

EXHIBIT B TO MF DECLARATION I-PHONE

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18 TIMOTHY P. SMITH, on behalf of himself
19 and all others similarly situated,

20 Plaintiffs,

21 vs.

22 APPLE INC.,

23 Defendant.

24 Case No.

25 **CLASS ACTION**

26 **COMPLAINT FOR TREBLE
27 DAMAGES AND PERMANENT
28 INJUNCTIVE RELIEF**

1. Violation of the Cartwright Act (Cal. Bus. & Prof. Code, § 16720, Unlawful Trusts.)
2. Violation of the Cartwright Act (Cal. Bus. & Prof. Code, § 16727, Unlawful Tying Agreement.)
3. Violation of the Unfair Competition Law (Cal. Bus. & Prof. Code, § 17200.)
4. Common Law Monopolization

DEMAND FOR JURY TRIAL

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- 1 8. Apple declares that unlocked iPhones void consumers' warranties. 22
- 2 9. Apple releases an update that "bricks" iPhones. 22
- 11. A congressional subcommittee is critical of Apple's business model. 23

3 **FIRST CAUSE OF ACTION** 24

4 **For Violation of Section 16720 of the Cartwright Act (Unlawful Trusts)** 24

- 1. The elements of a *per se* tying agreement under section 16720. 25
- 2. Apple's Agreement with AT&T is an unlawful trust because:
 - (1) Apple prohibits iPhone consumers from using or purchasing a cell phone service other than through AT&T, and (2) the sale of the iPhone—the tying product—is exclusively linked to the sale of AT&T's cell phone service—the tied product. 25
- 3. Apple has sufficient economic power in the iPhone (the tying market) to coerce the purchase of AT&T's cell phone service (the tied product). 25
- 4. A substantial amount of commerce was and will continue to be affected from the sale of AT&T's cell phone service together with the iPhone. 26
- 5. Apple's unlawful trust with AT&T substantially lessens competition and tends to create a monopoly in trade and commerce in California and throughout the entire United States. 26
- 6. Plaintiff has sustained pecuniary loss as a result of Apple's unlawful trust. 28
- 7. Plaintiff and the Class members paid supra-competitive prices for the iPhone and AT&T's cell phone service. 29

15 **SECOND CAUSE OF ACTION** 31

16 **For Violation of Section 16727 of the Cartwright Act (Unlawful Tying Agreement)** 31

- 1. The elements of a *per se* tying agreement under section 16727. 31
- 2. Apple's Agreement with AT&T is an unlawful tying agreement because: (1) Apple prohibits iPhone consumers from using or purchasing a cell phone service other than through AT&T, and (2) the sale of the iPhone—the tying product—is exclusively linked to the sale of AT&T's cell phone service—the tied product. 31
- 3. Apple has sufficient economic power in the iPhone (the tying market) to coerce the purchase of AT&T's cell phone service (the tied product). 32
- 4. A substantial amount of commerce was and will continue to be affected from the sale of AT&T's cell phone service together with the iPhone. 32
- 5. Apple's tying agreement with AT&T substantially lessens competition and tends to create a monopoly in trade and commerce in California and throughout the entire United States. 32
- 6. Plaintiff has sustained pecuniary loss as a result of Apple's unlawful tying agreement. 33
- 7. Plaintiff and the Class members paid supra-competitive prices for the iPhone and AT&T's cell phone service. 35

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1 Plaintiff Timothy P. Smith, individually and on behalf of all others similarly situated
2 (“Plaintiff”), for his complaint against defendant Apple Inc. (“Apple”), upon knowledge as to
3 himself and his own acts, and upon information and belief as to all other matters, alleges as follows:

4 **INTRODUCTION**

5 **1. Factual Introduction.**

6 1. Apple entered into an exclusive five year agreement with AT&T Mobility LLC
7 (“AT&T”) that establishes AT&T as the exclusive provider of cell phone service for the iPhone
8 through 2012 (“Agreement”). As part of the Agreement, Apple receives a portion of AT&T’s
9 profit.¹ Apple’s Agreement is a *per se* unlawful “tying” agreement because Apple prohibits iPhone
10 consumers from using or purchasing a cell phone carrier² service other than AT&T. A tying
11 agreement is a requirement that a buyer purchase one product or service as a condition of the
12 purchase of another or that the sale of one product is linked to the other. Apple achieves its
13 prohibition objectives by installing software locks on iPhones that prevent consumers from
14 switching their cell phone service to a competitor’s network. Apple’s prohibition substantially
15 lessens competition and tends to create a monopoly in the trade and commerce of the iPhone and
16 AT&T’s cell phone service.

17 2. On September 27, 2007, Apple punished consumers for exercising their rights to
18 unlock their iPhones. Apple issued a software update that “bricked”³ or otherwise caused iPhone
19 malfunctions for consumers who unlocked their phones and installed the update. Under an
20 ///

21 _____
22 ¹ The.next.net, “Apple Takes Its Bite of iPhone Mobile Service Fees,” July 2007,
<http://blogs.business2.com/business2blog/2007/07/apple-takes-its.html> (accessed October 3, 2007).

23 ² For ease of reference, “cell phone carrier” has the same meaning as cellular network provider,
24 wireless telephone communication network provider, and mobile telecommunications network
25 provider.

26 ³ When used in reference to electronics, “brick” describes a device which cannot function in any
27 capacity (such as a machine with damaged firmware). This usage derives from the machine now
28 being considered “as useful, and as entertaining, as a brick.” Wikipedia, “Brick, (electronics) –
Wikipedia, the free encyclopedia,” <http://en.wikipedia.org/wiki/Bricking> (accessed October 1,
2007). Bricked iPhones are colloquially known as the “iBrick”. (*Id.*, at [http://en.wikipedia.org
/wiki/Ibrick](http://en.wikipedia.org/wiki/Ibrick) (accessed October 3, 2007).

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1 exemption to the Digital Millennium Copyright Act of 1998, consumers can lawfully modify their
2 phones for use on a cell phone network of their choice. Apple ignored the exemption in disregard of
3 consumers' rights.

4 3. When iPhone owners took their phones to Apple for repair, Apple refused to honor
5 consumers' warranties. Instead, Apple gave a Marie-Antoinette-like response, "[let them] purchase
6 a new iPhone," said Jennifer Bowcock, an Apple spokeswoman.⁴

7 **2. Legal Introduction.**

8 4. The Digital Millennium Copyright Act (17 U.S.C. § 1201) provides, in part, that
9 "No person shall circumvent a technological measure that effectively controls access to a work
10 protected under this title."

11 5. In its 88-page recommendation to the Librarian of Congress, the Register of
12 Copyrights determined that "a strict application of the statutory language of section 1201 would
13 likely to result in a finding that one who circumvents the software lock on a cell phone in order to
14 connect to a new network is engaging in unlawful circumvention of an access control."⁵ The
15 Register of Copyrights concluded that cell phone software locks are access controls that adversely
16 affect the ability of consumers to make noninfringing use of the software on their cell phones.⁶
17 Accordingly, on November 27, 2006, the Librarian of Congress—upon recommendation of the
18 Register of Copyrights—issued an exemption for software programs that allow consumers to
19 unlock their cell phones. The Register stated that the exemption was sought "for the sole purpose of
20 permitting owners of cellular phone handsets to switch their handsets to a different network."⁷ The
21 exemption was codified in the Code of Federal Regulations as 37 CFR section 201.40(b)(5),
22

23 ⁴ Katie Hafner, "Altered iPhones Freeze Up," *The New York Times*, September 28, 2007,
24 http://www.nytimes.com/2007/09/29/technology/29iphone.html?_r=1&em&ex=1191211200&en=37222d83199c5f92&ei=5087%0A&oref=slogin (accessed October 3, 2007).

25 ⁵ James H. Billington, the Librarian of Congress, *Recommendation of the Register of*
26 *Copyrights*, November 17, 2006, U.S. Copyright Office, http://www.copyright.gov/1201/docs/1201_recommendation.pdf (accessed October 1, 2007).

27 ⁶ 71 Fed. Reg. 68472, 68476 (November 27, 2006), U.S. Copyright Office, <http://www.copyright.gov/fedreg/2006/71fr68472.html> (accessed October 1, 2007).

28 ⁷ *Id.*, at p. 68476.

1 effective November 27, 2007 and continuing through October 27, 2009.⁸

2 6. The Register of Copyrights stated that the recommendation was not “intended to be
3 construed as expressing approval or disapproval of any particular business models, or as expressing
4 any views on telecommunications policy.”⁹

5 **JURISDICTION AND VENUE**

6 7. This Court has jurisdiction over this action pursuant to California Code of Civil
7 Procedure section 410.10. Plaintiff seeks damages on behalf of himself and all others similarly
8 situated under the laws of the State of California.

9 8. Venue is proper in this Court pursuant to Code of Civil Procedure section 393 and
10 Civil Code section 1780(c), because:

11 (a) the acts and transactions or any substantial portion thereof, as described
12 herein, occurred within Santa Clara County;

13 (b) Santa Clara County is the place of Apple’s principal place of business;

14 (c) the described injuries to property occurred within Santa Clara County.

15 **THE PARTIES**

16 9. Plaintiff Timothy P. Smith is an individual residing in the State of California.
17 During the period of time covered by this Complaint, Plaintiff purchased an iPhone from Apple
18 together with the required AT&T cell phone service. He has been injured by reason of the
19 violations alleged herein.

