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

In re:

CELLPHONE TERMINATION FEE CASES

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

Handset Locking and Related Claims Against
AT&T Wireless, *et al.*

FILED BY FAX
ALAMEDA COUNTY

November 20, 2008

CLERK OF
THE SUPERIOR COURT
By Rosanne Case, Deputy

CASE NUMBER:
JCCP004332

JCCP No. 4332

Class Action

**FOURTH AMENDED COMPLAINT
[HANDSET LOCKING]**

JURY TRIAL DEMANDED

1 Plaintiffs, by their attorneys, make the following allegations based upon information and
2 belief, except as to allegations specifically pertaining to themselves and their counsel, which are
3 based on personal knowledge.

4 NATURE OF THE ACTION

5 1. This is a class and private attorney general action lawsuit filed to redress an unfair
6 and wrongful practice inflicted by defendants on California consumers: the secret locking of cell
7 phone handsets to make it impossible or impracticable for customers to switch cell phone service
8 providers without purchasing a new handset.

9 2. Plaintiffs seek relief in this action individually, as private attorney generals on
10 behalf of the general public and as a class action on behalf of all California residents who have
11 purchased handsets from defendants, or any of them, which have been secretly programmed with
12 SOC locks, band order locks, or SIM locks (all as described more fully below). Plaintiffs contend
13 that the practice of secretly programming handsets with SOC locks, band order locks, or SIM locks
14 is an unfair business practice which has no legitimate justification and which substantially harms
15 consumers. Plaintiffs further allege that defendants have a duty to disclose that they have locked a
16 handset before selling it to a consumer, and to disclose a handsets locking code in connection with
17 the sale of a handset, and that their failure to do so is a fraudulent and deceptive business practice.

18 PARTIES

19 3. Defendant AT&T Wireless PCS, LLC is a Delaware limited liability company with
20 its principal place of business in Washington, D.C.

21 4. Defendant AT&T Corporation is a Delaware corporation with its principal place of
22 business in Bedminster, New Jersey.

23 5.. Defendant Cellular Telephone Company d/b/a AT&T Wireless Services is a
24 Pennsylvania corporation or other type of business entity with its principal place of business in
25 Redmond, Washington.

26 6. Defendant AT&T Wireless Services Inc. is a Delaware corporation with its principal
27 place of business in New York. Defendant Bay Area Cellular Telephone Company is a company
28 with its principal place of business in Washington, D.C.

1 7. Defendants AT&T Wireless PCS, LLC, Cellular Telephone Company d/b/a AT&T
2 Wireless Services and AT&T Wireless Services Inc. are and at all times relevant hereto have been
3 engaged in the business of providing cell phone service and related products and services to the
4 public in California and in other states. They are hereinafter collectively referred to as "AT&T" or
5 "AT&T Wireless."

6 8. The true names and capacities, whether individual, corporate, associate or
7 otherwise, of defendants Does 1 through 100, inclusive, are unknown to plaintiffs, who therefore
8 sue said defendants by such fictitious names. Plaintiffs are informed and believe and thereon
9 allege that each of the defendants designated herein as a Doe is legally responsible in some manner
10 for the events and happenings herein referred to and caused, or is responsible in some proportion
11 for, the damages sustained by plaintiffs herein. Plaintiffs may seek leave to amend this complaint
12 to show the true names, capacities, actions and responsibilities of said defendants so fictitiously
13 named whenever the same shall have been ascertained. At that time, plaintiffs will seek leave to
14 include appropriate charging allegations as to said defendants.

15 9. Plaintiff Porsha Meoli ("Meoli") is a resident of Los Angeles, California. In or
16 about 2002, she entered into a 12-month service contract to receive cell phone service from AT&T
17 Wireless. Meoli also purchased from AT&T Wireless an Ericsson T60LX cell phone that
18 incorporates a SOC lock and a band order lock, as defined below. Meoli continues to be a
19 subscriber to AT&T's Digital Advantage calling plan and continues to use the said Ericsson cell
20 phone and AT&T Wireless service for personal, family or household purposes.

21 10. Plaintiff Leslie Armstrong ("Armstrong") is a resident of Contra Costa County,
22 California. Armstrong entered into a two-year agreement for wireless services with AT&T
23 Wireless on April 13, 2002. Those agreements, individually and/or collectively, provided, *inter*
24 *alia*, that Armstrong would be a subscriber to AT&T's Digital Advantage calling plan, at a base
25 rate of \$39.99 per month, for a two-year period. The equipment activated at the time Armstrong
26 signed the agreement was an Ericsson R300LX cell phone, which contains a SOC lock and a band
27 order lock, as defined below. Armstrong continues to be a subscriber to AT&T's Digital
28

1 Advantage calling plan and continues to use her Ericsson cell phone and AT&T Wireless service
2 for personal, family or household purposes.

