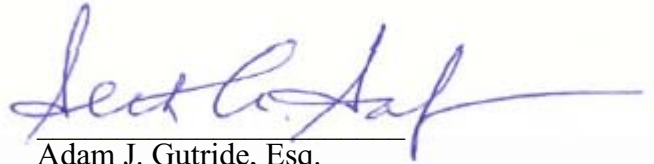
1. For reasonable attorneys' fees according to proof pursuant to, without limitation, the California Legal Remedies Act and California Code of Civil Procedure § 1021.5;
2. For costs of suit incurred; and
3. For such further relief as this Court may deem just and proper.

JURY TRIAL DEMANDED

Plaintiff hereby demands a trial by jury.

Dated: May 22, 2009

GUTRIDE SAFIER LLP



Adam J. Gutride, Esq.
Seth A. Safier, Esq.
835 Douglass Street
San Francisco, California 94114

Attorneys for Plaintiff

EXHIBIT B

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Attorneys for Plaintiff

SUPERIOR COURT OF THE STATE OF CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO

STEVEN MCARDLE, an individual, on behalf of himself,
the general public and those similarly situated

Plaintiff,

v.

AT&T MOBILITY LLC; NEW CINGULAR WIRELESS
PCS LLC; NEW CINGULAR WIRELESS SERVICES,
INC.

Defendants

CASE NO. [CV-09-01117 \(CW\)](#)

FIRST AMENDED CLASS
ACTION COMPLAINT FOR
FALSE ADVERTISING; VIO-
LATION OF THE CALIFOR-
NIA CONSUMERS LEGAL
REMEDIES ACT; FRAUD,
DECEIT AND/OR MISREPRE-
SENTATION; AND
UNFAIR BUSINESS PRAC-
TICES

JURY TRIAL DEMANDED

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1 Steven McArdle, by and through his counsel, brings this **First Amended** Class Action
2 Complaint ("**Class Action Complaint**") against Defendants, on behalf of himself and those
3 similarly situated, for violations of sections 17200 and 17500 *et seq.* of the California Business
4 and Professions Code, violation of the California Consumers Legal Remedies Act; and fraud,
5 deceit and/or misrepresentation. The following allegations are based upon information and belief,
6 including the investigation of Plaintiff's counsel, unless stated otherwise.

7 **INTRODUCTION**

8 1. This case is about how Defendants unfairly, unlawfully, and deceptively charge
9 customers exorbitant, international roaming fees for (1) calls that they did not answer,
10 (2) voicemail they did not check and/or (3) calls they did not place, while they were traveling
11 abroad. Not only did Defendants unfairly, unlawfully, and deceptively impose such charges,
12 unlike other mobile phone companies, they affirmatively hid from their customers how they could
13 avoid such charges. Thereby, Defendants effectively forced customers into incurring these
14 undisclosed fees and charges.

15 2. Defendants also unfairly, unlawfully, and deceptively charge customers additional,
16 undisclosed "data transfer" fees for text, video and pictures messages they send while traveling
17 abroad.

18 **PARTIES**

19 3. Steven McArdle ("Plaintiff") is, and at all times alleged in this Class Action
20 Complaint was, an individual and a resident of the City of San Francisco in San Francisco
21 County, California.

22 4. Defendant AT&T Mobility LLC is a limited liability company under the laws of
23 the state of Delaware, having its principal place of business in Atlanta, Georgia.

24 5. Defendant New Cingular Wireless PCS, LLC is a limited liability company under
25 the laws of the state of Delaware, having its principal place of business in Atlanta, Georgia.

26 6. Defendant New Cingular Wireless Services, Inc. is a corporation incorporated
27 under the laws of the state of Delaware, having its principal place of business in Atlanta, Georgia.

28 7. Defendants New Cingular Wireless PCS, LLC and New Cingular Wireless

1 Services, Inc. are referred to herein as “Cingular” or “Cingular Wireless.” In 2006, AT&T
2 purchased Cingular. Shortly thereafter, Cingular was renamed and rebranded as AT&T Wireless.
3 As used herein, “AT&T” refers collectively to AT&T Mobility LLC, its predecessors including
4 Cingular, and the brands Cingular Wireless and AT&T Wireless.

5 8. The true names and capacities of Defendants sued as Does 1 through 50 inclusive
6 are unknown to Plaintiff, who therefore sues said Defendants by such fictitious names pursuant to
7 section 474 of the California Code of Civil Procedure. Plaintiff will seek leave of Court to amend
8 this Class Action Complaint when said true names and capacities have been ascertained.

9 9. The Parties identified in paragraphs 4 through 8 of this Class Action Complaint are
10 collectively referred to hereafter as “Defendants.”

11 10. At all times herein mentioned, each of the Defendants was the agent, servant,
12 representative, officer, director, partner or employee of the other Defendants and, in doing the
13 things herein alleged, was acting within the scope and course of his/her/its authority as such
14 agent, servant, representative, officer, director, partner or employee, and with the permission and
15 consent of each Defendant.

16 11. At all times herein mentioned, Defendants, and each of them, were members of,
17 and engaged in, a joint venture, partnership and common enterprise, and acting within the course
18 and scope of, and in pursuance of, said joint venture, partnership and common enterprise.

19 12. At all times herein mentioned, the acts and omissions of Defendants, and each of
20 them, concurred and contributed to the various acts and omissions of each and all of the other
21 Defendants in proximately causing the injuries and damages as herein alleged.

22 13. At all times herein mentioned, Defendants, and each of them, ratified each and
23 every act or omission complained of herein. At all times herein mentioned, the Defendants, and
24 each of them, aided and abetted the acts and omissions of each and all of the other Defendants in
25 proximately causing the damages, and other injuries, as herein alleged.