20 10. Defendant Apple Inc. (“Apple”) is a California corporation whose headquarters and
21 principal place of business is in the City of Cupertino, County of Santa Clara, State of California.

22 As stated by Apple in a recent filing with the Securities and Exchange Commission:

23 Apple Inc. and its wholly-owned subsidiaries (“Apple” or the
24 “Company”) designs, manufactures, and markets personal computers,
25 portable digital music players, and mobile phones and sells a variety of
related software, services, peripherals, and networking solutions. The

26
27 ⁸ *Id.*, at p. 68472.

28 ⁹ James H. Billington, the Librarian of Congress, *Recommendation of the Register of Copyrights*, at p. 51, *supra* at fn. 5.

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1 Company sells its products worldwide through its online stores, its
2 retail stores, its direct sales force, and third-party wholesalers, resellers,
3 and value-added resellers. In addition, the Company sells a variety of
4 third-party Macintosh, iPod and iPhone compatible products including
5 application software, printers, storage devices, speakers, headphones,
6 and various other accessories and supplies through its online and retail
7 stores. The Company sells to education, consumer, creative
8 professional, business, and government customers.¹⁰

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CLASS ACTION ALLEGATIONS

11. This suit is brought as a class action pursuant to section 382 of the California Code of Civil Procedure, on behalf of a class of:

all natural persons, sole proprietorships, partnerships, limited partnerships, corporations, and other entities who own an iPhone, intended for use by themselves, their families, or their members, participants, or employees (the "Class") during the period from June 29, 2007 through such time in the future as the effects of Apple's illegal conduct, as alleged herein, have ceased (the "Class Period").

1. Class Size.

12. Plaintiff does not, as yet, know the exact size of the class, but estimates it to be 1.28 million iPhone owners with a projected increase of 25 to 37.6 million within the next 18 months as described below in *The basis for class size estimates*.

13. The number of unlocked iPhones is estimated at several hundred thousand people.¹¹ That number continues growing every day. (*Id.*)

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¹⁰ Apple Inc., Form 10-Q, "Quarterly Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934," August 8, 2007, Q3/FY07, p. 5, http://library.corporate-ir.net/library/10/107/107357/items/257461/10Q_Q3FY07.pdf (accessed October 1, 2007).

¹¹ Erica Sadun, "iPhone Dev Team Issues Statement," September 25, 2007, *Tuaw.com*, <http://www.tuaw.com/2007/09/25/iphone-dev-team-issues-statement> (accessed October 2, 2007).

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1 **A. The basis for class size estimates.**

2 14. On June 14, 2007, Apple’s CEO Steve Jobs projected sales of 10 million iPhones
3 within the first 18 months of the release date,¹² worth \$3.99 to \$4.19 billion in retail sales.¹³ “We
4 think 10 million is reasonable,” Jobs said.¹⁴ Some tech and Wall Street analysts believe Apple could
5 exceed that.¹⁵

6 15. On September 10, 2007, Apple announced that it sold its one millionth¹⁶ iPhone, just
7 74 days after its June 29th release date.¹⁷ Based on projections from this information, there are
8 approximately 1.31 million iPhones that have been sold as of October 1, 2007.¹⁸

9 16. Gene Munster, who covers Apple for investment firm Piper Jaffray, projects iPhone
10 sales to be \$15 billion by 2009 which amounts to projected sales of 25 to 37.6 million iPhones in

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12 ///

13 _____
14 ¹² Jefferson Graham and Edward C. Baig, “iPhone launch gives Apple’s Steve Jobs butterflies,”
15 *The USA Today*, June 28, 2007, http://www.usatoday.com/tech/wireless/phones/2007-06-28-iphone-launch_N.htm (accessed October 1, 2007).

16 ¹³ From its debut through September 4, 2007, the 4 GB iPhone sold for \$499 and the 8 GB
17 iPhone sold for \$599. (Apple, “Apple Premieres This Friday Night at Apple Retail Stores,” June 28,
18 2007, <http://www.apple.com/pr/library/2007/06/28iphone.html> (accessed October 1, 2007). On
19 September 5, 2007, Apple dropped the price of its 8 GB iPhone to \$399. (Apple, “Apple Sets
20 iPhone Price at \$399 for this Holiday Season,” <http://www.apple.com/pr/library/2007/09/05iphone.html> (accessed October 1, 2007). The range of \$3.99 to \$4.19 billion in retail sales is
21 calculated as follows: the first 1 million phones at \$399 to \$599 equals \$399 to \$599 million. Nine
22 million phones at \$399 equals \$3.59 billion.

23 ¹⁴ Jefferson Graham and Edward C. Baig, “iPhone launch gives Apple’s Steve Jobs butterflies,”
24 *supra* at fn. 12.

25 ¹⁵ Jefferson Graham, “iPhone mania nears fever pitch,” *The USA Today*, June 19, 2007,
26 http://www.usatoday.com/tech/wireless/phones/2007-06-19-iphone-mania_N.htm (accessed
27 October 3, 2007).

28 ¹⁶ Apple, “Apple Sells One Millionth iPhone,” September 10, 2007, <http://www.apple.com/pr/library/2007/09/10iphone.html> (accessed October 1, 2007).

¹⁷ Apple, “Apple Premieres This Friday Night at Apple Retail Stores,” June 28, 2007,
<http://www.apple.com/pr/library/2007/06/28iphone.html> (accessed October 1, 2007).

¹⁸ Calculation: As of September 10, 2007, 1 million iPhones were sold which is an average of
13,513 iPhones sold per day. *See fn. 16, supra*. Based on a daily sales average of 13,513 iPhones,
there were approximately 310,799 iPhones sold from September 11, 2007 through October 3, 2007,
inclusive.

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1 the next 15 months.¹⁹

2 **B. Impracticability of joinder.**

3 17. As discussed in “Relevant Market”, the geographic market of the iPhone and
4 AT&T’s cell phone service is worldwide. With a present class size of 1.31 million iPhone owners
5 and projections of 25 to 37.6 million in the next 15 months, joinder of all members of the Class
6 would not be practicable.

7 **2. Common questions of law and fact.**

8 18. There are questions of law and fact common to the class that predominate over any
9 questions that may affect only individual members of the Class, including, but not limited to:

10 (a) Whether Apple’s conduct violated section 16720 of the California Business
11 and Professions Code²⁰ relating to unlawful trusts;

12 (b) Whether Apple’s conduct violated section 16727 relating to unlawful
13 tying agreements;

14 (c) Whether Apple’s conduct violated section 17200 relating to unfair or
15 unlawful business acts or practices;

16 (d) Whether Apple’s conduct violated the common law;

17 (e) Whether Apple’s conduct was willful;

18 (f) Whether Apple’s acts, contracts, combinations and/or conspiracies restrained
19 trade, commerce, or competition for the purchase of the iPhone or the purchase of cellular wireless
20 services through carriers other than AT&T;

21 (g) Whether Apple’s conduct constitutes a *per se* violation of sections 16720
22 and 16727;

23 (h) Whether Apple obtained, possessed and/or unlawfully used monopoly power
24

25 _____
26 ¹⁹ Jefferson Graham, “iPhone mania nears fever pitch.” The range of iPhone’s sold is based on
27 the \$399 low and the \$599 high price of the iPhone at the time of Munster’s projections. *See fn. 15,*
28 *supra.*

²⁰ Unless otherwise specified, all further statutory references are to the California Business and Professions Code.

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1 over the Relevant Market for the iPhone and AT&T's cell phone service;

2 (i) Whether, under common principles of California antitrust law, Plaintiff and
3 the members of the Class suffered antitrust injury or were threatened with injury;

4 (j) The amount of money to replace unlocked iPhones that were damaged by the
5 iPhone Update;

6 (k) The amount of overcharges, roaming charges, or amounts paid by members
7 of the Class for AT&T's cell phone service over and above the amounts they would have paid in a
8 competitive market unaffected by Apple's illegal acts as alleged herein;

9 (l) The amount of early termination fees paid by members of the Class from
10 canceling their previous cell phone service while transferring to an iPhone;

11 (m) The amount of third-party warranty plans paid by members of the Class as a
12 result of Apple's statement that it will not honor warranties on unlocked iPhones;

13 (n) The effect of Apple's conduct upon, and the injury caused to, the business or
14 property of the Plaintiff and the members of the Class;

15 (o) the type and measure of damages suffered by Plaintiff and the
16 Class members.

17 19. Plaintiff will fairly and adequately protect the interests of the Class in that Plaintiff's
18 claims are typical and representative of the claims of all members of the Class, all of whom
19 own iPhones.

20 20. There are no defenses of a unique nature that may be asserted against Plaintiff
21 individually, as distinguished from the other members of the Class, and the relief sought is common
22 to the Class. Plaintiff is a typical owner of the iPhone, does not have any interest that is in conflict
23 with or is antagonistic to the interests of the members of the Class, and has no conflict with any
24 other member of the Class. Plaintiff has retained competent counsel experienced in antitrust
25 litigation and class action litigation to represent himself and the Class.

26 21. A class action is superior to other available methods for the fair and efficient
27 adjudication of this controversy. In the absence of a class action, Apple will retain the benefits of its
28 wrongful conduct.

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■ WIRELESS MARKET SHARE

Wireless provider AT&T is the leading carrier in current wireless communication market share.