3 11. Plaintiff Sridhar Krishnan ("Krishnan") is a resident of Alameda County, California.
4 Krishnan was a subscriber to AT&T Wireless service prior to January, 2003. While an AT&T
5 Wireless subscriber, Krishnan used several cell phones which he purchased from AT&T Wireless,
6 including most recently a Nokia 8260 cell phone, which contained SOC and band order locks, as
7 defined below. Krishnan used the cell phones and the AT&T Wireless service for, among other
8 reasons, personal, family or household purposes. After Krishnan terminated his AT&T Wireless
9 service on or about January 7, 2003, he purchased cell phone service from one of the competitors
10 of AT&T Wireless, but found that as a result of the SOC and band order locks programmed into his
11 Nokia 8260 cell phone, he was unable to use that cell phone with any carrier other than AT&T
12 Wireless. Plaintiffs Riley Clark, Steve Kozack, Jennifer Preuss, Betty Jennings and Joseph
13 Panganiban are residents of the State of California who were subscribers to cellphone service with
14 AT&T Wireless, and who purchased locked handsets from AT&T Wireless after March 12, 1999
15 and prior to the date on which AT&T Wireless merged with Cingular Wireless in 2004.

16 12. Plaintiff Foundation for Taxpayer and Consumer Rights ("FTCR") is a nationally
17 recognized, California-based non-profit education and advocacy group organized under section
18 501(c)(3) of the Internal Revenue Code. Founded in 1985, FTCR employs teams of public-interest
19 lawyers, policy experts, strategists, public educators and grassroots activists to advance and protect
20 the interests of consumers and taxpayers. Since its inception, FTCR has been particularly involved
21 in representing the interests of utility ratepayers in California in matters before the Legislature, the
22 courts and state agencies. FTCR sues in a representative capacity on behalf of the general public.

23 13. At all relevant times alleged in this matter, each defendant acted in concert with,
24 with the knowledge and approval of and/or as the agent of the other defendants within the course
25 and scope of the agency, regarding the acts and omissions alleged.
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JURISDICTION, VENUE AND APPLICABLE LAW

14. Defendants conduct substantial business in the State of California.

15. The allegations and claims for relief herein arise from acts committed in this state and elsewhere within the United States which violate California law. Because enforcement of consumer protection statutes and common law prohibitions are within this State's lawful authority, the relief and adjudication of claims which plaintiffs seek are within the jurisdiction of this Court.

16. Venue is proper in this Court. Defendants do business in this county and have entered into contracts with plaintiffs Krishnan and Armstrong and members of the plaintiff class and the general public that are to be performed in part in this County. A substantial number of the acts complained of herein took place in Alameda County. In addition, plaintiff Krishnan resides, and at all times relevant hereto has resided, in this County.

17. Plaintiffs state, and intend to state, causes of action solely under the laws of the State of California and specifically deny any attempt to state a cause of action under the laws of the United States of America. Furthermore, the claims of plaintiffs and the members of the plaintiff class assert no federal question or statute, and plaintiffs' state law causes of action are not federally pre-empted. The individual claims of Plaintiffs and the other members of the class do not exceed \$75,000.

AT&T'S HANDSET LOCKING PRACTICES

18. AT&T Wireless does not manufacture handsets. It purchases handsets from equipment vendors such as Nokia, Ericsson and Samsung. It then resells those handsets to AT&T Wireless subscribers. These handsets are referred to herein as "AT&T handsets."

19. Cellular telephone handsets, including those sold by AT&T Wireless, are manufactured to industry standards so that they can be used to obtain service from many different carriers – for example, when "roaming" off the original carrier's network. This allows the original carrier to enter into network-sharing or roaming agreements with other carriers, and thereby expand coverage and generate more service revenues.

20. An AT&T handset can operate on another carrier's network without any alteration or enhancement to the handset. Just as an FM radio is capable of receiving all stations in the FM

1 band, AT&T handsets, as sold, are capable of sending and receiving signals on all cellular or PCS
2 bands in use in the United States.

3 21. AT&T Wireless and other cellular/PCS carriers are members of industry standard
4 setting bodies such as the Cellular Telephone & Internet Association ("CTIA"), GSM Association,
5 and other industry groups. Through CTIA and other standard setting organizations, AT&T
6 Wireless conspired with other cellular/PCS carriers and equipment manufacturers to develop locks
7 for cellular/PCS handsets. AT&T Wireless also conspired with other wireless carriers and
8 equipment manufacturers, *inter alia*, through the CTIA Certification Program, which was designed
9 to certify that cellular/PCS handsets meet the specifications required for the carriers to program and
10 lock them for use on their respective networks.

11 22. AT&T Wireless provides cellular/PCS service using one of two digital signaling
12 technologies: Global System for Mobile communications (GSM) or Time Division Multiple
13 Access (TDMA).

14 23. AT&T's GSM handsets utilize SIM (subscriber information module) cards. A SIM
15 card is a wafer-thin card measuring approximately 7/8-inch by 5/8-inch that stores computer-
16 readable information. The subscriber's identifying information is written onto the SIM card, which
17 is read by the handset and transmitted to the carrier's network. A handset employing a SIM card
18 has a receptacle into which the card can be placed, typically behind the handset battery.

19 24. It is relatively easy to move a SIM card from handset to handset. No tools or
20 equipment are required. Anyone can simply use his or her fingers to slide the SIM card out of one
21 handset and into another.

22 25. AT&T Wireless requires equipment vendors to alter GSM handsets sold to AT&T
23 by locking them with SIM locks and by setting the SIM Unlock Code based on a secret algorithm
24 provided by AT&T Wireless. AT&T Wireless also requires its GSM equipment vendors to
25 transmit those SIM Unlock Codes to AT&T Wireless. AT&T Wireless does not consider a
26 shipment of GSM handsets complete, and will not make payment to an equipment vendor, until
27 AT&T Wireless receives the SIM Unlock Codes.
28

1 26. The SIM locks employed by AT&T Wireless prevent GSM handsets from operating
2 if a SIM card from another cellular/PCS carrier is inserted into the handset. This effectively
3 prevents the activation of the handset on the facilities of any carrier other than AT&T Wireless
4 unless the phone is unlocked.