26 **JURISDICTION AND VENUE**

27 14. This action is brought by Plaintiff pursuant, *inter alia*, to the California Business
28 and Professions Code, Sections 17200 *et. seq.* Plaintiff and Defendants are “persons” within the

1 meaning of the California Business and Professions Code, Sections 17201.

2 15. The injuries, damages and/or harm upon which this action is based, occurred or
3 arose out of activities engaged in by Defendants within, and affecting, the State of California.

4 16. Defendants have engaged, and continue to engage, in substantial and continuous
5 business practices in the State of California, including in the City and County of San Francisco.

6 17. Accordingly, Plaintiff alleges that jurisdiction and venue are proper in this Court.

7 **SUBSTANTIVE ALLEGATIONS**

8 **Defendants Market, Advertise and Sell Nationwide Wireless Phones And Related Services**

9 18. AT&T is a leading provider of mobile telephone products and services.

10 19. AT&T represents that all of their rate plans include basic voicemail and visual
11 voicemail at no extra charge. Customers are not charged for receiving voicemail, for calls they
12 do not answer, or for receiving visual notifications that a call was missed or that a voicemail was
13 left.

14 20. AT&T markets and advertises the international functionality of their mobile
15 phones and service plans. For example, AT&T markets and advertises, without limitation, the
16 following:

17 More wireless AT&T phones work in more places around the world than any other U.S.
18 carrier — over 200 countries. Stay connected while traveling to over 200 countries, plus
19 get discounted rates in over 85 of those countries when you sign up for AT&T World
20 Traveler.

20 Going on a trip outside the U.S.? See if you have coverage based on your device and
itinerary.

21 Next time you travel overseas, why not take your AT&T service with you?

22 21. For customers who wish to use their AT&T-enabled mobile telephones outside the
23 United States, AT&T offers on its website a “Wireless Travel Guide.” By using the Wireless
24 Travel Guide, customers can determine, based on their mobile phone device and itinerary,
25 whether they will have coverage in a certain country and what rates that they will pay (in each
26 country) for telephone calls that they make or receive and for sending text, picture and/or video
27 messages. For example, the Wireless Travel Guide informs AT&T customers traveling to Italy
28

1 that for calls placed and received in Italy they will be charged \$1.29 per minute,¹ \$.50 per sent
2 text message, and \$1.30 per sent picture or video message. The guide further informs customers
3 that receiving text messages is free.²

4 22. On its website, AT&T also informs customers that there are additional
5 international roaming charges for data transfer, such as sending/receiving email or surfing the
6 Internet. AT&T warns customers who have data-enabled mobile phones that, if they wish to
7 avoid these charges, they should turn their data roaming feature to “off” so that the phones will
8 not automatically check for emails or retrieve other data.

9 23. AT&T customers are provided with identical information when they telephone
10 AT&T with questions concerning international use of their phone and/or to activate their phones
11 for international use.

12 24. AT&T does not, however, adequately inform its customers that there will be, and
13 its affirmative statements mislead customers into thinking there will not be, international roaming
14 charges for incoming calls they do not accept, voicemails they do not retrieve and/or calls they do
15 not place while they are abroad.

16 25. For example, AT&T trains its representatives that, if customers inquire about
17 international usage, the representatives should inform them that they will incur charges for
18 sending international text messages and for making and receiving calls. AT&T does not train its
19 representatives to state, and the representatives do not state, that customers will incur charges for
20 (1) calls that they do not answer, (2) voicemail they do not check and/or (3) calls they do not
21 place while they are traveling abroad.

22 26. Similarly, when a customer arrives in a foreign country and turns on their phone,
23 they typically receive from AT&T a text message welcoming them to that country and informing
24 them that will incur charges for international text messages and phone usage. The text messages
25 also typically inform customers to turn off international data roaming. AT&T, however,
26 intentionally omits from the text message the fact that customers will incur charges for (1) calls

27
28 ¹ The \$1.29 per minute is the standard international rate in Italy. For customers that purchase the
“AT&T World Traveler” plan, the rate for telephone calls is reduced to \$.99 per minute.

² The international roaming fees and charges vary by country and mobile phone device.

1 that they do not answer, (2) voicemail they do not check and (3) calls they do not place while they
2 are traveling abroad. AT&T's intentional omissions deceive reasonable customers into believing
3 that they will not incur additional charges for (1) calls that they do not answer, (2) voicemail they
4 do not check and/or (3) calls they do not place while they were traveling abroad.

5 27. Nor does AT&T adequately inform customers, either on their website, in a text
6 message, or verbally when they call a customer service representative, how they can avoid
7 incurring charges (1) calls that they do not answer, (2) voicemail they do not check and/or (3)
8 calls they do not place while traveling abroad. With respect to AT&T's website, the information
9 does not appear in the Wireless Travel Guide nor on numerous other pages dealing with
10 international services and international roaming charges and other fees. AT&T's intentional
11 failure to provide such information only compounds the deception because other mobile phone
12 carriers provide such information to their customers.

13 28. The only source of information about these additional charges that will be imposed
14 on international travelers is on a single "Frequently Asked Question" page buried deep in
15 AT&T's website. To navigate to this page, a customer would have to specifically click on
16 "Frequently Asked Questions" even though he or she has already seen detailed information about
17 international roaming charges and other fees that provides no indication of the additional
18 voicemail and unanswered call related charges. One of the Frequently Asked Questions states as
19 follows:

20 Q. How am I charged for Voicemail calls while roaming internationally?

21 A. Voicemail calls are charged as follows:

22 When your device is on:

23 * Calls that you do not answer that are routed to the AT&T voicemail system will be
24 charged as an international roaming incoming call to your device.