AT&T	27.1%
Verizon	26.3%
Sprint Nextel (2)	23.6%
Others	11.9%
T-Mobile	11.1%

Note: Market share values are calculated as if they always have been combined

1 - AT&T acquired Cingular in 2004

2 - Sprint and Nextel merged

Source: Forrester Research

25. On June 29, 2007—the same day the iPhone went on sale—AT&T purchased Dobson Communications Corp. for \$2.8 billion in cash. The purchase added about 1.7 million customers to its nearly 62 million customer base at a time when some analysts were questioning how much larger carriers could grow in an already saturated U.S. wireless market.²³

4. **The relevant geographic market for the iPhone and AT&T's cell phone service.**

26. The relevant geographic market for the iPhone and AT&T's cell phone service is worldwide with AT&T being the exclusive cell phone carrier for the iPhone in the United States.²⁴

27. On September 18, 2007, Apple announced that Telefónica's O2 Telecommunications would be the exclusive carrier of the iPhone in the United Kingdom. The iPhone is scheduled to go on sale on November 9, 2007 together with an 18-month contract.²⁵

²³ Michelle Roberts, "AT&T agrees to buy Dobson Communications," *fn. 21, supra*.

²⁴ Apple Inc. Form 10-Q. "Quarterly Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934," *fn. 10, supra*.

²⁵ Apple, "Apple Chooses O2 as Exclusive Carrier for iPhone in UK," September 18, 2007. <http://www.apple.com/pr/library/2007/09/18iphone.html> (accessed October 1, 2007).

1 28. On September 19, 2007, Apple announced that Deutsche Telekom's T-Mobile
2 would be the exclusive carrier of the iPhone in Germany. The iPhone is scheduled to go on sale on
3 November 9, 2007 together with a 2-year contract.²⁶

4 29. On September 20, 2007, France Télécom announced that their wireless division
5 Orange SA had a contract with Apple to offer iPhones in France.²⁷

6 30. Apple is expected to release the iPhone in Australia in 2008.²⁸

7 31. The market for the iPhone is worldwide because it can be used on any GSM network
8 once the iPhone is unlocked.²⁹ It is reported that GSM is the most popular standard for mobile
9 phones in the world, with its promoter, the GSM Association, estimating that GSM accounts for
10 82% of the global mobile market.³⁰

11 **5. A substantial amount of commerce was and will continue to be affected**
12 **from the sale of AT&T's cell phone service together with the iPhone.**

13 32. By distributing an equal amount of iPhone users to AT&T's individual and family
14 cell phone plans, the monthly revenue generated by AT&T based on 1.31 million iPhones in use
15 today is estimated as follows:

<u>Type of Cell Phone Plan</u>	<u>Monthly Cost</u>	<u>Estimated Revenue</u>
Individual Plans	\$39.99 to \$199.99	\$52.39 to \$261.99 million
Family Plans	\$59.99 to \$299.99	<u>\$78.59 to \$392.99 million</u>
Total:		\$130.98 to \$654.98 million

21 ²⁶ Apple, "Apple and T-Mobile Announce Exclusive Partnership for iPhone in Germany,"
22 September 19, 2007. <http://www.apple.com/pr/library/2007/09/19iphone.html> (accessed October 1,
2007).

23 ²⁷ Laetitia Fontaine, "France Telecom's Orange To Distribute Apple iPhone In France," *The*
24 *Wall Street Journal Online*, September 20, 2007. [http://online.wsj.com/article/BT-CO-20070920-](http://online.wsj.com/article/BT-CO-20070920-705999-Q4B7U_6vEH_eljKax_y25c35Ilw_20080930.html?mod=cnews)
25 [705999-Q4B7U_6vEH_eljKax_y25c35Ilw_20080930.html?mod=cnews](http://online.wsj.com/article/BT-CO-20070920-705999-Q4B7U_6vEH_eljKax_y25c35Ilw_20080930.html?mod=cnews) (accessed October 1,
2007).

26 ²⁸ Dan Warne, "Australia won't see iPhone 'til 2008,'" *Ninemsn*, January 10, 2007,
http://apcmag.com/4959/australia_wont_see_iphone_til_2008 (accessed October 1, 2007).

27 ²⁹ GSM is an acronym for Global System for Mobile communications.

28 ³⁰ GSM Association, "GSM—the website of the GSM Association," <http://www.gsmworld.com/gsmastats.shtml> (accessed October 1, 2007).

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1 33. Based on these estimates, AT&T's cell phone service substantially affects commerce
2 to the tune of \$130 to \$654 million every month or \$390 million to \$1.96 billion to date.

3 CALIFORNIA ANTITRUST LAW

4 1. Summary and overview.

5 34. California statutory antitrust law is found at sections 16600–17210 of the California
6 Business & Professions Code. It consists of the Cartwright Act, the Unfair Practices Act, and the
7 Unfair Competition Act, as well as various statutory restrictions on covenants not to compete. The
8 Cartwright Act prohibits trusts, which are defined as a combination of capital, skill or acts by two
9 or more persons to, among other things, create or carry out restrictions in trade or commerce.
10 (Section 16720.) It also prohibits sales or leases of products on the condition that the purchaser not
11 deal in the goods of a competitor where the effect is to substantially lessen competition or tend to
12 create a monopoly in any line of commerce. (Section 16727.) The Unfair Practices Act prohibits
13 sales below cost, locality discrimination, and secret rebates or unearned discounts which injure
14 competition. (Section 17000 *et seq.*) The Unfair Competition Act generally prohibits any unlawful,
15 unfair, or fraudulent business act or practice, as well as deceptive or misleading advertising.
16 (Section 17200 *et seq.*)

17 2. Combination and collusion (Section 16720).

18 35. Section 16720 prohibits trusts, and is the Cartwright Act counterpart to Section 1 of
19 the federal Sherman Act (15 U.S.C. § 2). Trusts are defined in section 16720 as any “combination”
20 of capital, skill or acts by two or more persons to, among other things, carry out restrictions in
21 commerce, prevent competition, or fix prices. Section 16720 applies to a wide variety of
22 anticompetitive conduct, but applies only where there is proof of a “combination of resources of
23 two or more independent entities for the purpose of restraining competition and preventing market
24 competition.” (*G.H.I.I. v. MTS, Inc.* (1983) 147 Cal. App. 3d 256, 266; *See also Chavez v.*
25 *Whirlpool Corp.* (2001) 93 Cal. App. 4th. 363.)

26 3. Exclusive dealing (Section 16727).

27 36. Section 16727 provides, among other things, that it is unlawful to sell or lease goods,
28 or give a rebate or price discount, on the condition that the purchaser not deal in goods of a

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1 competitor where the effect is to substantially lessen competition or tend to create a monopoly.
2 Section 16727 is a carbon copy of Section 3 of the Clayton Act (15 U.S.C. § 14). Like its federal
3 counterpart, it does not prohibit all exclusive dealing contracts. Rather, California courts may apply
4 the rule of reason and invalidate only those with the requisite anticompetitive effects. (*Gianelli*
5 *Distributing Co. v. Beck & Co.* (1985) 172 Cal. App. 3d 1020.)

6 37. The key issue under the rule of reason in exclusive dealing cases is whether the
7 defendant has market power in the relevant market. (*Redwood Theatres v. Festival Enterprises*
8 (1988) 200 Cal. App. 3d 687.) The relevant market normally includes all products that are
9 reasonably interchangeable in price, use and quality. (*Exxon v. Superior Court* (1997) 51 Cal. App.
10 4th 1672, 1682-84.) If defendant has a small market share, or otherwise lacks market power, a court
11 could find that the exclusivity requirement will not violate the Cartwright Act. (*Kim v. Servosnax*
12 (1992) 10 Cal. App. 4th 1346.) However, market power may exist even though it falls short of
13 market dominance and exists only with respect to some buyers due to the *desirability* of that
14 product to those buyers, or the *uniqueness* of its attributes. (*Suburban Mobile Homes v. AMFAC*
15 *Communities* (1980) 101 Cal.App.3d 532, 544.) (Emphasis added.)

16 **4. Tying agreements (Section 16727).**

17 38. One species of exclusive dealing is a tying agreement—a requirement that a buyer
18 purchase one product or service as a condition of the purchase of another. Traditionally, the product
19 that is the inducement for the arrangement is called the “tying product,” and the product or service
20 that the buyer is required to purchase is called the “tied product.” A tying arrangement may be
21 condemned under either or both sections 16720 and 16727. (*Morrison v. Viacom* (1998) 66 Cal.
22 App. 4th 534, 540.)

23 39. Tying may be *per se* illegal if the seller has market power over the first product or a
24 substantial amount of commerce was affected in the sale of the second product. (*Suburban Mobile*
25 *Homes v. AMFAC Communities* (1980) 101 Cal. App. 3d 532.) The *per se* rule is satisfied under
26 section 16727 if either the market power or substantial commerce tests are satisfied. (*Morrison v.*
27 *Viacom, supra*, at p. 542.) Under section 16720, both tests must be satisfied. (*Id.*)

28 ///

THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998

1. Statutory background.

40. In 1998, Congress enacted the Digital Millennium Copyright Act (“DMCA”), which among other things, amended title 17, United States Code, to add section 1201 (“Section 1201”). Section 1201 prohibits circumvention of technological measures employed by or on behalf of copyright owners to protect their works (“access controls”). Specifically, section 1201(a)(1)(A) (“Copyright Prohibition”) provides, in part, that “No person shall circumvent a technological measure that effectively controls access to a work protected under this title.” In order to ensure that the public will have continued ability to engage in noninfringing uses of copyrighted works, such as fair use³¹, subparagraph (B) of section 1201 limits this prohibition, exempting noninfringing uses of any “particular class of works” when users are (or in the next 3 years are likely to be) adversely affected by the prohibition in their ability to make noninfringing uses of that class of works. (Section 1201(a)(1)(B).) (“Copyright Exemption.”)