5 27. SIM locks cannot be unlocked without a secret code provided by the carrier, or
6 special equipment and expertise which ordinary consumers typically lack. However, with
7 appropriate equipment and expertise or with knowledge of the unlocking codes, it takes only a few
8 minutes to enter the SIM Unlock Code through the handset keypad and reprogram the handset for
9 use on another network, thus restoring the handset's ability to be activated on another network.
10 Indeed, a SIM Unlock Code can be entered to unlock a handset in less time than it takes to dial a
11 long distance phone number, since it contains fewer digits – eight digits for a SIM Unlock Code
12 compared to ten for a phone number (with area code).

13 28. The TDMA phones marketed by AT&T are programmed with System Operator
14 Code (“SOC”) locks and/or band order locks.

15 29. A system operator code is a 3- or 4-digit number assigned to a cellular/PCS carrier.
16 For example, the International SOC code for AT&T Wireless is 801 (hex), 2049 (decimal). The
17 SOC code programmed into the handset must match the code of the carrier providing service.
18 However, when these handsets are locked, the SOC code cannot be changed. This SOC lock
19 effectively ensures that handsets programmed by AT&T Wireless cannot be reprogrammed for
20 activation on a rival carrier's network.

21 30. A SOC lock cannot be unlocked without a secret code provided by the carrier, or
22 special equipment and expertise which ordinary consumers typically lack.

23 31. A band order lock restricts the frequencies or channels on which handsets will
24 operate. AT&T employs band order locks in conjunction with SOC locks.

25 32. Cellular/PCS services operate on the 800 MHz band or the 1900 MHz band. The
26 800 MHz band contains two channel sets: Block “A” and Block “B”. The 1900 MHz band
27 contains six channel sets: Blocks “A” through “F”. Each carrier typically operates on only one or
28 two such blocks within a given geographic area. While cellular/PCS handsets are generally

1 capable of operating across the entire range of frequencies allocated for cellular/PCS services --
2 i.e., the entire 800 MHz band and the entire 1900 MHz band -- each carrier is licensed to operate
3 only on certain restricted channel sets, or blocks, within those bands.

4 33. AT&T TDMA handsets are designed to be compatible with the channels and
5 networks of many carriers, and they are manufactured in such a way that band-order settings are
6 reprogrammable. A band order lock employs software to restrict handsets to AT&T's channel
7 blocks and combat the reprogrammability of the handsets, which reinforces the limitations imposed
8 by the SOC locks.

9 34. A band order lock cannot be unlocked without a secret code provided by the carrier,
10 or special equipment and expertise which ordinary consumers typically lack.

11 35. AT&T Wireless markets handsets which it secretly programs with SIM locks, SOC
12 locks and/or band order locks. AT&T Wireless does not disclose to consumers that the handsets it
13 sells and distributes are disabled with SIM locks, SOC locks and/or band order locks.

14 MISREPRESENTATIONS

15 36. AT&T Wireless makes representations that are materially false, misleading, and
16 likely to deceive a reasonable consumer and have directly caused economic injury in fact to
17 Plaintiffs and the members of the class, and to their money and property. These include (i) the
18 statement in AT&T Wireless' form subscriber agreement stating the subscriber's phone "may
19 contain pre-installed software necessary to use [AT&T Wireless] Service, and the software will
20 prevent the phone from being activated with any other carrier's service," (ii) representations that
21 AT&T Wireless handsets are "PCS Phones," which convey to the reasonable consumer that the
22 handsets will function on all PCS bands, (iii) representations that AT&T Wireless handsets are
23 "GSM" handsets, which convey to the reasonable consumer that the handsets will function on
24 GSM networks, (iv) representations that AT&T Wireless handsets are "TDMA" handsets, which
25 convey to the reasonable consumer that the handsets will function on TDMA networks, (v)
26 representations that AT&T Wireless handsets are dual- or tri-mode, or dual- or tri-band handsets,
27 which suggest functionality not limited to AT&T Wireless' network, and (vi) representations that
28 AT&T Wireless handsets are brand name handsets, such as Nokia, Ericsson or Samsung, etc.,

1 which convey to the reasonable consumer that the handsets will have functionality similar to
2 unaltered handsets sold under those brand names (hereafter the "Misrepresentations").

3 37. The first of the Misrepresentations, the statement in AT&T Wireless' form
4 subscriber agreement stating that the subscriber's phone "may contain pre-installed software
5 necessary to use [AT&T Wireless] Service, and the software will prevent the phone from being
6 activated with any other carrier's service," is materially false, misleading, and likely to deceive a
7 reasonable consumer because it conceals, and is part of a scheme to conceal, the Concealed Facts
8 set forth below, and to prevent consumers from discovering some or all of those Concealed Facts.

9 CONCEALED FACTS

10 38. AT&T Wireless intentionally concealed and continues to conceal the following
11 material facts (hereafter, "the Concealed Facts"):

12 (a) its handset locking practices.

