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INC., CELLULAR TELEPHONE COMPANY d/b/a
AT&T WIRELESS SERVICES and BAY AREA
CELLULAR TELEPHONE COMPANY

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ALAMEDA

Coordination Proceeding
Special Title (Rule 1550(b))

JUDICIAL COUNCIL COORDINATION
PROCEEDING NO. 4332

In re:
CELLPHONE TERMINATION FEE
CASES

AT&T WIRELESS DEFENDANTS'
ANSWER AND AFFIRMATIVE
DEFENSES TO FOURTH AMENDED
CONSOLIDATED COMPLAINT
[HANDSET LOCKING]

This Document Relates to: *Meoli, et al.*
v. AT&T Wireless PCS, LLC, et al.

Department: 23
Judge: Hon. Winifred Smith



FILED
ALAMEDA COUNTY

DEC 24 2009

CLERK OF THE SUPERIOR COURT
By: [Signature]
Deputy

FAXED

1 Defendants New Cingular Wireless Services, LLC, f/k/a AT&T Wireless
2 Services, Inc., New Cingular Wireless PCS, LLC, f/k/a AT&T Wireless PCS, LLC,
3 Cellular Telephone Company d/b/a AT&T Wireless Services, and Bay Area Cellular
4 Telephone Company (collectively, "AWS") for themselves and themselves alone, hereby
5 answer the unverified Fourth Amended Complaint [Handset Locking] ("Complaint") of
6 plaintiffs Porsha Meoli, Leslie Armstrong, Sridhar Krishnan, Riley Clark, Steve Kozack,
7 Jennifer Preuss, Betty Jennings and Joseph Panganiban (collectively, "Plaintiffs") as
8 follows:

9 **GENERAL DENIAL**

10 Pursuant to Section 431.30(d) of the California Code of Civil Procedure,
11 AWS generally denies each and every allegation in the Complaint, and each purported
12 cause of action therein, including, without limitation, that Plaintiffs are entitled to any of
13 the relief requested, that AWS is liable for any alleged wrongful conduct or omission, and
14 that any alleged conduct or omissions of AWS, or any of its officers, directors,
15 employees or agents, caused any injury or damage to Plaintiffs in the manner or amount
16 alleged, or at all.

17 **AFFIRMATIVE DEFENSES**

18 AWS sets forth the following affirmative defenses to the Complaint. AWS
19 does not, by stating the matters set forth herein, allege or admit that it has the burden of
20 proof and/or persuasion with respect to any of these matters, and does not assume the
21 burden of proof or persuasion with respect to any matter as to which Plaintiffs have the
22 burden of proof or persuasion.

23 **FIRST AFFIRMATIVE DEFENSE**

24 **(Failure to State a Claim)**

25 1. The Complaint, and each cause of action and allegation therein, fails
26 to state facts sufficient to constitute a cause of action upon which relief can be granted.
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SECOND AFFIRMATIVE DEFENSE

(Federal Preemption)

2. Plaintiffs fail to state facts sufficient to constitute a cause of action created by or recognized under any California statute or regulation or under California common law, because the state-law causes of action alleged in the Complaint are preempted by federal law, including the Federal Communications Act and the orders and regulations of the Federal Communications Commission.

THIRD AFFIRMATIVE DEFENSE

(Primary Jurisdiction)

3. Plaintiffs' claims are barred, in whole or in part, by the doctrines of primary and/or exclusive regulatory agency jurisdiction.

FOURTH AFFIRMATIVE DEFENSE

(Lack of Standing)

4. Plaintiffs' claims are barred, in whole or in part, because Plaintiffs and/or members of the class lack standing to assert any or all of the causes of action alleged in the Complaint, and Plaintiffs lack standing to recover on behalf of the class they seek to represent or the general public.

FIFTH AFFIRMATIVE DEFENSE

(Statute of Limitations)

5. Plaintiffs' and/or class members' claims are barred, in whole or in part, by the applicable statutes of limitation, including, but not limited to, Cal. Bus. & Prof. Code § 17208, Cal. Code of Civil Procedure §§ 337, 338, 340, and 343 and Cal. Civil Code § 1783.

SIXTH AFFIRMATIVE DEFENSE

(Right to Arbitration)

6. Plaintiffs' and/or class members' claims are subject to valid agreements to arbitrate, and therefore are not properly brought in this Court, individually

1 or as a class or representative action.