25 * In addition, the foreign carrier's routing of that call to the AT&T voicemail system
26 may generate an outgoing call charge from your device's location to the U.S.

27 * These charges apply even if the caller disconnects from the voice mail system without
28 leaving a message.

If your device is turned off or in flight mode and the wireless network is off:

* When someone tries to call you, the call will go directly to your personal voicemail

1 greeting.

2 * Since the network does not try to deliver the call to you in a foreign country, there are
3 no international roaming charges.

4 When receiving Visual Voicemail messages on your iPhone:

5 * Visual Voicemail messages received when roaming outside of the U.S. will be
6 charged at International roaming data rates, either at the International pay-per-use data
7 rate or against your iPhone International data package.

8 29. AT&T does not require customers to view the Frequently Asked Questions page
9 before using their phones internationally, nor does it make it likely that users will view this page,
10 as it is buried deep on AT&T's website, and customer service representatives are not trained to
11 tell customers who call AT&T to look at this page. Nor are customer service representatives
12 trained to provide this information. To the contrary, they are trained not to provide this
13 information unless a customer specifically requests it—i.e., asks if they will be charged for
14 unanswered calls, voicemail that they receive but do not check or, even, when people disconnect
15 from voicemail without leaving a message.

16 30. Defendants force customers to incur these additional charges if they wish to use
17 their telephones while traveling abroad. For example, if a customer wishes to be able to send and
18 receive text messages, there is no way to configure the phone so as to avoid the charges for
19 incoming calls and voicemail notifications, even if the calls are not answered and the voicemails
20 are not checked. Otherwise put, in order to use other functions that AT&T advertises, and for
21 which they are told how much they will be charged, customers are forced to incur additional
22 inadequately or undisclosed charges and fees.

23 31. Finally, even though, as set forth above, Defendants disclose to customers that
24 they will be charged additional amounts for text, video or pictures messages—e.g., \$.50 per text
25 message—while traveling abroad, Defendants charged approximately double the disclosed
26 amount. Specifically, as disclosed, Defendants charged customers for sending the text, video or
27 picture message. However, Defendants charged an additional data transfer fee, presumably for
28 the “data” transfer that was associated with sending the text, video or picture message. No where,
however, did Defendants disclose to their customers the existence or amount of any additional

1 “data transfer” fees associated with sending the text, video or picture messages while abroad.

2 **Plaintiff Was Charged International Roaming Rates for Calls He Did Not Answer,**
3 **Voicemail He Did Not Check And Calls He Did Not Place. Plaintiff Was Also Charged**
4 **Undisclosed Data Transfer Fees For the Text Messages That He Sent.**

5 32. Plaintiff has been a mobile telephone customer of AT&T since the summer of
6 2004. Plaintiff had an LG mobile (flip) phone until recently when he purchased a BlackBerry
7 Pearl mobile phone.

8 33. Between March 20 and March 30, 2008, Plaintiff traveled to Italy. Prior to
9 departing, Plaintiff looked at Defendants’ website to gather information concerning international
10 use of his wireless phone. Plaintiff noticed on Defendants’ website that he would be charged
11 additional amounts to place and receive calls and send text messages. Plaintiff was not, however,
12 informed that he would be charged for voicemail that he did not check, calls that he did not
13 answer and/or calls that he did not make while traveling abroad.

14 34. On or about March 20, 2008, Plaintiff telephoned Defendants’ customer service
15 department in order to discuss his need for international text messaging. At that time, Plaintiff
16 purchased the 100INT’LTEXTMSGs Plan for an additional \$9.99 per month.³ It was Plaintiff’s
17 understanding that without this plan, he could not send text messages while traveling abroad.⁴
18 Defendants’ customer service agent informed Plaintiff that while traveling internationally, he
19 would be charged additional amounts to place and receive calls and send text messages. The
20 agent did not state, however, that Plaintiff would be charged for voicemail that he did not check,
21 calls that he did not answer and/or calls that he did not make while traveling abroad.

22 35. When he arrived in Germany (on a layover), Plaintiff received from AT&T a
23 welcome text message. That text message informed Plaintiff that he would be charged additional
24 amounts to place and receive calls and send text messages. Plaintiff was not, however, informed
25 in the text message that he would be charged for voicemail that he did not check, calls that he did
26 not answer and/or calls that he did not make while traveling abroad. Plaintiff received a similar

27 ³ The first month was pro-rated—i.e., Plaintiff paid \$2.00 for 3/20/08 – 3/25/08.

28 ⁴ Defendants’ customer service agent may have misinformed Plaintiff about the utility of the
100INT’LTEXTMSGs Plan. In fact, it may have been \$9.99 for Plaintiff to send 100 text mes-
sages from the US to an international phone number, a service that Plaintiff did not want or need.

1 text message when he arrived in Italy.

2 36. Despite the fact that Plaintiff did not place or answer any telephone calls while in
3 Italy, he was still charged a total of \$3.87 for telephone calls that he did not answer, voicemail he
4 did not receive and/or calls he did not place. Had he known he would be charged for the call
5 irrespective of whether or not he answered, he would have kept his phone off or informed friends,
6 family and business associates not to call but rather to text or email.

7 37. Though Plaintiff was informed that sending text messages from abroad would cost
8 \$.50 per text message, Plaintiff was never informed that there would be an additional "data
9 transfer" fee associated with sending text messages. Nonetheless, Defendants charged Plaintiff
10 \$.50 for each text message that he sent while traveling abroad and an additional (undisclosed)
11 \$10.04 "data transfer fee" for sending those text messages. Plaintiff's mobile phone was not,
12 however, data enabled—i.e., he could not send or receive email on his phone. Nor could he
13 access the Internet.