13 (b) that, contrary to AT&T's representations to existing and/or potential subscribers,
14 AT&T Wireless handsets, as sold, and without alteration or enhancement, *are compatible with* and
15 *will work* with services provided by other wireless carriers;

16 (c) that whatever limitations may exist on the handset's ability to be activated on or
17 make use of the networks of rival carriers who use compatible technology are the result of
18 AT&T's deliberate and systematic degradation of the functionality of the handsets through the use
19 of SIM, SOC and band order locks;

20 (d) that locking software *is not* "necessary to use AT&T's service" – its purpose and
21 effect are not to benefit the consumer or enable or facilitate any aspect of AT&T's service but,
22 rather, to restrict consumer choice and render it more difficult and expensive for subscribers to
23 switch to another carrier;

24 (e) that AT&T Wireless handsets are locked with SIM locks, SOC locks and/or band
25 order locks to create an impediment to activation on non-AT&T Wireless networks;

26 (f) that AT&T Wireless handsets can be unlocked in seconds by entering the unlock
27 code through the handset keypad or otherwise;

28

1 (g) that once unlocked, AT&T Wireless handsets can be activated on non-AT&T
2 Wireless networks; and

3 (h) the lock codes themselves for the handsets sold to Plaintiffs and the other Class
4 members.

5 39. The Concealed Facts were known to AT&T Wireless at all relevant times.

6 40. The Concealed Facts are important facts which consumers could not have
7 discovered because handset locks are not visible to a purchaser visually inspecting the handset.
8 Nor is there any disclosure about the locks on the packaging or materials provided with the handset
9 at the time of purchase. In the ordinary course, a purchaser would not discover the locking
10 software until attempting to activate the handset with another carrier. Thus, when purchasing an
11 AT&T Wireless handset, Plaintiffs were not aware that the handset had been altered and locked as
12 described above. Nor were other Class members aware that the handsets they purchased from
13 AT&T Wireless had been altered and locked as described above.

14 41. Plaintiffs did not know the Concealed Facts when purchasing an AT&T Wireless
15 handset. Nor did other Class members.

16 42. AT&T Wireless intended to deceive Plaintiffs and the other Class members by
17 concealing the Concealed Facts.

18 43. Plaintiffs and the other Class members reasonably relied on AT&T Wireless'
19 deception by purchasing AT&T Wireless handsets, activating those handsets on AT&T Wireless'
20 network, and remaining AT&T Wireless subscribers.

21 HARMS TO PLAINTIFFS AND THE CLASS

22 44. Plaintiffs and the other Class members have suffered an injury in fact resulting in a
23 loss of money and property due to AT&T Wireless' aforesaid handset locking practices and
24 deception because (i) they have been locked in to the service of AT&T Wireless and impeded from
25 switching to another carrier, (ii) they have incurred or may incur costs to have the handsets
26 unlocked, (iii) they have been, may be or are unable to use their handsets when switching carriers,
27 (iv) the handsets they acquired from AT&T Wireless are of diminished value, (v) AT&T Wireless'
28 practices deprived them of the full enjoyment of their rights of ownership over the handsets that

1 they purchased, and/or (vi) the option to switch carriers without having to purchase a new
2 cellphone has economic value, the deprivation of which has harmed Plaintiffs and the members of
3 the Class.

4 45. AT&T Wireless' deception was a substantial factor in causing these harms to
5 Plaintiffs and the other Class members.

6 **AT&T WIRELESS' DUTY TO DISCLOSE THE CONCEALED FACTS**

7 46. AT&T Wireless owed a duty to Plaintiffs and the other Class members to disclose
8 the handset locks. There are at least five bases for such duty.

9 47. *First*, AT&T Wireless owes a duty to release the unlock codes by virtue of the sale
10 of the handset. AT&T Wireless itself does not consider a handset shipment from the manufacturer
11 to AT&T Wireless to be completed until the unlock code is transmitted to AT&T Wireless, and
12 will not pay for a handset until it has received the unlock code. This demonstrates that AT&T
13 Wireless itself regards the unlock code as an essential part of the sale, and essential to obtaining
14 full rights of ownership and use of the handset. Similarly, the transfer of the handsets from AT&T
15 Wireless to Plaintiffs is not complete because AT&T Wireless has not disclosed the unlock codes
16 to Plaintiffs. AT&T Wireless has thus deprived Plaintiffs of full rights of ownership and use of
17 that handset by withholding the unlock code. AT&T Wireless would not have paid the
18 manufacturers, for those handsets until the manufacturers provided the unlock codes to AT&T
19 Wireless. AT&T Wireless thus had a duty, upon receipt of payment from Plaintiffs to disclose the
20 unlock codes to Plaintiffs so as to transfer to them the full rights of ownership and use of the
21 handset that AT&T Wireless itself had received from the manufacturers.

22 48. *Second*, as a seller, AT&T Wireless has a duty to disclose the Concealed Facts
23 because they are known to AT&T Wireless but are not accessible to consumers purchasing AT&T
24 Wireless handsets. *See, e.g., Nussbaum v. Weeks* (1989) 214 Cal. App.3d 1589, 1600 ("seller has a
25 general duty to disclose material facts that are not accessible to the buyer"), *citing* 5 Witkin,
26 Summary of Cal. Law. (9th ed. 1988) Torts § 700, at 801-02.
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1 through this class action will benefit both the parties and this Court. The identities of individual
2 members of the class are ascertainable through the billing records of the defendants named herein.