41. Identification of these exempt classes of works is made in a rulemaking proceeding conducted by the Register of Copyrights who provides notice of the rulemaking, seeks comments from the public, consults with the Assistant Secretary for Communications and Information of the Department of Commerce, and recommends final regulations to the Librarian of Congress. The Librarian of Congress, in exercising his authority under 17 U.S.C. section 1201(a)(1)(C) and (D), shall publish the classes of copyrighted works that shall be subject to the exemption from the Copyright Prohibition.

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³¹ James H. Billington, the Librarian of Congress, *Recommendation of the Register of Copyrights*, p. 3., *fn. 9, supra*.

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1 **2. Cell phone providers use software locks to restrain competition.**

2 42. Cell phone network providers are using various types of software locks in order to
3 control customer access to the “bootloader” programs³² on cellphones and the operating system
4 programs embedded inside cell phones.³³ These software locks prevent customers from using their
5 cell phones on a competitor’s network (even after all contractual obligations to the original wireless
6 carrier have been satisfied) by controlling access to the software that operates the cell phones (e.g.,
7 the mobile firmware).³⁴ The Register of Copyrights states that “the access controls do not appear to
8 actually be deployed in order to protect the interests of the copyright owner or the value or integrity
9 of the copyrighted work; rather, they are used by wireless carriers to limit the ability of subscribers
10 to switch to other carriers, *a business decision that has nothing whatsoever to do with the interests*
11 *protected by copyright.*”³⁵ (Emphasis added.)

12 **3. Unlocking cell phones is a lawful activity.**

13 43. In its 88-page recommendation to the Librarian of Congress, the Register of
14 Copyrights determined that “a strict application of the statutory language of § 1201 would be likely
15 to result in a finding that one who circumvents the software lock on a cell phone in order to connect
16 to a new network is engaging in unlawful circumvention of an access control.”³⁶ The Register of
17 Copyrights concluded that cell phone software locks are access controls that adversely affect the
18 ability of consumers to make noninfringing use of the software on their cell phones.³⁷ Accordingly,
19 on November 27, 2006, the Librarian of Congress—upon recommendation of the Register of
20 Copyrights—issued an exemption for software programs that allow consumers to unlock their cell
21 phones. The Register stated that the exemption was sought “for the sole purpose of permitting
22 _____

23 ³² A bootloader is “A small program stored in ROM and responsible for initializing the
24 hardware to a known initial state and making it possible to download application software to the
25 system to be run.” Jack Ganssle and Michael Barr, *Embedded Systems Dictionary* 33 (2003).

26 ³³ 71 Fed. Reg. 68472, 68476, fn. 6, supra.

27 ³⁴ Id.

28 ³⁵ 71 Fed. Reg. 68472, 68476, fn. 6, supra.

³⁶ James H. Billington, the Librarian of Congress, *Recommendation of the Register of*
Copyrights, fn. 9, supra.

³⁷ 71 Fed. Reg. 68472, 68476, fn. 6, supra.

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owners of cellular phone handsets to switch their handsets to a different network.”³⁸ The exemption was codified in the Code of Federal Regulations as 37 CFR section 201.40(b)(5), effective November 27, 2007 and continuing through October 27, 2009.³⁹

FACTUAL ALLEGATIONS

1. Apple enters into an exclusive agreement with AT&T for the sale of the iPhone tied to the sale of AT&T’s cell phone service.

44. On January 9, 2007, Apple announced that Cingular—now merged into AT&T—would be Apple’s partner for the iPhone,⁴⁰ as follows:

- (a) AT&T to be the exclusive provider for iPhone cell phone service in the United States;
- (b) The duration of the exclusive agreement is to be five years until 2012;⁴¹
- (c) Apple is to receive a portion of AT&T’s profit;⁴²
- (d) iPhone consumers are to be prohibited from using a cell phone carrier⁴³ other than AT&T. The prohibition is achieved by the installation of software locks on the iPhone that prevents consumers from switching their cell phone service to a competitor’s network;
- (e) Apple is to be restrained for a period of time from developing a version of the iPhone for CDMA⁴⁴ wireless networks. (*Id.*)

³⁸ *Id.*, at p. 68476.

³⁹ *Id.*, at p. 68472.

⁴⁰ Apple, “Apple Chooses Cingular as Exclusive U.S. Carrier for Its Revolutionary iPhone,” January 9, 2007, <http://www.apple.com/pr/library/2007/01/09cingular.html> (accessed October 3, 2007).

⁴¹ Leslie Cauley, “AT&T eager to wield its iWeapon,” *fn. 22, supra*.

⁴² The.next.net, “Apple Takes Its Bite of iPhone Mobile Service Fees,” July 2007, <http://blogs.business2.com/business2blog/2007/07/apple-takes-its.html> (accessed October 3, 2007).

⁴³ For ease of reference, “cell phone carrier” has the same meaning as cellular network provider, wireless telephone communication network provider, and mobile telecommunications network provider.

⁴⁴ CDMA is an acronym for code division multiple access. CDMA allows many users to occupy the same time and frequency allocations in a given band or space. It is reported to consistently provide better capacity for voice and data communications than other commercial mobile technologies, allowing more subscribers to connect at any given time, and it is the common

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1 45. The restraint on Apple’s development of the iPhone for CDMA networks is
2 significant because AT&T’s rivals use CDMA technology. Verizon has a 26.3% market share and
3 is one of six U.S. carriers to use CDMA technology—the others being Sprint Nextel (23.6% market
4 share), Alltel, U.S. Cellular, Cricket, Midwest Wireless, and Metro PCS.⁴⁵ AT&T uses GSM—a
5 global standard incompatible with CDMA.

6 46. If an iPhone user consumer terminates their cell phone agreement after the 30 day
7 cancellation period, but before the expiration of their two-year service commitment, they will pay
8 AT&T an early termination fee of \$175 for *each* wireless telephone number associated with
9 the service.⁴⁶

10 47. The *USA Today* describes Apple’s agreement with AT&T as “an easy way to
11 handcuff rivals and steal customers.”⁴⁷

12 **2. Apple unveils the iPhone.**

13 48. On June 29, 2007, Apple released the iPhone, a “revolutionary and magical product
14 that is literally five years ahead of any other mobile phone,” said Steve Jobs, Apple’s CEO.⁴⁸

15 **3. The uniqueness of the iPhone.**

16 49. “The largest and most beautiful screen I’ve ever seen on a cell phone,” enthused *The*
17 *Wall Street Journal*.⁴⁹ The iPhone is unique because unlike traditional phones, there is no keypad.

18 It combines three of Apple’s multimedia products. Not only is it a phone, but it combines a

19
20 platform on which Third-Generation (3G) wireless data services are built. (CDMA Development
21 Group, “CDG: Technology: CDMA Technology.” <http://www.cdg.org/technology/index.asp>
(accessed October 1, 2007).

22 ⁴⁵ Wikipedia, “Verizon Wireless – Wikipedia, the free encyclopedia,” http://en.wikipedia.org/wiki/Verizon_wireless (accessed October 1, 2007).

23 ⁴⁶ AT&T, “Service Agreement – AT&T.” http://www.wireless.att.com/cell-phone-service/legal/service-agreement.jsp?q_termsKey=postpaidServiceAgreement&q_termsName=Service+Agreement (accessed October 1, 2007).

24 ⁴⁷ Leslie Cauley, “AT&T eager to wield its iWeapon,” *fn. 22, supra*.

25 ⁴⁸ Apple, “Apple Reinvents the Phone with iPhone,” January 9, 2007, <http://www.apple.com/pr/library/2007/01/09iphone.html> (accessed October 3, 2007).

26 ⁴⁹ Walter S. Mossberg, “BlackJack Beats Out Palm 750, but iPhone May Well Top Both,” *The*
27 *Wall Street Journal Online*, January 11, 2007, <http://online.wsj.com/article/SB116846792028973034.html?mod=mostpop> (accessed October 3, 2007).

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1 widescreen iPod with touch-screen technology, and a breakthrough Internet communications device
2 with desktop-class email, web browsing, maps, and searching—into one small handheld device.

3 **4. The desirability of the iPhone.**⁵⁰

4 50. In San Francisco, consumer David Lau has heard it all, and he does not care. He
5 wants his iPhone. “I have the gear lust that many people experience when the newest, coolest thing
6 comes out,” says Lau, 26, who works in real estate.⁵¹ “I work in an office by myself, and this device
7 gives me freedom. It could be my entire office anywhere I choose.” (*Id.*) His girlfriend just wants
8 him to stop talking about it. “For the past four weeks, I’ve heard nothing but iPhone talk from
9 David, his friends, my brother and, basically, any male between the ages of 13 and 40 within
10 earshot. It’s insane. I’d pay 500 bucks and sleep outside in line to just shut these guys up.” (*Id.*)

11 **5. Apple’s guerilla warfare tactics.**

12 51. Stan Sigman, CEO of wireless at AT&T, makes no apologies for his tough approach.
13 “I’m glad we have (the iPhone) in our bag,” he says. “Others will try to match it, but for a period of
14 time, they’re going to be playing catch-up.”⁵² “It’s guerrilla warfare,” says Jane Zweig, CEO of
15 market researcher The Shosteck Group. “They all want to say ‘We’re No. 1.’”⁵³ The *USA Today*
16 says that “carriers [are left] with one option, basically, for adding customers: steal them.”⁵⁴ Charles
17 Golvin, a wireless industry analyst at Forrester Research, says, “Today’s market is not about
18 finding new opportunities. It’s about stealing somebody else’s customers.” (*Id.*) The software locks
19 employed in the iPhone stifle competition by limiting consumers’ choice to one cell phone carrier.