2 **SEVENTH AFFIRMATIVE DEFENSE**

3 (Class Action Inappropriate)

4 7. Plaintiffs' claims are barred, in whole or in part, because this case is
5 not appropriate for class action treatment.

6 **EIGHTH AFFIRMATIVE DEFENSE**

7 (Not a Proper Representative)

8 8. Plaintiffs' claims are barred, in whole or in part, because Plaintiffs
9 are not proper representatives to bring this action on behalf of the class or the general
10 public.

11 **NINTH AFFIRMATIVE DEFENSE**

12 (Failure to Plead With Certainty and Particularity)

13 9. The allegations of the Complaint, and each purported cause of action
14 alleged in the Complaint, are not pleaded with sufficient particularity, are uncertain,
15 vague, ambiguous and unintelligible, and fail to meet applicable pleading requirements.

16 **TENTH AFFIRMATIVE DEFENSE**

17 (Business Justification)

18 10. Plaintiffs' claims are barred, in whole or in part, because the conduct
19 challenged by Plaintiffs was justified under the circumstances.

20 **ELEVENTH AFFIRMATIVE DEFENSE**

21 (Business Judgment/Lawful Practice)

22 11. Plaintiffs' claims are barred, in whole or in part, because the conduct
23 challenged by Plaintiffs constitutes a reasonable exercise of business judgment which is
24 not forbidden by law.

25 **TWELFTH AFFIRMATIVE DEFENSE**

26 (No Recovery for Alleged Events Outside California)

27 12. The Complaint is barred to the extent that any of the events alleged
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1 took place outside the State of California without any impact on California residents

2 **THIRTEENTH AFFIRMATIVE DEFENSE**

3 (Conduct Not "Unfair")

4 13. Plaintiffs' claims that AWS violated the "unfair" prong of Cal. Bus.
5 & Prof. Code §§ 17200, *et seq.*, fail because the utility of AWS's alleged conduct
6 outweighs any harm allegedly suffered by Plaintiffs and is otherwise not "unfair" under
7 the statutes, regulations, rules and/or policies to which Plaintiffs purport to tether those
8 claims.

9 **FOURTEENTH AFFIRMATIVE DEFENSE**

10 (Reasonably Available Alternative)

11 14. Plaintiffs' claims that AWS violated the "unfair" prong of Cal. Bus.
12 & Prof. Code §§ 17200, *et seq.*, fail because Plaintiffs had reasonably available
13 alternative sources of supply from which to purchase the allegedly non-offending
14 products.

15 **FIFTEENTH AFFIRMATIVE DEFENSE**

16 (No Deception of Consumers)

17 15. Plaintiffs' claims that AWS violated the "deceptive and fraudulent"
18 prong of Cal. Bus. & Prof. Code §§ 17200, *et seq.*, fail because AWS's alleged acts or
19 omissions were not likely to, and did not in fact, mislead Plaintiffs and/or members of the
20 class or the general public.

21 **SIXTEENTH AFFIRMATIVE DEFENSE**

22 (Customer Satisfaction)

23 16. Plaintiffs' claims that AWS violated the "deceptive and fraudulent"
24 prong of Cal. Bus. & Prof. Code §§ 17200, *et seq.*, fail because AWS's customers were
25 and are satisfied with AWS's products and services.

26 **SEVENTEENTH AFFIRMATIVE DEFENSE**

27 (No Reliance)

1 17. Plaintiffs' claims that Cingular violated Cal. Bus. & Prof. Code
2 §§ 17200, *et seq.* and the Consumer Legal Remedies Act ("CLRA") are barred, in whole
3 or in part, because Plaintiffs did not reasonably or justifiably rely on any alleged
4 representation or omission by AWS.

5 **EIGHTEENTH AFFIRMATIVE DEFENSE**

6 (No Monetary or Property Loss)

7 18. Plaintiffs' claims under Cal. Bus. & Prof. Code §§ 17200, *et seq.* are
8 barred because Plaintiffs have not sustained any loss of money or property.

9 **NINETEENTH AFFIRMATIVE DEFENSE**

10 (No Causation)

11 19. Plaintiffs' claims under Cal. Bus. & Prof. Code §§ 17200, *et seq.* are
12 barred because loss of money or property did not result from any acts or omissions of
13 AWS.

14 **TWENTIETH AFFIRMATIVE DEFENSE**

15 (No Duty)

16 20. Plaintiffs' claims are barred, in whole or in part, because AWS did
17 not owe Plaintiffs and/or members of the class any of the duties alleged in the Complaint.