3 55. There is a well-defined community of interest in the questions of law and fact
4 involved affecting the members of the Class and Subclass. Questions of law and fact common to
5 the Class and Subclass predominate over questions which may affect only individual class
6 members, including, but not limited to, the following:

7 a. Whether AT&T misrepresented and/or concealed the fact that the handsets
8 defendants sell are locked, the manner in which they are locked or the purpose or effects of the
9 locks;

10 b. Whether AT&T should be enjoined to make appropriate disclosures of the
11 existence and effects of its handset locks;

12 c. Whether AT&T should be enjoined to offer to unlock, or provide the codes
13 to unlock, the handsets purchased by Plaintiffs and the Class and Subclass;

14 d. Whether AT&T should be enjoined from secretly programming and selling
15 locked handsets; and

16 e. Whether the representation made in AT&T's form customer agreements that
17 the locks are "software necessary to use [AT&T Wireless] Service" is false, misleading, likely to
18 deceive, or constitutes a violation of California law.

19 56. Plaintiffs are asserting claims that are typical of the claims of the Class and
20 Subclass, and plaintiffs will fairly and adequately represent and protect the interests of the Class
21 and Subclass. Plaintiffs have no interests antagonistic to the interests of the Class and Subclass.
22 Plaintiffs have retained counsel who are competent and experienced in the prosecution of class
23 action litigation.

24 57. Absent a class action, defendants' practices will irreparably injure the members of
25 the Class and Subclass by defrauding consumers by concealing from them the qualities of the
26 handsets they purchase from AT&T Wireless, and by secretly imposing unfair and improper
27 obstacles to switching to a carrier other than AT&T Wireless. Because of the size of the individual
28 class members' claims, few, if any, class members could afford to seek legal redress on an

1 individual basis for the wrongs complained of herein. Absent a class action, the class members
 2 will continue to suffer losses and the violations of law described herein will continue without
 3 remedy and AT&T Wireless will retain the proceeds of its misdeeds. AT&T Wireless continues, to
 4 this day, to engage in the unlawful and unfair conduct which is the subject of this complaint.

5 **COUNT I**
 6 **Unfair Competition In Violation Of**
 7 **California Business & Professions Code §§ 17200 *Et Seq.***
 8 **(Fraudulent and Deceptive Business Practices)**

9 58. Plaintiffs incorporate by reference all allegations of all prior paragraphs as though
 10 fully set forth herein.

11 59. COUNT I is brought against AT&T Wireless by plaintiffs individually, on behalf of
 12 the Class and on behalf of the general public.

13 60. AT&T Wireless is subject to the Unfair Competition Law, Business & Professions
 14 Code section 17200 *et seq.* (the "UCL"). The UCL provides, in pertinent part: "Unfair competition
 15 shall mean and include unlawful, unfair or fraudulent business practices and unfair, deceptive,
 16 untrue or misleading advertising..."

17 61. AT&T Wireless' handset locking practices violated the "fraudulent" prong of the
 18 UCL by making the Misrepresentations and by concealing the Concealed Facts.

19 WHEREFORE, plaintiffs pray for relief as hereinafter set forth.

20 **COUNT II**
 21 **Unfair Competition In Violation Of**
 22 **California Business & Professions Code §§ 17200 *Et Seq.***
 23 **(Unlawful Business Practices)**

24 62. Plaintiffs incorporate by reference all allegations of all prior paragraphs as though
 25 fully set forth herein.

26 63. COUNT II is brought against AT&T Wireless by plaintiffs individually, on behalf
 27 of the Class and on behalf of the general public.

28 64. AT&T Wireless is subject to the UCL. The UCL provides, in pertinent part:
 "Unfair competition shall mean and include unlawful, unfair or fraudulent business practices and
 unfair, deceptive, untrue or misleading advertising..."

1 65. AT&T Wireless violated the “unlawful” prong of the UCL by violating the
2 Consumer Legal Remedies Act, Civil Code §§ 1770 (a)(5) – (7) and (9) as set forth in COUNT IV,
3 below.

4 66. AT&T Wireless violated the “unlawful” prong of the UCL by violating the
5 Consumers Legal Remedies Act, Civil Code § 1770(a)(14) and (19), as set forth in Count VI,
6 below.

7 67. AT&T Wireless violated the “unlawful” prong of the UCL by violating the
8 Cartwright Act, Bus. & Prof. Code § 16720, by conspiring with other cellular/PCS carriers, such as
9 the membership of CTIA, including, for example, Cingular and other carriers, by conspiring to
10 restrain trade by locking handsets to tie the sale of cellular/PCS handsets and services. Beginning
11 at a date unknown to plaintiffs, but at least as early as April 1, 2002, and continuing to the present,
12 AT&T Wireless, its co-conspirators, and unknown Doe defendants have engaged in a continuing
13 contract, combination and conspiracy in unreasonable restraint of trade and commerce, as
14 evidenced by the foregoing acts and practices, among others. This contract, combination, and
15 conspiracy had the purpose and effect of unreasonably restraining trade and commerce. The
16 contract, combination, and conspiracy alleged herein consisted of a continuing agreement,
17 understanding, and concert of action among the defendants and their co-conspirators, the
18 substantial terms of which were to lock handsets so that each carrier would be the only source of
19 handsets for that carrier’s subscribers, and each carrier’s handsets would be locked for use only on
20 that carrier’s network, and to create an impediment to activation on other networks. For the
21 purpose of forming and effectuating the contract, combination, and conspiracy, AT&T Wireless
22 and its co-conspirators, including, *inter alia*, CTIA, did those things which they contracted,
23 combined, and conspired to do, including but not limited to the acts, practices, and course of
24 conduct set forth above.