20 **6. Verizon shuns Apple’s demand for control.**

21 52. Verizon passed on the opportunity to become Apple’s exclusive U.S. distributor,
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24 ⁵⁰ *Cf. Suburban Mobile Homes v. AMFAC Communities* (1980) 101 Cal.App.3d 532, 544—
25 market power may exist even though it falls short of market dominance and exists only with respect
26 to some buyers due to the *desirability* of that product to those buyers, or the *uniqueness* of its
27 attributes. (Emphasis added.)

28 ⁵¹ Jefferson Graham, “iPhone mania nears fever pitch,” *fn. 15, supra*.

⁵² *Id.*

⁵³ Leslie Cauley, “AT&T eager to wield its iWeapon,” *fn. 22, supra*.

⁵⁴ *Id.*

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1 balking at Apple’s demand for control over distribution, pricing, marketing and more.⁵⁵ Denny
2 Strigl, Verizon’s chief operating officer, decided to pass on the iPhone deal and says he has no
3 regrets: “Time will tell” if he made the right call, he says. (*Id.*)

4 **7. Consumers lawfully unlock their iPhones to switch cell phone carriers.**

5 53. In August 2007, consumers downloaded various software programs available on the
6 Internet that unlocked the iPhone. After it was unlocked, several hundred thousand consumers
7 switched their cell phone service to the carrier of their choice. Under a year 2006 exemption to the
8 federal Digital Millennium Copyright Act of 1998, discussed above, consumers had and still have
9 the express and lawful right to unlock their cell phones to switch to other cell phone carriers.

10 **8. Apple declares that unlocked iPhones void consumers’ warranties.**

11 54. On September 24, 2007, Apple issued a press release warning consumers that
12 unlocked iPhones violated Apple’s software license agreement and voided the warranty.⁵⁶

13 **9. Apple releases an update that “bricks” iPhones.**

14 55. On September 27, 2007, Apple punished consumers for exercising their rights to
15 unlock their iPhones.⁵⁷ Apple issued a software update to the iPhone—known as the iPhone
16 Software Version 1.1.1 update. The update “bricked”⁵⁸ or otherwise caused iPhone malfunctions to
17 consumers of unlocked iPhones. In response to consumers requests for help, a spokeswoman for
18 Apple said, “[let them] purchase a new iPhone.”⁵⁹

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21 ⁵⁵ *Id.*

22 ⁵⁶ PR News, “Apple today released the following statement,” September 24, 2007,
<http://www.prnewswire.com/cgi-bin/stories.pl?ACCT=109&STORY=/www/story/09-24-2007/0004668880> (accessed October 3, 2007).

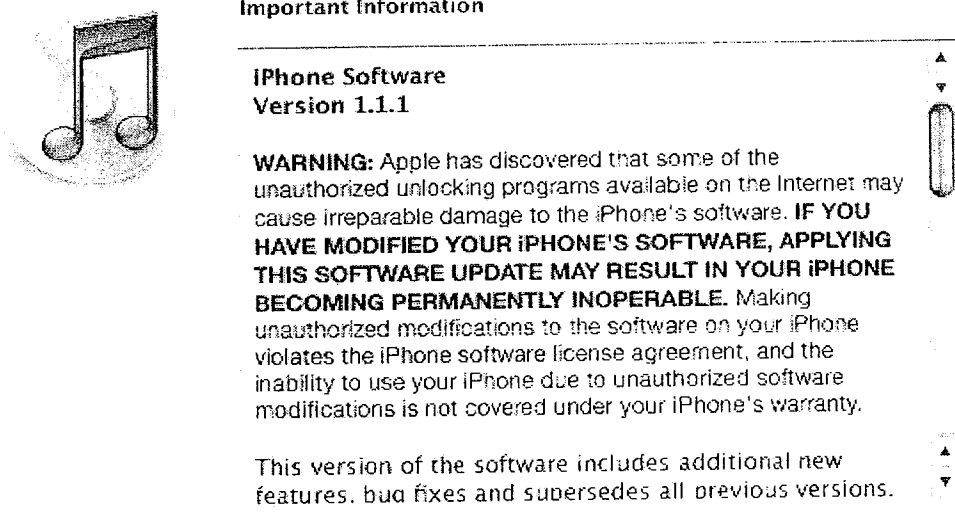
23 ⁵⁷ Cf. Apple’s 1984 television commercial that launched the Apple Macintosh computer. The
24 commercial alluded to the growing market share of the IBM PC which grew from a 8.57% market
25 share in 1982 to a 26.42% market share in 1983. The commercial played on the fears of IBM
26 domination, and, by the mid-90s, the PC’s market share was over 97%, although the International
27 Business Machines Corporation (IBM) eventually exited from the PC market. (Wikipedia, “1984
(television commercial) – Wikipedia, the free encyclopedia,” [http://en.wikipedia.org/wiki/1984_\(television_commercial\)](http://en.wikipedia.org/wiki/1984_(television_commercial))) (accessed October 3, 2007).

28 ⁵⁸ See fn. 3, *supra*.

⁵⁹ See fn. 4, *supra*.

1 56. Apple acted in defiance and without sufficient consideration of consumers' rights to
2 unlock their iPhones because it knew that the probable result of its update would be to render
3 unlocked iPhones inoperable. Although the update⁶⁰ itself warns that unlocking programs available
4 on the Internet may cause irreparable damage to the iPhone's software, and that if a user has
5 modified the iPhone's software, applying the software update "may result in your iPhone becoming
6 permanently inoperable," it appears that Apple took no steps to issue an update with unlocked
7 firmware or otherwise issue its update to prevent damage to unlocked iPhones.

8 57. A picture of the warning to the iPhone Software Version 1.1.1 update ("iPhone
9 Update") appears below.



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20 **11. A congressional subcommittee is critical of Apple's business model.**

21 58. On July 11, 2007, the U.S. Congress' Subcommittee on Telecommunications and the
22 Internet ("Subcommittee") held a hearing to examine the relationship between wireless consumers
23 and wireless service providers.⁶¹ The hearing, entitled "Wireless Innovation and Consumer
24

25
26 ⁶⁰ The iPhone Update can be downloaded at http://movies.apple.com/movies/us/apple/iphone/2007/itunes_store/iphone-itunesstore_848x480.zip (accessed October 3, 2007).

27 ⁶¹ Congressman Ed Markey's official Web site, "July 11, 2007 – MARKEY: Wireless
28 Innovation and Consumer Protection is Critical to Bright Wireless Future," U.S. Congress, House, Subcommittee on Telecommunications and the Internet, *Wireless Innovation and Consumer*

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1 Protection” took place a week after the much-anticipated release of the Apple iPhone.⁶²

2 59. During his opening statement congressman and chairman of the Subcommittee, Ed
3 Markey said:

4 The iPhone highlights both the promise and the problems with the
5 wireless industry today. On the one hand, it demonstrates the sheer
6 brilliance and wizardry of wireless engineering On the other hand,
7 the advent of the iPhone raises questions about the fact that a consumer
8 can’t use this phone with other wireless carriers, and that consumers in
9 some areas of the country where AT&T doesn’t provide service can’t
10 use it in some neighborhoods at all ... Moreover, even though
11 consumers must buy an iPhone for the full price for 500 or 600 dollars,
12 AT&T Wireless reportedly still charges an early termination fee of
13 apparently \$175 for ending the service contract early, even though the
14 phone cost wasn’t subsidized and a consumer can’t even take it to use
15 with another network provider. This highlights problems with the
16 current marketplace structure, where devices are provided by carriers,
17 portability of devices to other carriers is limited or non-existent, and
18 many consumers feel trapped having bought an expensive device or
19 having been locked into a long-term contract with significant penalties
20 for switching.

15 **FIRST CAUSE OF ACTION**

16 **For Violation of Section 16720**

17 **of the Cartwright Act (Unlawful Trusts)**

18 60. Plaintiff, on behalf of himself and all others similarly situated, realleges and
19 incorporates herein by reference each of the allegations contained in the preceding paragraphs of
20 this Complaint, and further alleges against Apple as follows:

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24 *Protection*, 110th Cong., 1st sess., July 11, 2007, http://markey.house.gov/index.php?option=com_content&task=view&id=2954&Itemid=141 (accessed October 1, 2007).

25 ⁶² As of October 4, 2007, the hearing transcript was not available. The printed hearing should be
26 available within 90–120 days (October 9 to November 8, 2007) of the conclusion of the July 11th
27 hearing. Committee on Energy and Commerce, “The House Committee on Energy and Commerce:
28 Hearing,” http://energycommerce.house.gov/cmte_mtgs/110-ti-hrg.071107.ConsumerProtection.shtml (accessed October 4, 2007).