18 **TWENTY-FIRST AFFIRMATIVE DEFENSE**

19 (CLRA Procedural Defects)

20 21. Plaintiffs' claims for alleged violations of the Consumer Legal
21 Remedies Act ("CLRA") are barred because Plaintiffs have failed to satisfy the
22 procedural prerequisites to bring a claim under the CLRA by, among other things, failing
23 to file an affidavit stating facts showing that the action has been commenced in a proper
24 place, as required under Cal. Civil Code § 1780(c).

25 **TWENTY-SECOND AFFIRMATIVE DEFENSE**

26 (Alleged Injuries Caused By Others)

27 22. To the extent Plaintiffs or any member of the general public or any
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1 class has suffered any injury or damage, which AWS denies, such injuries or damages
2 were caused by the actions or conduct of others, and specifically not by AWS.

3 **TWENTY-THIRD AFFIRMATIVE DEFENSE**

4 **(Intervening Acts of Others)**

5 23. AWS is informed and believes and on that basis alleges that the
6 harms alleged in Plaintiffs' Complaint, if proved, were caused by persons and entities
7 other than AWS, including but not limited to various unidentified intermediaries involved
8 in each individual transaction at issue in this lawsuit. Such intervening and superseding
9 conduct of others bars and/or diminishes the recovery, if any, by Plaintiffs against AWS.

10 **TWENTY-FOURTH AFFIRMATIVE DEFENSE**

11 **(Set Off)**

12 24. To the extent any of Plaintiffs' claims have merit, which AWS
13 denies, Plaintiffs' recovery must be reduced or set off by any restitutionary or other
14 monetary relief that AWS is entitled to recover from each Plaintiff and/or class member.
15 AWS is entitled to offset and recoup against any judgment that may be entered for
16 Plaintiffs for all obligations owing by Plaintiffs and/or class members to AWS, including
17 but not limited to any unpaid account balances and/or any damages incurred in
18 connection with any termination of contracts between AWS and Plaintiffs and/or any
19 member of the class.

20 **TWENTY-FIFTH AFFIRMATIVE DEFENSE**

21 **(Benefits Realized)**

22 25. Plaintiffs have enjoyed the benefits of the products which are the
23 subject of the Complaint, and is thereby barred from pursuing one or more of the claims
24 for relief set forth in the Complaint.

25 **TWENTY-SIXTH AFFIRMATIVE DEFENSE**

26 **(Laches)**

27 26. Plaintiffs have unreasonably delayed in bringing this action to the
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1 prejudice of AWS, and thus their right to recover against AWS, if any, is barred by the
2 doctrine of laches.

3 **TWENTY-SEVENTH AFFIRMATIVE DEFENSE**

4 (Estoppel)

5 27. By their conduct, Plaintiffs are estopped from asserting any right to
6 recover on the causes of action alleged in the Complaint.

7 **TWENTY-EIGHTH AFFIRMATIVE DEFENSE**

8 (Unclean Hands)

9 28. Plaintiffs' claims, if any, are barred, in whole or in part, by the
10 doctrine of unclean hands.

11 **TWENTY-NINTH AFFIRMATIVE DEFENSE**

12 (Waiver and Release)

13 29. Plaintiffs' claims are barred, in whole or in part, because those
14 whom Plaintiffs purport to represent have released or waived, in whole or in part, some
15 or all of the claims asserted in the Complaint.

16 **THIRTIETH AFFIRMATIVE DEFENSE**

17 (Acquiescence)

18 30. Plaintiffs' claims, if any, are barred, in whole or in part, by the
19 equitable doctrine of acquiescence.

20 **THIRTY-FIRST AFFIRMATIVE DEFENSE**

21 (Ratification/Consent)

22 31. Plaintiffs' claims are barred, in whole or in part, because those
23 whom Plaintiffs purport to represent consented to and approved all the acts and omissions
24 about which they now complain. In addition to other manifestations of consent, they
25 agreed to be bound by the terms and conditions of AWS's Service Agreements when they
26 utilized the services provided by AWS.

1 **THIRTY-SECOND AFFIRMATIVE DEFENSE**

2 **(Uncertain/Unmanageable Damages)**

3 32. Plaintiffs' claims, if any, are barred, in whole or in part, because
4 Plaintiffs' requested monetary relief is too speculative and/or too remote and/or
5 impossible to prove and/or allocate.