25 68. AT&T Wireless violated the “unlawful” prong of the UCL by violating the
26 Cartwright Act, Bus. & Prof. Code § 16727, by unlawfully tying the sale of cellular/PCS handsets
27 and services. Cellular/PCS services and handsets are two separate products. AT&T Wireless
28 coerces subscribers to purchase handsets only from AT&T Wireless as a condition of obtaining

1 service through AT&T Wireless' network and refuses to provide service with handsets purchased
2 from other sources.

3 69. AT&T Wireless has economic power in the tying product market, the provision of
4 cellular/PCS services in the State of California, by virtue of its extensive portfolio of spectrum
5 licenses, the high cost to consumers of switching to another service, and otherwise. AT&T
6 Wireless' tying arrangements have substantially lessened competition by creating barriers to entry
7 to the handset market, by reducing the number of handset manufacturers from several dozen in the
8 mid-1990s to a mere ten or so manufacturers today, by preventing the development of handset
9 technology that would allow handsets to access signals provided by multiple providers of wireless
10 services, by increasing the cost of handsets, and by increasing the cost of handset and services
11 bundles. AT&T Wireless' tying arrangements affect a substantial amount of commerce since
12 AT&T Wireless has millions of subscribers in California.

13 70. AT&T Wireless violated the "unlawful" prong of the UCL by violating the FTC
14 Act, 15 U.S.C. § 45(n), because AT&T Wireless' handset locking practices are business practices
15 that cause or are likely to cause injury to consumers by imposing unnecessary costs when
16 switching carriers, such as the cost to unlock the handset or the cost of a new handset if the
17 consumer is unaware of the lock or unaware of the availability of means to unlock it, and also by
18 degrading the value of the handset. These injuries are substantial, and are not reasonably avoidable
19 by consumers who in most cases are unaware of the locks. There are no countervailing benefits to
20 consumers or to competition because handset locks have no utility whatsoever; their only function
21 is to prevent the purchaser from obtaining full rights of ownership and use of handsets purchased
22 from AT&T Wireless.

23 71. AT&T Wireless violated the "unlawful" prong of the UCL by violating the FCC's
24 bundling rule. Due to concerns about the potential anticompetitive impact of tying arrangements,
25 in 1992 the FCC clarified its policy with respect to the bundling of wireless phones and services.
26 The FCC stated its "concern that customers have the ability to choose their own CPE [handset] and
27 service packages to meet their own communication needs and that they not be forced to buy
28 unwanted carrier-provided CPE [handsets] in order to obtain necessary services." *In The Matter Of*

1 *Bundling Of Cellular Customer Premises Equipment And Cellular Service*, CC Docket No. 91-34,
2 1992 WL 689944 (F.C.C. June 10, 1992), at ¶ 6. Given these concerns, the FCC permitted cellular
3 carriers to offer handsets and services as a bundled package, provided that cellular service was also
4 offered separately on a nondiscriminatory basis. In other words, the FCC permitted carriers to
5 bundle handsets and service on the condition that the carriers offer service regardless of whether
6 the subscriber purchased a bundled phone from the carrier or an unbundled phone from a source
7 other than the carrier. *See id.* AT&T Wireless does not offer service separately, without the
8 purchase of a bundled AT&T Wireless handset, in violation of this rule. AT&T Wireless' handset
9 locking practices, including AT&T Wireless' conspiracy with other carriers and sellers of handsets,
10 is an integral part of AT&T Wireless' violation of this FCC rule.

11 WHEREFORE, plaintiffs pray for relief as hereinafter set forth.

12 **COUNT III**
13 **Unfair Competition In Violation Of**
14 **California Business & Professions Code §§ 17200 *Et Seq.***
15 **(Unfair Business Practices)**

16 72. Plaintiffs incorporate by reference all allegations of all prior paragraphs as though
17 fully set forth herein.

18 73. COUNT III is brought against AT&T Wireless by plaintiffs individually, on behalf
19 of the Class and on behalf of the general public.

20 74. AT&T Wireless is subject to the UCL. The UCL provides, in pertinent part:
21 "Unfair competition shall mean and include unlawful, unfair or fraudulent business practices and
22 unfair, deceptive, untrue or misleading advertising..."

23 75. AT&T Wireless violated the "unfair" prong of the UCL because AT&T Wireless'
24 handset locking practices threaten an incipient violation of the Consumer Legal Remedies Act,
25 Civil Code §§ 1770 (a)(5) – (7) and (9) as set forth in COUNT IV, below, and violate the policy or
26 spirit of those laws because the effects of AT&T Wireless' handset locking practices are
27 comparable to or the same as a violation of the law, or otherwise significantly threaten or harm
28 competition.