14 38. Plaintiff's experience was not an isolated incident. Rather, many other customers
15 have been charged for voicemail that they did not check, calls that they did not answer and calls
16 they did not place while traveling abroad.

17 39. For example, one customer posted this statement on an Internet complaint forum:

18 AT&T Roaming Charges.. on VOICEMAIL??

19 AAGH!

20 I need your help/input guys. I went to the caribbean for a week in June and I get a
21 bill for \$150 of roaming fees. The problem is, I only made *2* calls. Before I
22 went, I specifically asked an AT&T retail employee if I can carry my phone in the
23 caribbean without penalty. I was told specifically that if I turn off my data roaming
24 then I will only get charged for the calls that I make. That will be the only over-
25 ages.

26 They are charging me \$2.99/minute for every single voicemail call I receive while
27 there. I racked up about \$150 in overages!!
28 HUH??? :befuddled

Has anyone else experienced this? I am especially upset because I did my due dili-
gence and still got screwed. They offered to refund 1/2 the roaming charges as a
one time "courtesy"..

1 Uhm... No, they need to remove the whole thing. I am currently awaiting a call
2 back from a higher power that for some reason, takes 24-72 hours.

3 They must be busy with complaints.

4 <http://www.howardforums.com/printthread.php?t=1401697>, last visited January 30, 2009.

5 40. Another customer wrote:

6 Can an ATT employee PLEASE comment on the problems with voicemail while
7 roaming internationally? I just received a statement containing \$20 in charges for
8 unsuccessful attempts to leave me voicemail. For every attempt, there's \$1.29 for
9 an incoming call, and on the next line \$1.29 for forwarding it to a number in the
10 646 area code that turns out to be generic voicemail access.

11 Had callers known what to do, they could have re-entered my phone number and
12 left me a message, but, unsurprisingly (sic), none of them guessed this. I didn't re-
13 ceive any messages at all for the entire trip. Just charges.

14 In a tiny footnote, the ATTWS website does admit the double roaming charges for
15 voicemail, but nowhere does it disclose the near impossibility that you will ever
16 receive a message. Are there ANY plans to address, or even acknowledge (sic), this
17 issue

18 <http://forums.wireless.att.com/cng/board/message?board.id=gsmgprs&thread.id=3395>, last visited
19 January 30, 2009.

20 **CLASS ALLEGATIONS**

21 41. Plaintiff brings this action against Defendants on behalf of himself and all others
22 similarly situated, as a class action pursuant to section 382 of the California Code of Civil
23 Procedure and section 1781 of the California Civil Code. Plaintiff seeks to represent a group of
24 similarly situated persons. The group is defined as follows:

25 All California residents who, from February 6, 2005 through the present, paid
26 Defendants for (1) voicemails they did not retrieve, calls they did not answer
27 and/or calls they did not make while traveling abroad or (2) "data transfer"
28 fees for text, picture or video messages they sent while traveling abroad.

42. This action has been brought and may properly be maintained as a class action
against the Defendants pursuant to the provisions of California Code of Civil Procedure section
382 because there is a well-defined community of interest in the litigation and the proposed class
is easily ascertainable.

43. Numerosity: Plaintiff does not know the exact size of the class, but it is estimated

1 that it is composed of more than 1,000 persons. The persons in the class are so numerous that the
2 joinder of all such persons is impracticable and the disposition of their claims in a class action
3 rather than in individual actions will benefit the parties and the courts.

4 44. Common Questions Predominate: This action involves common questions of law
5 and fact to the potential class because each Class Member's claim derives from the deceptive,
6 unlawful and/or unfair statements and omissions that led customers to believe that they would not
7 be charged, and failed to inform customers that they would be charged, for (1) calls that they did
8 not answer, (2) voicemail they did not check and (3) calls they did not place while traveling
9 abroad. Class Member claims also derive from common questions of law and fact related to the
10 undisclosed data transfer fees that Defendants assessed for text, video and picture messages that
11 customers placed while traveling abroad. The common questions of law and fact predominate
12 over individual questions, as proof of a common or single set of facts will establish the right of
13 each member of the Class to recover. Among the questions of law and fact common to the class
14 are:

15 a) Whether Defendants unfairly, unlawfully and/or deceptively charged Class
16 Members for (1) calls that they did not answer, (2) voicemail they did not check and (3) calls they
17 did not place while traveling abroad;

18 b) Whether Defendants adequately disclosed to Class Members that they
19 would be charged for (1) calls that they did not answer, (2) voicemail they did not check and (3)
20 calls they did not place while they were traveling abroad;

21 c) Whether Defendants unfairly, unlawfully and/or deceptively led Class
22 Members to believe that they would not be charged for (1) calls that they did not answer, (2)
23 voicemail they did not check and (3) calls they did not place while they were traveling abroad;

24 d) Whether Defendants unfairly, unlawfully and/or deceptively charged Class
25 Members data transfer fees for text, picture and/or video messages that they sent while they were
26 traveling abroad;

27 e) Whether Defendants' advertising and marketing regarding their
28 international telephone service and mobile phones was likely to deceive Class Members or was

1 unfair;

2 f) Whether Defendants engaged in the alleged conduct knowingly, recklessly,
3 or negligently;

4 g) The amount of revenues and profits Defendants received and/or the amount
5 of monies or other obligations lost by Class Members as a result of such wrongdoing;

6 h) Whether Class Members are entitled to injunctive and other equitable relief
7 and, if so, what is the nature of such relief; and

8 i) Whether Class Members are entitled to payment of actual, incidental,
9 consequential, exemplary and/or statutory damages plus interest thereon, and if so, what is the
10 nature of such relief.