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1 **1. The elements of a *per se* tying agreement under section 16720.**

2 61. Under section 16720, a *per se* tying arrangement is established if:

3 (1) a tying agreement, arrangement, or condition existed whereby the sale of the
4 tying product was linked to the sale of the tied product or service,

5 (2) the party had sufficient economic power in the tying market to coerce the
6 purchase of the tied product,

7 (3) a substantial amount of commerce was affected in the sale of the tied
8 product, and

9 (4) the complaining party sustained pecuniary loss as a consequence of the
10 unlawful act. (*Morrison v. Viacom* (1998) 66 C.A.4th 541; *Suburban Mobile Homes v. AMFAC*
11 *Communities* (1980) 101 Cal. App. 3d 532.)

12 **2. Apple's Agreement with AT&T is an unlawful trust because:**

13 **(1) Apple prohibits iPhone consumers from using or purchasing**
14 **a cell phone service other than through AT&T, and (2) the sale**
15 **of the iPhone—the tying product—is exclusively linked to the sale**
16 **of AT&T's cell phone service—the tied product.**

17 62. The sale of the iPhone (the tying product) is linked to the purchase of a two year
18 wireless service account with AT&T (the tied product).

19 63. Purchasers cannot easily obtain the tied product (cell phone services) from another
20 source because the iPhone is intentionally locked by Apple. Moreover, for those who manage to
21 unlock their iPhones, Apple has demonstrated that its software updates render iPhones
22 “permanently inoperable.” Downloading the iPhone Update was important for consumers because
23 the update addressed several security issues.⁶³

24 **3. Apple has sufficient economic power in the iPhone (the tying market)**
25 **to coerce the purchase of AT&T's cell phone service (the tied product).**

26 64. Apple has sufficient economic power in the tying market (the iPhone) to coerce the

27 ⁶³ Apple Inc., “About the Security Content of the iPhone 1.1.1 Update,” September 25, 2007,
28 <http://docs.info.apple.com/article.html?artnum=306586> (accessed October 3, 2007).

1 purchase of the tied product (AT&T's cell phone service) because it has a 100% market share of the
2 iPhone. Moreover, for some buyers, such as Plaintiff, the *desirability* of the iPhone and the
3 *uniqueness* of its attributes has created a frenzy for himself and throughout the world. Even as of
4 the third week of September 2007, New Yorkers have to wait 15 minutes in line to purchase an
5 iPhone at 3:00 in the morning.⁶⁴

6 **4. A substantial amount of commerce was and will continue to be affected**
7 **from the sale of AT&T's cell phone service together with the iPhone.**

8 65. As discussed in Relevant Market, AT&T's revenue from the iPhone to date is
9 estimated to be \$130.98 to \$654.98 million.

10 **5. Apple's unlawful trust with AT&T substantially lessens**
11 **competition and tends to create a monopoly in trade and commerce in**
12 **California and throughout the entire United States.**

13 66. Apple and AT&T entered into and engaged in a continuing unlawful trust in restraint
14 of the trade and commerce described in this Complaint in violation of section 16720 of the
15 California Business and Professions Code ("The Cartwright Act").

16 67. The Cartwright Act states in section 16726 that: "Except as provided in this chapter,
17 every trust is unlawful, against public policy and void." A trust is defined in section 16720
18 as follows:

19 A trust is a combination of capital, skill or acts by two or more persons
20 for any of the following purposes:

- 21 (a) To create or carry out restrictions in trade or commerce.
22 (b) To limit or reduce the production, or increase the price of
23 merchandise or of any commodity.
24 (c) To prevent competition in manufacturing, making,
25 transportation, sale or purchase of merchandise, produce or any
26 commodity.

27 ⁶⁴ Liz Gannes, "Midnight Madness: Benjamins for iPhones in Manhattan," *GigaOM*, September
28 26, 2007, <http://gigaom.com/2007/09/26/midnight-madness-benjamins-for-iphones-in-manhattan>
(accessed October 3, 2007).

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- (d) To fix at any standard or figure, whereby its price to the public or consumer shall be in any manner controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, barter, use or consumption in this State.
- (e) To make or enter into or execute or carry out any contracts, obligations, or agreements of any kind or description, by which they do all or any or any combination of the following:
 - (1) Bind themselves not to sell, dispose of or transport any article or any commodity or any article of trade, use, merchandise, commerce or consumption below a common standard figure, or fixed value;
 - (2) Agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure;
 - (3) Establish or settle the price of any article, commodity or transportation between them or themselves and others, so as directly or indirectly to preclude a free and unrestricted competition among themselves, or any purchasers or consumers in the sale or transportation of any such article or commodity;
 - (4) Agree to pool, combine or directly or indirectly unite any interests that they may have connected with the sale or transportation of any such article or commodity, that its price might in any manner be affected.

68. Beginning with its exclusive agreement with AT&T in January 2007, Apple has engaged in continuing trusts in restraint of trade and commerce, attempts to monopolize, conspiracies to monopolize and monopolization of the Relevant Market, in requiring consumers to purchase AT&T's cell phone service with the purchase of the iPhone, in violation of the Cartwright Act.

69. Apple's trusts have included concerted action and undertakings with AT&T with the purpose and effect of:

- (a) Allocating the California and the entire United States' market for iPhone cell phone service to AT&T;

1 (b) Permitting AT&T to maintain a monopoly over California and the entire
2 United States' market for iPhone cell phone service and charging supra-competitive prices for U.S.
3 cell phone service and roaming charges while travelling abroad;

4 (c) Precluding iPhone owners from unlocking their iPhones at the risk of voiding
5 their warranties; and

6 (d) Releasing the iPhone Update which damaged lawfully unlocked iPhones.

7 **6. Plaintiff has sustained pecuniary loss as a result of Apple's unlawful trust.**

8 70. As a direct and proximate result of Apple's combination and contract with AT&T to
9 restrain trade and monopolize the Relevant Market, Plaintiff and members of the Class have
10 suffered pecuniary loss and have been deprived of the benefits of free and fair competition on the
11 merits as follows:

12 (a) The amount of money to replace unlocked iPhones damaged by the
13 iPhone Update;

14 (b) The amount of overcharges, roaming charges, or amounts paid by members
15 of the Class for AT&T's cell phone service over and above the amounts they would have paid in a
16 competitive market unaffected by Apple's illegal acts as alleged herein;

17 (c) The amount of early termination fees paid by members of the Class from
18 canceling their previous cell phone service while transferring to an iPhone;

19 (d) The amount of third-party warranty plans paid by members of the Class as a
20 result of Apple's statement that it will not honor warranties on unlocked iPhones;

21 (e) The effect of Apple's conduct upon, and the injury caused to, the business or
22 property of the Plaintiff and the members of the Class.

23 71. Plaintiff, on behalf of himself and all others similarly situated, has been injured in
24 his property as a result of Apple's violation of section 16720 for which he seeks treble damages,
25 including pre-judgment interest, injunctive relief, and attorneys' fees and costs, pursuant to sections
26 16750(a) and 16761 of the California Business and Professions Code.

27 72. The violation of section 16720 consists, without limitation, of a continuing
28 combination, trust, agreement, understanding, and concert of action among Apple and AT&T,

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1 concerning the sale of the iPhone and AT&T's cell phone service in California and throughout the
2 entire United States.

3 73. For the purpose of forming and effectuating the aforesaid unlawful trust, Apple has
4 done those things they agreed, combined, and conspired to do, as described in this Complaint.

5 74. The unlawful trust had the following effects, among others:

6 (a) The market for cell phone service for the iPhone has been allocated to
7 AT&T, with a portion of AT&T monopoly profits being allocated to Apple in exchange for
8 AT&T's exclusivity;

9 (b) Plaintiff and class-members have been forced to pay supra-competitive prices
10 for U.S. cell phone service and roaming charges while travelling abroad;

11 (c) Other cell phone carriers have profited from early termination fees paid by
12 pre-iPhone, pre-AT&T consumers;

13 (d) Hundreds of thousands of iPhones are no longer operable or otherwise
14 disabled because of the iPhone Update;

15 (e) Consumers have refrained from purchasing iPhones because they do not
16 want to switch their cell phone carrier to AT&T;⁶⁵

17 (f) Competition in the sale of iPhones with multiple cell phone carriers has been
18 suppressed, restrained, and eliminated; and

19 (g) Prices of the iPhones purchased by Plaintiff and other members of the Class
20 have been raised, fixed, maintained, and stabilized at artificial and supra-competitive levels.⁶⁶

21 **7. Plaintiff and the Class members paid supra-competitive prices for the**
22 **iPhone and AT&T's cell phone service.**

23 75. During the period covered by this Complaint, Plaintiff and members of the Class
24

25 ⁶⁵ David Cassel, "Steve Jobs Addresses New AT&T/Iphone Controversy," *Tech.Blorge.com*,
26 June 28, 2007, <http://tech.blorge.com/Structure:%20/2007/06/28/steve-jobs-addresses-new-attiphone-controversy> (accessed October 3, 2007).

27 ⁶⁶ See generally, AP Associated Press, "Woman Sues Over Apple's iPhone Price Cut," October
28 1, 2007, http://ap.google.com/article/ALeqM5ihibMdRH06j7AlMkqA78PS3QJH_gD8S0NCOG1
(accessed October 3, 2007).

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1 purchased the iPhone directly from Apple. By reason of the alleged violations of antitrust laws,
2 Plaintiff and the other members of the Class paid more for the iPhone and AT&T's cell phone
3 service than they would have paid in the absence of the illegal trust and, as a result, have been
4 injured in their property and have suffered damages in an amount according to proof at trial.