1 76. AT&T Wireless violated the “unfair” prong of the UCL because AT&T Wireless’
2 handset locking practices threaten an incipient violation of the Cartwright Act, Bus. & Prof. Code §
3 16720, and § 16727, as described above, and violate the policy or spirit of those laws because the
4 effects of AT&T Wireless’ handset locking practices are comparable to or the same as a violation
5 of the law, or otherwise significantly threaten or harm competition.

6 77. AT&T Wireless violated the “unfair” prong of the UCL because AT&T Wireless’
7 handset locking practices threaten an incipient violation of the FTC Act, 15 U.S.C. § 45(n), as
8 described above, and violate the policy or spirit of those laws because the effects of AT&T
9 Wireless’ handset locking practices are comparable to or the same as a violation of the law, or
10 otherwise significantly threaten or harm competition.

11 78. AT&T Wireless violated the “unfair” prong of the UCL because AT&T Wireless’
12 handset locking practices threaten an incipient violation of the FCC’s bundling rules set forth in *In*
13 *The Matter Of Bundling Of Cellular Customer Premises Equipment And Cellular Service*,
14 CC Docket No. 91-34, 1992 WL 689944 (F.C.C. June 10, 1992), as described above, and violate
15 the policy or spirit of those laws because the effects of AT&T Wireless’ handset locking practices
16 are comparable to or the same as a violation of the law, or otherwise significantly threaten or harm
17 competition.

18 79. AT&T Wireless violated the “unfair” prong of the UCL because AT&T Wireless’
19 handset locking practices are contrary to the public policy expressed by the United States Congress
20 which established the promotion of competition in the field of telecommunications as a fundament
21 policy underlying the Communications Act of 1934. *See* The Omnibus Budget Reconciliation Act
22 of 1993, Pub. L. No. 103-66, Title VI, § 6002(b), amending the Communications Act of 1934 and
23 codified at 47 U.S.C. § 332(c).

24 80. AT&T Wireless violated the “unfair” prong of the UCL because AT&T Wireless’
25 handset locking practices are contrary to the public policy expressed by the United States Congress
26 in the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §
27 151, *et seq.* (“the 1996 Act” or “the Act”), to “promote competition and reduce regulation in order
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1 to secure lower prices and higher quality services for American telecommunications consumers and
2 encourage the rapid deployment of new telecommunications technologies.” 1996 Act, preamble.

3 81. AT&T Wireless violated the “unfair” prong of the UCL because AT&T Wireless’
4 handset locking practices are contrary to the public policy expressed by the FCC rules requiring
5 wireless carriers to provide number portability. *See Telephone Number Portability, First Report*
6 *and Order and Further Notice of Proposed Rule*, 11 F.C.C.R. 8352, 1996 WL 400225 (1996)
7 (“First Report and Order”); 47 C.F.R. § 52.31. The FCC ordered wireless number portability
8 because it found that consumers “will be reluctant to change wireless service providers unless they
9 can keep the same number,” and “will find themselves forced to stay with carriers with whom they
10 may be dissatisfied because the cost of giving up their wireless phone number in order to move to
11 another carrier is too high.” *See CTIA v. FCC*, 303 F.3d 502, 506-07 (D.C. Cir. 2003), quoting 17
12 F.C.C.R. at 14,979-80. The same rationale for allowing consumers to keep their phone number
13 when changing carriers, also supports allowing consumers to keep their handsets when changing
14 carriers. Consumers “will be reluctant to change wireless services providers unless they can keep
15 the same [handset],” and “will find themselves forced to stay with carriers with whom they may be
16 dissatisfied because the cost of giving up their wireless phone [handset] in order to move to another
17 carrier is too high.” *See id.*

18 WHEREFORE, plaintiffs pray for relief as hereinafter set forth.

19 **COUNT IV**
20 **Consumer Legal Remedies Act**

21 82. Plaintiffs incorporate by reference all allegations of all prior paragraphs as though
22 fully set forth herein.

23 83. COUNT IV is brought by Plaintiffs individually, on behalf of the Subclass, against
24 AT&T Wireless.

25 84. By secretly locking handsets and failing to disclose the existence and effects of
26 AT&T’s handset locks as alleged above, AT&T Wireless has engaged in, and continues to engage
27 in, unfair methods of competition and unfair or deceptive acts and practices in violation of the
28

1 Consumer Legal Remedies Act, Civil Code Sections 1750 *et seq.* (the "CLRA"), including without
2 limitation, the provisions of California Civil Code Sections 1770(a)(5)-(7) and (9).

3 85. CLRA section 1770(a)(5) prohibits "Representing that goods or services have
4 sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not
5 have or that a person has a sponsorship, approval, status, affiliation, or connection which he or she
6 does not have." AT&T Wireless violated this provision by making the Misrepresentations and by
7 concealing the Concealed Facts. AT&T Wireless continues to violate this provision in connection
8 with sales of handsets to class members.

9 86. CLRA section 1770(a)(6) prohibits "Representing that goods are original or new if
10 they have deteriorated unreasonably or are altered, reconditioned, reclaimed, used, or secondhand."
11 AT&T Wireless violated this provision by representing that the handsets sold to Plaintiffs were
12 original or new when in fact they had been altered by AT&T Wireless. AT&T Wireless continues
13 to violate this provision in connection with sales of handsets to class members.