6 **THIRTY-THIRD AFFIRMATIVE DEFENSE**

7 **(Failure to Mitigate)**

8 33. To the extent Plaintiffs or any member of the class or the general
9 public claims that they suffered any injury or damages, which AWS denies, their claims
10 are barred, in whole or in part, because they failed to mitigate their damages, if any.

11 **THIRTY-FOURTH AFFIRMATIVE DEFENSE**

12 **(Indemnity)**

13 34. AWS is entitled to full or partial indemnity from such other parties
14 as are found to have proximately caused the injuries alleged by Plaintiffs, if any exist,
15 which AWS denies, from anyone who expressly or impliedly agreed to indemnify and
16 hold harmless AWS from damages or liabilities such as those claimed by Plaintiffs.

17 **THIRTY-FIFTH AFFIRMATIVE DEFENSE**

18 **(Unjust Enrichment)**

19 35. Any award to Plaintiffs in this action would constitute unjust
20 enrichment.

21 **THIRTY-SIXTH AFFIRMATIVE DEFENSE**

22 **(Adequate Remedy At Law)**

23 36. Plaintiffs are not entitled to any equitable relief because they have
24 adequate remedies at law, and no threat of harm exists to support a grant of injunctive
25 relief.

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THIRTY-SEVENTH AFFIRMATIVE DEFENSE

(No Restitution or Disgorgement)

37. To the extent Plaintiffs or any member of the class or the general public claims that they suffered any injury or damage, which AWS denies, they are not entitled to restitution or disgorgement of profits under Cal. Bus. & Prof. Code §§ 17200, *et seq.*

THIRTY-EIGHTH AFFIRMATIVE DEFENSE

(Plaintiffs' Claims Unconstitutional)

38. Plaintiffs' claims are barred, in whole or in part, because they are in contravention of AWS's rights under applicable clauses of the United States and California Constitutions, including without limitation, the following provisions: (a) said claims constitute an impermissible burden on interstate commerce in violation of Article I, Section 8 of the United States Constitution; (b) said claims violate the Excessive Fines Clause of the Eighth Amendment to the United States Constitution; (c) said claims violate AWS's right to Due Process under the Fourteenth Amendment to the United States Constitution and under the California Constitution; (d) said claims contravene the constitutional prohibition against vague and overbroad laws; (e) said claims reflect an unlawful delegation of prosecutorial power to private parties in violation of Article II of the United States Constitution, the separation of powers doctrine, and the provisions of Article V of the California Constitution; and (f) an award on said claims would work an unlawful taking of property in violation of the Fifth and Fourteenth Amendments of the United States Constitution and Article I, Section 19 of the California Constitution.

THIRTY-NINTH AFFIRMATIVE DEFENSE

(Restitution Unconstitutional)

39. Any award of restitution under Cal. Bus. & Prof. Code § 17203 would (a) violate the Excessive Fines Clauses of the Eighth Amendment to the United States Constitution (as incorporated by the Due Process Clause of the Fourteenth

1 Amendment to the United States Constitution) and of Article I, Section 17 of the
2 California Constitution; (b) violate the Due Process Clauses of the Fourteenth
3 Amendment to the United States Constitution, and of Article I, section 7 of the California
4 Constitution, because the standards of liability under these statutes are unduly vague and
5 subjective, and permit retroactive, random, arbitrary, and capricious punishment that
6 serves no legitimate governmental interest; and (c) constitute a taking of property without
7 just compensation in violation of the Takings Clauses of the Fifth Amendment of the
8 United States Constitution (as incorporated by the Due Process Clause of the Fourteenth
9 Amendment to the United States Constitution) and of Article I, Section 19 of the
10 California Constitution.

11 **FORTIETH AFFIRMATIVE DEFENSE**

12 (Award of Damages to Those Who Will Not Acknowledge
13 Full Settlement of Claims Unconstitutional)

14 40. Any award of damages, restitution or disgorgement under the
15 California Business & Professions Code or the California Civil Code to persons who
16 refuse to execute an acknowledgment that the payment is in full settlement of claims
17 against AWS would violate the Due Process Clauses of the United States and California
18 Constitutions and the Excessive Fines Clause of the California Constitution.

19 **FORTY-FIRST AFFIRMATIVE DEFENSE**

20 (Accord and Satisfaction)

21 41. Plaintiffs and/or one or more of the class members have received and
22 accepted full satisfaction of their claims, if any.