11 45. Typicality: Plaintiff's claims are typical of the class because Plaintiff was charged
12 for (1) calls that he did not answer, (2) voicemail he did not check and/or (3) calls he did not
13 place while he was traveling abroad. Plaintiff was also charged undisclosed data transfer fees for
14 text messages he sent while traveling abroad. Thus, Plaintiff and Class Members sustained the
15 same injuries and damages arising out of Defendants' conduct in violation of the law. The
16 injuries and damages of each Class Member were caused directly by Defendants' wrongful
17 conduct in violation of law as alleged.

18 46. Adequacy: Plaintiff will fairly and adequately protect the interests of all Class
19 Members because it is in his best interests to prosecute the claims alleged herein to obtain full
20 compensation due to him for the unfair and illegal conduct of which he complains. Plaintiff also
21 has no interests that are in conflict with or antagonistic to the interests of Class Members.
22 Plaintiff has retained highly competent and experienced class action attorneys to represent his
23 interests and that of the class. No conflict of interest exists between Plaintiff and Class Members
24 hereby, because all questions of law and fact regarding liability of Defendants are common to
25 Class Members and predominate over any individual issues that may exist, such that by prevailing
26 on his own claim, Plaintiff necessarily will establish Defendants' liability to all Class Members.
27 Plaintiff and his counsel have the necessary financial resources to adequately and vigorously
28 litigate this class action, and Plaintiff and counsel are aware of their fiduciary responsibilities to

1 the Class Members and are determined to diligently discharge those duties by vigorously seeking
2 the maximum possible recovery for Class Members.

3 47. Superiority: There is no plain, speedy, or adequate remedy other than by
4 maintenance of this class action. The prosecution of individual remedies by members of the class
5 will tend to establish inconsistent standards of conduct for the Defendants and result in the
6 impairment of Class Members' rights and the disposition of their interests through actions to
7 which they were not parties. Class action treatment will permit a large number of similarly
8 situated persons to prosecute their common claims in a single forum simultaneously, efficiently,
9 and without the unnecessary duplication of effort and expense that numerous individual actions
10 would engender. Furthermore, as the damages suffered by each individual member of the class
11 may be relatively small, the expenses and burden of individual litigation would make it difficult
12 or impossible for individual members of the class to redress the wrongs done to them, while an
13 important public interest will be served by addressing the matter as a class action.

14 48. Nexus to California. The State of California has a special interest in regulating the
15 affairs of corporations that do business here and persons who live here. Defendants have more
16 mobile telephone customers in California than in any other state. Accordingly, there is a
17 substantial nexus between Defendants' unlawful behavior and California such that the California
18 courts should take cognizance of this action on behalf of a class of individuals who reside in
19 California.

20 49. Plaintiff is unaware of any difficulties that are likely to be encountered in the
21 management of this action that would preclude its maintenance as a class action.

22 **CAUSES OF ACTION**

23 **PLAINTIFF'S FIRST CAUSE OF ACTION** 24 **(False Advertising, Business and Professions Code § 17500, et seq.)** 25 **On Behalf Of Himself And The California Subclasses**

26 50. Plaintiff realleges and incorporates by reference the paragraphs of this Class
27 Action Complaint as if set forth herein.

28 51. Beginning at an exact date unknown to Plaintiff, but within three (3) years
preceding the filing of the Class Action Complaint, Defendants have made untrue, false,

1 deceptive and or misleading statements in connection with the advertising and marketing of their
2 wireless services and mobile phones throughout the State of California, including in the City and
3 County of San Francisco.

4 52. Defendants have made representations and statements that lead reasonable
5 customers to believe that they will not incur charges when using their phones abroad. Defendants
6 inform customers that, when using their phones in the United States, they will not incur charges
7 for (1) calls that they do not answer, (2) voicemail they do not check and/or (3) calls they do not
8 place. Defendants also inform customers that, while using their phones in the United States, they
9 will not incur data transfer charges for text, video and/or picture messages that they send.
10 Defendants inform customers that, when using their phones abroad, they will incur additional
11 charges for making or receiving calls, sending text messages and sending picture or video
12 messages. Defendants, however, deceptively did (and do) not adequately inform customers that,
13 when traveling abroad, they will incur charges for (1) calls that they did not answer, (2) voicemail
14 they did not check and/or (3) calls they did not place while they were traveling abroad.
15 Defendants also deceptively do not inform customers that, when traveling abroad, they will incur
16 data transfer fees for text, video and/or picture messages that they send.

17 53. Plaintiff and those similarly situated relied to their detriment on Defendants' false,
18 misleading and deceptive advertising and marketing practices. Had Plaintiff and those similarly
19 situated been adequately informed and not intentionally deceived by Defendants, they would have
20 acted differently by, without limitation, (1) keeping their phones off, (2) forwarding all calls, and
21 (3) informing friends, family and business associates not to call them while they were traveling.
22 They would also have sent fewer or no text, video and/or picture messages.

23 54. Defendants engaged in these false, misleading and deceptive advertising and
24 marketing practices to increase their profits. Accordingly, Defendants have engaged in false
25 advertising, as defined and prohibited by section 17500, *et seq.* of the California Business and
26 Professions Code.

27 55. The aforementioned practices, which Defendants have used, and continue to use,
28 to their significant financial gain, also constitute unlawful competition and provide an unlawful

1 advantage over Defendants' competitors as well as injury to the general public.

2 56. Plaintiff seeks, on behalf of those similarly situated, full restitution of monies, as
3 necessary and according to proof, to restore any and all monies acquired by Defendants from
4 Plaintiff, the general public, or those similarly situated by means of the unfair and/or deceptive
5 trade practices complained of herein, plus interest thereon.