5 76. Plaintiff and members of the Class are "persons" within the meaning of the
6 Cartwright Act as defined in section 16702.

7 77. The acts done by Apple as part of, and in furtherance of their contracts,
8 combinations or conspiracies, were authorized, ordered or done by their respective officers,
9 directors, agents, employers or representatives while actively engaged in the management of
10 Apple's affairs.

11 78. Apple's unlawful and anti-competitive contracts, combinations or conspiracies to
12 prevent competition in California and the entire United States' marketplace for cell phone carriers
13 other than AT&T, resulted in Plaintiff and the Class paying more than they would have paid for the
14 iPhone and cell phone service.

15 79. Apple's contracts, combinations and/or conspiracies are a *per se* violation of the
16 Cartwright Act.

17 80. As a result of Apple's unlawful and anti-competitive conduct, consumers continue to
18 pay artificially inflated prices for the iPhone and AT&T's cell phone service. These prices are
19 substantially greater than the prices that consumers would pay absent the illegal contracts,
20 combinations or conspiracies alleged herein. As a result, Plaintiff and the Class have sustained and
21 will continue to sustain substantial losses and damage to their property in the form of, among other
22 things, overcharges and the payment of supra-competitive prices for U.S. cell phone service and
23 roaming charges while travelling abroad.

24 81. Apple's trust and conspiracy with AT&T to monopolize the Relevant Market for the
25 iPhone, and actions to fix prices, violates the Cartwright Act. Accordingly, Plaintiff and members
26 of the Class seek three times their damages caused by Apple's violations of the Cartwright Act and
27 a permanent injunction enjoining Apple's continuing violations of the Cartwright Act.

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SECOND CAUSE OF ACTION
For Violation of Section 16727 of the
Cartwright Act (Unlawful Tying Agreement)

82. Plaintiff, on behalf of himself and all others similarly situated, realleges and incorporates herein by reference each of the allegations contained in the preceding paragraphs 1–58 of this Complaint, and further alleges against Apple as follows:

1. The elements of a *per se* tying agreement under section 16727.

83. Under section 16727, a *per se* tying arrangement is found if the following elements (1) and (4) are established along with either element (2) or (3):

(1) a tying agreement, arrangement, or condition existed whereby the sale of the tying product was linked to the sale of the tied product or service,

(2) the party had sufficient economic power in the tying market to coerce the purchase of the tied product,

(3) a substantial amount of commerce was affected in the sale of the tied product, and

(4) the complaining party sustained pecuniary loss as a consequence of the unlawful act. (*Morrison v. Viacom* (1998) 66 C.A.4th 541; *Suburban Mobile Homes v. AMFAC Communities* (1980) 101 Cal. App. 3d 532.)

2. Apple’s Agreement with AT&T is an unlawful tying agreement because: (1) Apple prohibits iPhone consumers from using or purchasing a cell phone service other than through AT&T, and (2) the sale of the iPhone—the tying product—is exclusively linked to the sale of AT&T’s cell phone service—the tied product.

84. Apple’s exclusivity Agreement with AT&T is an unlawful tying agreement because the sale of the iPhone—the tying product—is linked to the sale of AT&T’s cell phone service—the tied product.

85. Purchasers cannot easily obtain the tied product—cell phone service—from another source because the iPhone is intentionally locked by Apple to preclude consumers from switching cell phone carriers. Moreover, for those who manage to unlock their iPhones, Apple has

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1 demonstrated that its software updates render iPhones “permanently inoperable.”

2 **3. Apple has sufficient economic power in the iPhone (the tying**
3 **market) to coerce the purchase of AT&T’s cell phone service**
4 **(the tied product).**

5 86. Apple has sufficient economic power in the tying market (the iPhone market) to
6 coerce the purchase of the tied product (AT&T’s cell phone service) because Apple as a 100%
7 market share of the iPhone. Moreover, for some buyers, such as Plaintiff, the *desirability* of the
8 iPhone and the *uniqueness* of its attributes has created a frenzy throughout the world.⁶⁷

9 **4. A substantial amount of commerce was and will continue to be**
10 **affected from the sale of AT&T’s cell phone service together with**
11 **the iPhone.**

12 87. As discussed in “Relevant Market”, AT&T’s revenue from the iPhone to date is
13 estimated to be \$130.98 to \$654.98 million.

14 **5. Apple’s tying agreement with AT&T substantially lessens**
15 **competition and tends to create a monopoly in trade and commerce in**
16 **California and throughout the entire United States.**

17 88. Apple and AT&T entered into and engaged in a continuing unlawful tying
18 agreement in restraint of the trade and commerce described in this Complaint in violation of section
19 16727 of the California Business and Professions Code (“The Cartwright Act”).

20 89. The Cartwright Act states in section 16727 that:

21 It shall be unlawful for any person to lease or make a sale or
22 contract for the sale of goods, merchandise, machinery,
23 supplies, commodities for use within the State, or to fix a price
24 charged therefor, or discount from, or rebate upon, such price,
25 on the condition, agreement or understanding that the lessee or
26 purchaser thereof shall not use or deal in the goods,
27 merchandise, machinery, supplies, commodities, or services of
28 a competitor or competitors of the lessor or seller, where the

⁶⁷ Liz Gannes, “Midnight Madness: Benjamins for iPhones in Manhattan,” *fn. 62, supra*.
Jefferson Graham, “iPhone mania nears fever pitch,” *fn. 15, supra*.

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1 effect of such lease, sale, or contract for sale or such condition,
2 agreement or understanding may be to substantially lessen
3 competition or tend to create a monopoly in any line of trade or
4 commerce in any section of the State.

5 90. Beginning with its exclusive agreement with AT&T in January 2007, Apple has
6 engaged in a continuing tying agreement in restraint of trade and commerce, attempts to
7 monopolize, conspiracies to monopolize and monopolization of the Relevant Market, in linking the
8 purchase of the iPhone exclusively with AT&T's cell phone service, in violation of the
9 Cartwright Act.

10 91. Apple's tying agreement has included concerted action and undertakings with
11 AT&T with the purpose and effect of:

- 12 (a) Allocating the entire U.S. market for iPhone cell phone service to AT&T;
13 (b) Permitting AT&T to maintain a monopoly over the entire U.S. market for
14 iPhone cell phone service and charging supra-competitive prices for U.S. cell phone service and
15 roaming charges while travelling abroad;
16 (c) Precluding iPhone owners from unlocking their iPhones at the risk of voiding
17 their warranties; and
18 (d) Releasing the iPhone Update which damaged lawfully unlocked iPhones.

19 **6. Plaintiff has sustained pecuniary loss as a result of Apple's
20 unlawful tying agreement.**

21 92. As a direct and proximate result of Apple's combination and contract to restrain
22 trade and monopolize the Relevant Market, members of the Class have suffered pecuniary loss and
23 have been deprived of the benefits of free and fair competition on the merits as follows:

- 24 (a) The amount of money to replace unlocked iPhones damaged by the
25 iPhone Update;
26 (b) The amount of overcharges, roaming charges, or amounts paid by members
27 of the Class for AT&T's cell phone service over and above the amounts they would have paid in a
28 competitive market unaffected by Apple's illegal acts as alleged herein;
(c) The amount of early termination fees paid by members of the Class from

1 canceling their previous cell phone service while transferring to an iPhone;

2 (d) The amount of third-party warranty plans paid by members of the Class as a
3 result of Apple's statement that it will not honor warranties on unlocked iPhones;

4 (e) The effect of Apple's conduct upon, and the injury caused to, the business or
5 property of the Plaintiff and the members of the Class.

6 93. Plaintiff, on behalf of himself and all others similarly situated, has been injured in
7 his property as a result of Apple's violation of section 16727 for which he seeks treble damages,
8 including pre-judgment interest, injunctive relief, and attorneys' fees and costs, pursuant to sections
9 16750(a) and 16761 of the California Business and Professions Code.

10 94. The violation of section 16727 consists, without limitation, of a continuing
11 combination, trust, agreement, understanding, and concert of action among Apple and AT&T,
12 concerning the sale of the iPhone and AT&T's cell phone service in California and throughout the
13 entire United States.

14 95. For the purpose of forming and effectuating the aforesaid unlawful tying agreement,
15 Apple has done those things they agreed, combined, and conspired to do, as described in
16 this Complaint.

17 96. The unlawful tying agreement had the following effects, among others:

18 (a) The market for cell phone service for the iPhone has been allocated to
19 AT&T, with a portion of AT&T monopoly profits being allocated to Apple in exchange for
20 AT&T's exclusivity;

21 (b) Plaintiff and Class members have been forced to pay supra-competitive
22 prices for U.S. cell phone service and roaming charges while travelling abroad;

23 (c) Other cell phone carriers have profited from early termination fees paid by
24 pre-iPhone, pre-AT&T consumers;

25 (d) Hundreds of thousands of iPhones are no longer operable or otherwise
26 disabled because of the release of the iPhone Update;

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1 (e) Consumers have refrained from purchasing iPhones because they do not
2 want to switch their cell phone carrier to AT&T;⁶⁸

3 (f) Competition in the sale of iPhones with multiple cell phone carriers has been
4 suppressed, restrained, and eliminated; and

5 (g) Prices of the iPhones purchased by Plaintiff and other members of the Class
6 have been raised, fixed, maintained, and stabilized at artificial and supra-competitive levels.⁶⁹

7 **7. Plaintiff and the Class members paid supra-competitive prices for the**
8 **iPhone and AT&T's cell phone service.**

9 97. During the period covered by this Complaint, Plaintiff and members of the Class
10 purchased the iPhone directly from Apple. By reason of the alleged violations of antitrust laws,
11 Plaintiff and the other members of the Class paid more for the iPhone and the AT&T cell phone
12 service than they would have paid in the absence of the illegal trust and, as a result, have been
13 injured in their property and have suffered damages in an amount according to proof at trial.