23 **FORTY-SECOND AFFIRMATIVE DEFENSE**

24 (Novation)

25 42. Plaintiffs' and/or one or more of the class members' recovery
26 against AWS is barred by the doctrine of novation.

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FORTY-THIRD AFFIRMATIVE DEFENSE

(Mootness)

43. The claims of Plaintiffs and/or one or more of the class members are barred by the doctrine of mootness.

FORTY-FOURTH AFFIRMATIVE DEFENSE

(Notice of Grievance Requirement)

44. AWS is informed and believes, and on that basis alleges, that Plaintiffs' claims for damages are barred by the applicable notice of grievance submittal deadlines contained in the Service Agreements between Plaintiffs and AWS.

FORTY-FIFTH AFFIRMATIVE DEFENSE

(AT&T Corporation Not a Proper Defendant)

45. Defendant AT&T Corporation is not a proper defendant in this action. At all times relevant hereto, AT&T Corporation was not engaged in the business of providing wireless telephone service or related products and services to the public in California.

FORTY-SIXTH AFFIRMATIVE DEFENSE

(Reservation of Rights)

46. AWS does not currently have complete knowledge or information on which to form a belief as to whether it may have additional, as yet unstated, defenses or counterclaims available. AWS expressly reserves its right to assert additional affirmative defenses or counterclaims which come to light as the action progresses.

PRAYER

WHEREFORE, AWS prays for judgment as follows:

- 1. That the Complaint be dismissed with prejudice and judgment be entered in favor of AWS;
- 2. That Plaintiffs, any class member and/or the general public take

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nothing by the Complaint;

3. That AWS be awarded its costs of suit and attorneys' fees as permitted by law; and

4. That AWS be awarded such other and further relief as the Court deems just and proper.

DATED: December 24, 2009. DRINKER BIDDLE & REATH LLP

By: 
Michael J. Stortz

Attorneys for Defendants
NEW CINGULAR WIRELESS PCS, LLC, f/k/a
AT&T WIRELESS PCS, LLC, NEW CINGULAR
WIRELESS SERVICES, INC., f/k/a AT&T
WIRELESS SERVICES, INC., CELLULAR
TELEPHONE COMPANY d/b/a AT&T WIRELESS
SERVICES and BAY AREA CELLULAR
TELEPHONE COMPANY

1 PROOF OF SERVICE

2 I, MICHELLE SMITH declare that:

3 I am at least 18 years of age, and not a party to the above-entitled action. My
4 business address is 50 Fremont Street, 20th Floor, San Francisco, California 94105,
Telephone: (415) 591-7500.

5 On December 24, 2009, I caused to be served the following document(s):

6
7 **AT&T WIRELESS DEFENDANTS' ANSWER AND AFFIRMATIVE DEFENSES TO
FOURTH AMENDED CONSOLIDATED COMPLAINT [HANDSET LOCKING]**

8
9 by enclosing a true copy of (each of) said document(s) in (an) envelope(s), addressed as
follows:

10
11 BY MAIL: I am readily familiar with the business' practice for collection and
12 processing of correspondence for mailing with the United States Postal Service. I
13 know that the correspondence is deposited with the United States Postal Service on
14 the same day this declaration was executed in the ordinary course of business. I
know that the envelope was sealed, and with postage thereon fully prepaid, placed
for collection and mailing on this date, following ordinary business practices, in the
United States mail at San Francisco, California.

15 BY FEDERAL EXPRESS: by placing the document(s) listed above in a sealed
16 Federal Express envelope and affixing a pre-paid air bill, and causing the envelope
to be delivered to a Federal Express Delivery Service agent for delivery.

17 BY E-MAIL: I caused such documents to be transmitted by e-mail to the following
18 e-mail addresses as set forth on the attached service list.

19 **Please See Attached Service List*

20 I declare under penalty of perjury under the laws of the State of California that the
21 above is true and correct. Executed on December 24, 2009, at San Francisco, California.

22 
MICHELLE SMITH

EARLY TERMINATION FEE CASES

Alameda Superior Court – JCCP 4332

Early Termination Fee Cases

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<p>Harvey Rosenfield (123082) Pamela Pressley (180362) The Foundation For Taxpayer And Consumer Rights 1750 Ocean Park Blvd., Suite 200 Santa Monica, CA 90405 Tel: (310) 392-0522 Fax: (310) 392-8874 harvey@consumerwatchdog.org pam@consumerwatchdog.org</p>	