6 57. Plaintiff seeks, on behalf of those similarly situated, an injunction to prohibit
7 Defendants from continuing to engage in the false, misleading and deceptive advertising and
8 marketing practices complained of herein. The acts complained of herein occurred, at least in
9 part, within three (3) years preceding the filing of this Class Action Complaint.

10 58. Plaintiff and those similarly situated are further entitled to and do seek both a
11 declaration that the above-described practices constitute false, misleading and deceptive
12 advertising, and injunctive relief restraining Defendants from engaging in any such advertising
13 and marketing practices in the future. Such misconduct by Defendants, unless and until enjoined
14 and restrained by order of this Court, will continue to cause injury in fact to the general public
15 and the loss of money and property in that the Defendants will continue to violate the laws of
16 California, unless specifically ordered to comply with the same. This expectation of future
17 violations will require current and future customers to repeatedly and continuously seek legal
18 redress in order to recover monies paid to Defendants to which Defendants are not entitled.
19 Plaintiff, those similarly situated and/or other consumers nationwide have no other adequate
20 remedy at law to ensure future compliance with the California Business and Professions Code
21 alleged to have been violated herein.

22 59. As a direct and proximate result of such actions, Plaintiff and the other members of
23 the Class have suffered, and continue to suffer, injury in fact and have lost money and/or property
24 as a result of such false, deceptive and misleading advertising in an amount which will be proven
25 at trial, but which is in excess of the jurisdictional minimum of this Court.

26 60. As a direct and proximate result of such actions, Defendants have enjoyed, and
27 continue to enjoy, significant financial gain in an amount which will be proven at trial, but which
28 is in excess of the jurisdictional minimum of this Court.

1 **PLAINTIFF'S SECOND CAUSE OF ACTION**
2 **(Violation of the Consumers Legal Remedies Act, California Civil Code § 1750, *et seq.*)**
3 **On Behalf of Himself And The California Subclasses**

4 61. Plaintiff realleges and incorporates the paragraphs of this Class Action Complaint
5 as if set forth herein.

6 62. This cause of action is brought pursuant to the California Consumers Legal
7 Remedies Act, California Civil Code § 1750, *et seq.* ("CLRA").

8 63. Defendants' actions, representations and conduct have violated, and continue to
9 violate the CLRA, because they extend to transactions that are intended to result, or which have
10 resulted, in the sale or lease of goods or services to consumers.

11 64. Plaintiff and other Class Members are "consumers" as that term is defined by the
12 CLRA in California Civil Code § 1761(d).

13 65. The provision of mobile telephone services that Plaintiff (and others similarly
14 situated Class Members) purchased from Defendants were "services" within the meaning of
15 California Civil Code § 1761.

16 66. By engaging in the actions, representations and conduct set forth in this Class
17 Action Complaint, Defendants have violated, and continue to violate, § 1770(a)(5) and
18 § 1770(a)(7) of the CLRA. In violation of California Civil Code §1770(a)(5), Defendants' acts
19 and practices constitute improper representations that the goods or services that they sell have
20 sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities, which they do not
21 have. In violation of California Civil Code §1770(a)(7), Defendants' acts and practices constitute
22 improper representations that the goods or services that they sell are of a particular standard,
23 quality, or grade, or that goods are of a particular style or model, when they were not.
24 Specifically, Defendants acts and practices lead customers to believe that there is no charge,
25 while traveling internationally, for (1) calls that they did not answer, (2) voicemail they did not
26 check and (3) calls they did not place, when in fact there are such charges. Similarly, Defendants
27 acts and practices lead customers to believe that they would only incur a single charge for text,
28 video and/or picture messages that they sent while traveling abroad and that there would be no
additional charges for data transfer.

1 67. By engaging in the actions, representations and conduct set forth in this Class
2 Action Complaint, Defendants have violated, and continue to violate, § 1770(a)(19) of the CLRA.
3 In violation of California Civil Code §1770(a)(19), Defendants unlawfully inserted, and have
4 enforced, in their terms of service agreements unconscionable provisions. Specifically,
5 Defendants have inserted in their terms of service agreement mandatory arbitration and class
6 action waiver provisions, which they have unlawfully sought to enforce against the Plaintiff and
7 those similarly situated, by filing an affirmative defense in this case and motions to compel
8 arbitration in similar cases.

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9 68. Plaintiff requests that this Court enjoin Defendants from continuing to employ the
10 unlawful methods, acts and practices alleged herein pursuant to California Civil Code
11 § 1780(a)(2). If Defendants are not restrained from engaging in these types of practices in the
12 future, Plaintiff and the other members of the Class will continue to suffer harm.

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Deleted: , by filing an affirmative defense in this case and motions to compel arbitration in similar cases

13 69. On February 10 and March 24, 2009, Plaintiff sent to Defendants certified letters,
14 return receipt requested, demanding that they comply with the CLRA, including California Civil
15 Code § 1782. Defendants acknowledged receipt of each of those demand letters on February 23
16 and March 30, 2009. Defendants have failed to comply with the requirements of California Civil
17 Code § 1782 with respect to the Class.

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Deleted: <#>CLRA § 1782 NOTICE.
Irrespective of any representations to the contrary in this Class Action Complaint, Plaintiff specifically disclaims, at this time, any request for damages under any provision of the CLRA. Plaintiff, however, hereby provides Defendants with notice and demand that within thirty (30) days from that date, Defendants correct, repair, replace or otherwise rectify the unlawful, unfair, false and or deceptive practices complained of herein. Defendants' failure to do so will result in Plaintiff amending this Complaint to seek, pursuant to California Civil Code § 1780(a)(3), on behalf of himself and those similarly situated Class Members, compensatory damages, punitive damages and restitution of any ill-gotten gains due to Defendants' acts and practices.