14 98. Plaintiff and members of the Class are "persons" within the meaning of the
15 Cartwright Act as defined in section 16702.

16 99. The acts done by Apple as part of, and in furtherance of, their contracts,
17 combinations or conspiracies were authorized, ordered or done by their respective officers,
18 directors, agents, employers or representatives while actively engaged in the management of
19 Apple's affairs.

20 100. Apple's unlawful and anti-competitive contracts, combinations or conspiracies to
21 prevent competition in the California and the entire United States' marketplace for cell phone
22 carriers other than AT&T, resulted in Plaintiff and the Class paying more than they would have
23 paid for the iPhone and cell phone service.

24 101. Apple's contracts, combinations and/or conspiracies are a *per se* violation of the
25

26 _____
27 ⁶⁸ David Cassel, "Steve Jobs Addresses New AT&T/Iphone Controversy," *supra*, at *fn.* 63.

28 ⁶⁹ *See generally*, AP Associated Press, "Woman Sues Over Apple's iPhone Price Cut," *supra*
at *fn.* 64.

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1 Cartwright Act.

2 102. As a result of Apple's unlawful and anti-competitive conduct, consumers continue to
3 pay artificially inflated prices for the iPhone and AT&T's cell phone service. These prices are
4 substantially greater than the prices that consumers would pay absent the illegal contracts,
5 combinations or conspiracies alleged herein. As a result, Plaintiff and the Class have sustained and
6 will continue to sustain substantial losses and damage to their property in the form of, among other
7 things, overcharges and the payment of supra-competitive prices for U.S. cell phone service and
8 roaming charges while travelling abroad.

9 103. Apple's trust and conspiracy with AT&T to monopolize the Relevant Market for the
10 iPhone, and actions to fix prices violates the Cartwright Act. Accordingly, Plaintiff and members of
11 the Class seek three times their damages caused by Apple's violations of the Cartwright Act and a
12 permanent injunction enjoining Apple's continuing violations of the Cartwright Act.

13 **THIRD CAUSE OF ACTION**

14 **Unfair Competition in Violation of Section 17200**

15 104. Plaintiff, on behalf of himself and all others similarly situated, realleges and
16 incorporates herein by reference each of the allegations contained in the preceding paragraphs of
17 this Complaint, and further alleges against Apple as follows:

18 105. Apple's actions to restrain trade, monopolize the market for the iPhone, and fix
19 prices constitutes unfair competition and unlawful, unfair, and fraudulent business acts and
20 practices in violation of California Business and Professional Code sections 17200, *et seq.*

21 106. Apple's conduct in engaging in combinations of capital, skill, and acts with AT&T
22 with the intent, purpose, and effect of acquiring and perpetuating Apple and AT&T's monopoly,
23 creating and carrying out restrictions in trade and commerce, increasing or maintaining the price of
24 the iPhone and AT&T's cell phone service, and restraining trade and preventing competition in the
25 Relevant Market, constitutes and was intended to constitute unfair competition and unlawful,
26 unfair, and fraudulent business acts and practices within the meaning section 17200.

27 107. Apple also violated California's Unfair Competition Act by violating the
28 Cartwright Act.

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1 108. As a result of Apple's violations of Code section 17200, Apple has unjustly enriched
2 itself at the expense of Plaintiff and the Class members. The unjust enrichment continues to accrue
3 as the unlawful, unfair, and fraudulent business acts and practices continue.

4 109. To prevent their unjust enrichment, Apple should be required pursuant to Business
5 and Professions Code sections 17203 and 17204 to disgorge their illegal gains for the purpose of
6 making full restitution to all injured Class members identified hereinabove. Apple should also be
7 permanently enjoined from continuing their violations of section 17200.

8 110. The acts and business practices, as alleged herein, constituted and constitute a
9 common, continuous, and continuing course of conduct of unfair competition by means of unfair,
10 unlawful, and/or fraudulent business acts or practices within the meaning of section 17200, *et seq.*,
11 including, but in no way limited to, the following:

- 12 (a) violations of sections 16720 and 16727 as set forth above; and
- 13 (b) common law monopolization.

14 111. Apple's acts and business practices as described above, whether or not in violation
15 of sections 16720 and 16727, the Cartwright Act, or common law monopolization, are otherwise
16 unfair, unconscionable, unlawful, and fraudulent.

17 112. The illegal conduct alleged herein is continuing, and there is no indication that
18 Apple will refrain from such activity into the future.

19 113. Accordingly, Plaintiff, on behalf of himself and all others similarly situated, requests
20 the following classwide equitable relief:

- 21 (a) that a judicial determination and declaration be made of the rights of Plaintiff
22 and the Class members, and the corresponding responsibilities of Apple;
- 23 (b) that Apple be declared to be financially responsible for the costs and
24 expenses of a Court-approved notice-program by mail, Internet, broadcast media, and publication
25 designed to give immediate notification to Class members; and
- 26 (c) requiring disgorgement and/or imposing a constructive trust upon Apple's ill-
27 gotten gains, freezing Apple's assets, and/or requiring Apple to pay restitution to Plaintiff and to all
28 members of the Class of all funds acquired by means of any act or practice declared by this Court to

1 be an unlawful, unfair, or fraudulent, business practice, or to constitute unfair competition.

2 **FOURTH CAUSE OF ACTION**

3 **For Common Law Monopolization**

4 114. Plaintiff, on behalf of himself and all others similarly situated, realleges and
5 incorporates herein by reference each of the allegations contained in the preceding paragraphs of
6 this Complaint, and further alleges against Apple as follows:

7 115. Apple has engaged in predatory and anticompetitive conduct intentionally to obtain
8 and maintain monopoly power for Apple and AT&T in the Relevant Market in violation of
9 common law.

10 116. Apple has willfully acquired and maintained monopoly power, and Apple now has
11 100% of the California and the entire United States' markets for the iPhone.

12 117. Apple willfully acquired monopoly power and maintained it by suppressing the
13 competition in the iPhone and cell phone service for the iPhone through restrictive and exclusionary
14 conduct. Apple entered into an exclusive agreement with AT&T with the specific intent of
15 acquiring and maintaining monopoly power.

16 118. Plaintiff and the Class members, suffered injury in their property as a result of
17 Apple's monopoly power and anticompetitive conduct because Plaintiff and members of the Class
18 have been, and continue to be, forced to purchase the iPhone and AT&T's cell phone service at
19 inflated prices, rather than a less expensive alternative through other carriers.

20 119. Apple forced Plaintiff and the Class members to pay substantially more for the
21 iPhone and cell phone service than they would have paid in a competitive marketplace either for the
22 iPhone or for AT&T's cell phone service.

23 120. Plaintiff and the Class members are entitled to bring this action and to recover herein
24 compensatory damages, the cost of bringing suit, and reasonable attorneys' fees.

25 **PRAYER**

26 WHEREFORE, Plaintiff, on behalf of himself and all others similarly situated, prays that
27 this Court enter judgment on behalf of himself and the Class members, adjudging and
28 decreeing that:

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- 1 1. This action may be maintained as a class action under section 382 of the California
2 Code of Civil Procedure and/or section 1781 of the California Civil Code, and certifying Plaintiff as
3 representative of the Class and designating his counsel as counsel for the Class;
- 4 2. Apple has engaged in a trust, contract, combination, or conspiracy in violation of
5 California Business and Professions Code section 16750(a), and that Plaintiff and the members of
6 the Class have been damaged and injured in their property as a result of this violation;
- 7 3. The alleged combination and conspiracy be adjudged and decreed to be an
8 unreasonable restraint of trade in violation of the Cartwright Act, including sections 16720
9 and 16727;
- 10 4. Plaintiff and the members of the Class recover threefold the damages determined to
11 have been sustained by them as a result of Apple's conduct complained of herein as provided in
12 California Business and Professions Code section 16750(a), and that judgment be entered against
13 Apple for the amount so determined;
- 14 5. Apple's conduct constitutes unlawful, unfair, and/or fraudulent business practices
15 within the meaning of California's Unfair Competition Act, and California Business and
16 Professions Code sections 17200, *et seq.*;
- 17 6. Judgment be entered against Apple and in favor of Plaintiff and each member of the
18 Class, for restitution and disgorgement of ill-gotten gains as allowed by law and equity as
19 determined to have been sustained by them, together with the costs of suit, including reasonable
20 attorneys' fees'
- 21 7. Judgment be entered against Apple and in favor of Plaintiff and each member of the
22 class, for damages arising from Apple's monopolization of the Relevant Market as determined to
23 have been sustained by them, together with the costs of suit, including reasonable attorneys' fees;
- 24 8. For prejudgment and post-judgment interest;
- 25 9. For a permanent injunction precluding Apple from:
- 26 a. selling the iPhone with any software lock;
- 27 b. denying warranty service to users of unlocked iPhones;
- 28 c. requiring iPhone consumers to purchase their cell phone service through AT&T.