18 70. Pursuant to California Civil Code § 1780, on behalf of similarly situated Class
19 Members, Plaintiff seeks actual damages of at least \$1000, punitive damages, an award of \$5000
20 for each Class Member who is a disabled person or senior citizen, and restitution of any ill-gotten
21 gains due to Defendants' acts and practices.

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22 71. Plaintiff also requests that this Court award him his costs and reasonable attorneys'
23 fees pursuant to California Civil Code § 1780(d).

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24 **PLAINTIFF'S THIRD CAUSE OF ACTION**
25 **(Fraud, Deceit and/or Misrepresentation)**
26 **On Behalf of Himself and The Class**

27 72. Plaintiff realleges and incorporates by reference the paragraphs of this Class
28 Action Complaint as if set forth herein.

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73. On or about March 20, 2008, Defendants fraudulently and deceptively failed to

1 inform Plaintiff that (1) calls that he did not answer, (2) voicemail he did not check and/or (3)
2 calls he did not place while he was abroad would be charged at \$1.29 per minute. Defendants
3 fraudulently and deceptively failed to inform that he would be charged additional data transfer
4 fees for text, video and/or picture messages that he sent while traveling abroad.

5 74. These omissions were material at the time they were made. They concerned
6 material facts that were essential to the analysis undertaken by Plaintiff as to whether and how to
7 use his mobile phone while traveling abroad.

8 75. At the time of his purchase of mobile phone services, activation of international
9 phone services and his arrival abroad, Defendants omitted to inform Plaintiff that (1) calls that he
10 did not answer, (2) voicemail he did not check and/or (3) calls he did not place while he was
11 abroad would be charged at \$1.29 per minute. Defendants also failed to inform Plaintiff that he
12 would be charged additional data transfer fees for text, video and/or picture messages that he sent
13 while traveling abroad. Defendants had a fiduciary duty to provide this information.

14 76. In not so informing Plaintiff, Defendants breached their duty to him. Defendants
15 also gained financially from, and as a result of, their breach.

16 77. Plaintiff and those similarly situated relied to their detriment on Defendants'
17 fraudulent omissions. Had Plaintiff and those similarly situated been adequately informed and
18 not intentionally deceived by Defendants, they would have acted differently by, without
19 limitation, (1) keeping their phones off, (2) forwarding all calls, and/or (3) informing friends,
20 family and business associates not to call them while they were traveling abroad. They would
21 have also sent fewer (or no) text, video and/or picture messages while they were traveling abroad.

22 78. Defendants had a fiduciary duty to inform Class Members at the time of their
23 purchase of mobile phone services, activation of international phone services and their arrival
24 abroad, of the additional charges that would be imposed on (1) calls that they did not answer, (2)
25 voicemail they did not check and (3) calls they did not place while they were abroad. Defendants
26 omitted to provide this information to Class Members. Class Members relied to their detriment
27 on Defendants' omissions. These omissions were material to the decisions of the Class Members
28 to use their phones while traveling abroad. In making these omissions, Defendants breached their

1 duty to Class Members. Defendants also gained financially from, and as a result of, their breach.

2 79. Defendants had a fiduciary duty to inform Class Members at the time of their
3 purchase of mobile phone services, activation of international phone services and their arrival
4 abroad, of the additional data transfer charges that would be imposed on text, video and/or picture
5 messages they sent when they were abroad. Defendants omitted to provide this information to
6 Class Members. Class Members relied to their detriment on Defendants' omissions. These
7 omissions were material to the decisions of the Class Members to use their phones while traveling
8 abroad. In making these omissions, Defendants breached their duty to Class Members.

9 Defendants also gained financially from, and as a result of, their breach.

10 80. By and through such fraud, deceit, misrepresentations and/or omissions,
11 Defendants intended to induce Plaintiff and those similarly situated to alter their position to their
12 detriment.

13 81. Plaintiff and those similarly situated justifiably and reasonably relied on
14 Defendants' omissions, and, accordingly, were damaged by the Defendants.

15 82. As a direct and proximate result of Defendants' misrepresentations, Plaintiff and
16 those similarly situated have suffered damages in an amount equal to the amount that Defendants
17 billed them for calls that they did not answer, voicemail they did not check, calls they did not
18 place and data transfer fees for text, video and picture messages they sent while they were abroad.

19 83. Defendants' conduct as described herein was willful and malicious and was
20 designed to maximize Defendants' profits even though Defendants knew that it would cause loss
21 and harm to Plaintiff.

22 **PLAINTIFF'S FOURTH CAUSE OF ACTION**
23 **(Unfair, Unlawful and Deceptive Trade Practices, Business and Professions Code § 17200,**
et seq.)
24 **On Behalf of Himself and the California Subclasses**

25 84. Plaintiff realleges and incorporates by reference the above paragraphs of this Class
26 Action Complaint as if set forth herein.

27 85. Within four (4) years preceding the filing of this Class Action Complaint, and at
28 all times mentioned herein, Defendants have engaged, and continue to engage, in unfair, unlawful

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1 and deceptive trade practices in California by engaging in the unfair, deceptive and unlawful
2 business practices outlined in this Class Action Complaint. In particular, Defendants have
3 engaged, and continue to engage, in unfair, unlawful and deceptive trade practices by without
4 limitation

- 5 a. failing to properly inform their customers that they would be charged for (1) calls
6 that they did not answer, (2) voicemail they did not check and (3) calls they did not
7 place while they were traveling abroad;
- 8 b. affirmatively deceiving their customers into believing that they would not be
9 charged for (1) calls that they did not answer, (2) voicemail they did not check and
10 (3) calls they did not place while they were traveling abroad;
- 11 c. marketing, advertising and selling international wireless services and mobile
12 phones without disclosing to customers the true costs associated with such
13 international services and phone usage;
- 14 d. failing to properly inform their customers how they can use abroad their mobile
15 phones without incurring charges for (1) calls that they did not answer, (2)
16 voicemail they did not check and (3) calls they did not place; and
- 17 e. assessing undisclosed “data transfer” fees for sending text, picture and/or video
18 messages while traveling abroad.

19 86. Plaintiff and those similarly situated relied to their detriment on Defendants’
20 unfair, deceptive and unlawful business practices. Had Plaintiff and those similarly situated been
21 adequately informed and not intentionally deceived by Defendants, they would have acted
22 differently by, without limitation, (1) keeping their phones off, (2) forwarding all calls, and/or (3)
23 informing friends, family and business associates not to call them while they were traveling
24 abroad. They would have also sent fewer (or not) text, video and picture message while they
25 were traveling abroad.

26 87. Defendants engage in these unfair practices to increase their profits. Accordingly,
27 Defendants have engaged in unlawful trade practices, as defined and prohibited by section 17200,
28 et seq. of the California Business and Professions Code.

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1 88. The aforementioned practices, which Defendants have used, and continue to use,
2 to their significant financial gain, also constitute unlawful competition and provide an unlawful
3 advantage over Defendants' competitors as well as injury to the general public.

4 89. Plaintiff seeks, on behalf of those similarly situated, full restitution of monies, as
5 necessary and according to proof, to restore any and all monies acquired by Defendants from
6 Plaintiff, the general public, or those similarly situated by means of the unfair and/or deceptive
7 trade practices complained of herein, plus interest thereon.

8 90. Plaintiff seeks, on behalf of those similarly situated, an injunction to prohibit
9 Defendants from continuing to engage in the unfair trade practices complained of herein. The
10 acts complained of herein occurred, at least in part, within four (4) years preceding the filing of
11 this Class Action Complaint.

12 91. Plaintiff and those similarly situated are further entitled to and do seek both a
13 declaration that the above-described trade practices are unfair, unlawful and/or fraudulent and
14 injunctive relief restraining Defendants from engaging in any of such deceptive, unfair and/or
15 unlawful trade practices in the future. Such misconduct by Defendants, unless and until enjoined
16 and restrained by order of this Court, will continue to cause injury in fact to the general public
17 and the loss of money and property in that the Defendants will continue to violate the laws of
18 California, unless specifically ordered to comply with the same. This expectation of future
19 violations will require current and future customers to repeatedly and continuously seek legal
20 redress in order to recover monies paid to Defendants to which Defendants are not entitled.
21 Plaintiff, those similarly situated and/or other consumers nationwide have no other adequate
22 remedy at law to ensure future compliance with the California Business and Professions Code
23 alleged to have been violated herein.

24 92. As a direct and proximate result of such actions, Plaintiff and the other members of
25 the Class have suffered and continue to suffer injury in fact and have lost money and/or property
26 as a result of such deceptive, unfair and/or unlawful trade practices and unfair competition in an
27 amount which will be proven at trial, but which is in excess of the jurisdictional minimum of this
28 Court.

1 93. As a direct and proximate result of such actions, Defendants have enjoyed, and
2 continue to enjoy, significant financial gain in an amount which will be proven at trial, but which
3 is in excess of the jurisdictional minimum of this Court.

4 **PRAYER FOR RELIEF**

5 WHEREFORE, Plaintiff prays for judgment as follows:

6 A. On Causes of Action Numbers 1 and 4 against Defendants and in favor of
7 Plaintiff and the other members of the class:

- 8 1. For the greater of actual or compensatory damages according to
9 proof;
- 10 2. For restitution pursuant to, without limitation, the California Busi-
11 ness & Professions Code §§ 17200, et seq. and 17500, et seq;
- 12 3. For injunctive relief pursuant to, without limitation, the California
13 Business & Professions Code §§ 17200, et seq and 17500, et seq;
14 and

15 B. On Cause of Action Number 2 against Defendants and in favor of Plaintiff
16 and the other members of the class:

- 17 1. For restitution and injunctive relief pursuant to California Civil
18 Code section 1780;
- 19 2. For actual damages and punitive damages for each Class Member;
20 and
- 21 3. For statutory damages in the amount of \$5000 for each Class Mem-
22 ber who is a disabled person or senior citizen.

23 C. On Cause of Action Number 3 against Defendants and in favor of Plaintiff
24 and the other members of the class:

- 25 1. An award of compensatory damages, the amount of which is to be
26 determined at trial; and
- 27 2. An award of punitive damages, the amount of which is to be deter-
28 mined at trial; and

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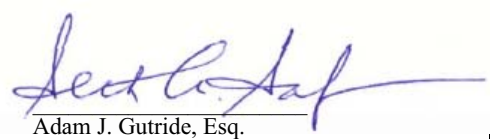
- D. On all causes of action against Defendants and in favor of Plaintiff, class members and the general public:
1. For reasonable attorneys' fees according to proof pursuant to, without limitation, the California Legal Remedies Act and California Code of Civil Procedure § 1021.5;
 2. For costs of suit incurred; and
 3. For such further relief as this Court may deem just and proper.

JURY TRIAL DEMANDED

Plaintiff hereby demands a trial by jury.

Dated: May 4, 2009,

GUTRIDE SAFIER LLP



Adam J. Gutride, Esq.
Seth A. Safier, Esq.
835 Douglass Street
San Francisco, California 94114

Attorneys for Plaintiff

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