14 87. CLRA section 1770(a)(7) prohibits "Representing that goods or services are of a
15 particular standard, quality, or grade, or that goods are of a particular style or model, if they are of
16 another." AT&T Wireless violated this provision by making the Misrepresentations and by
17 concealing the Concealed Facts. AT&T Wireless continues to violate this provision in connection
18 with sales of handsets to class members.

19 88. CLRA section 1770(a)(9) prohibits "Advertising goods or services with intent not to
20 sell them as advertised." AT&T Wireless violated this provision by advertising the sale of various
21 handset models, including the Ericsson T60LX, Ericsson R300LX, and Nokia 8260, with the intent
22 of not selling fully functional, unaltered versions of such handsets, but instead selling only such
23 handsets as have been altered by AT&T Wireless. AT&T Wireless continues to violate this
24 provision in connection with its advertising of handsets. As a proximate result thereof, Plaintiffs
25 and the members of the Subclass have been harmed as alleged above and will continue to be
26 harmed in the future unless the Court grants relief as prayed for herein.

27 89. On March 12, 2003, plaintiffs Meoli, Armstrong and Krishnan, pursuant to Civil
28 Code section 1782, sent defendants a letter via certified mail, return receipt requested, advising

1 them that they are in violation of the CLRA and must correct, repair and rectify such violation or
2 agree to do so within thirty days. A true and correct copy of said demand is attached hereto as
3 Exhibit A.

4 90. Defendants never responded to the March 12, 2003 letter.

5 WHEREFORE, Plaintiffs pray for relief as hereinafter set forth.

6 **COUNT V**
7 **Declaratory Relief**

8 91. Plaintiffs incorporate by reference all allegations of all prior paragraphs as though
9 fully set forth herein.

10 92. COUNT V is brought by Plaintiffs individually and on behalf of the Class against
11 AT&T Wireless.

12 93. Plaintiffs are informed and believe that the form contract imposed by AT&T
13 Wireless on its subscribers includes the following provision:

14 Any dispute or claim arising out of or relating to this Agreement or to any
15 product or service provided in connection with the Agreement (whether
16 based in contract, tort, statute, fraud, misrepresentation or any other legal
17 theory) will be resolved by binding arbitration except that (1) you may take
18 claims to small claims court if they qualify for hearing by such court, or (2)
19 you or we may choose to pursue claims in court if the claims relate solely to
20 the collection of any debts you owe to us. However, even for those claims
21 that may be taken to court, you and we both waive any claims for punitive
22 damages and any right to pursue claims on a class or representative basis.

23 94. An actual and justiciable controversy exists between the parties as to their respective
24 rights and obligations under the form contracts imposed on subscribers by AT&T Wireless.

25 95. Specifically, Plaintiffs believe and thereon allege that the above provision that
26 purports to compel arbitration and preclude Plaintiffs and the class members from participating in a
27 class or representative action against AT&T Wireless is procedurally and substantively
28 unconscionable, and is therefore unenforceable.

96. Plaintiffs believe and thereon allege that this provision is procedurally
unconscionable in that Plaintiffs and the class members were not given an opportunity for
meaningful negotiation over this term and that the provision was presented by AT&T Wireless on a
"take it or leave it basis." Plaintiffs are also informed and believe and thereon allege that other

1 cellular telephone service providers also impose a similar provision in their form contracts and that
2 it would be difficult if not impossible for Plaintiffs and the class members to reject the terms of the
3 said provision and obtain similar services elsewhere without the offending provision.

4 97. Plaintiffs believe and thereon allege that the provision of the AT&T Wireless form
5 contract is substantively unconscionable in that the terms of the provision impose harsh and
6 oppressive terms and are so one-sided as to shock the conscience. For example, the above-quoted
7 provision, while purporting to require binding arbitration for any claims brought by subscribers,
8 purports to allow AT&T Wireless to bring claims to court for collection of debts owed to it by
9 subscribers. Specifically, the provision is meant to prevent AT&T Wireless customers from
10 seeking redress for relatively small amounts of money and provides them with no benefit
11 whatsoever. Indeed, it seriously jeopardizes the rights of AT&T Wireless subscribers by
12 prohibiting any effective means of litigating the business practices of AT&T Wireless. AT&T
13 Wireless seeks to immunize itself from class or representative actions despite their potential merit,
14 while suffering no similar detriment to its own rights. The provision also provides a disincentive to
15 AT&T Wireless to avoid the type of conduct that might lead to a class or representative action. In
16 fact, AT&T Wireless has granted itself a license to push the boundaries of good business practices
17 to their furthest limits.

18 98. Plaintiffs, on behalf of themselves and all others similarly situated, therefore seek a
19 judicial declaration to that effect.

20 **COUNT VI**
21 **Consumer Legal Remedies Act**
22 **(Unconscionable Contract Clauses)**

23 99. Plaintiffs incorporate by reference all allegations of all prior paragraphs as
24 though fully set forth herein.

25 100. COUNT VI is brought by Plaintiffs individually and on behalf of the Subclass
26 against AT&T Wireless.

27 101. CLRA section 1770(a)(14) prohibits "Representing that a transaction confers or
28 involves rights, remedies, or obligations which it does not have or involve, or which are prohibited
by law." AT&T violated this provision by representing, in its form customer agreements, that

1 customers were required to arbitrate any disputes with AT&T, to waive any right to pursue claims
 2 on a class or representative basis, and to waive rights to remedies available to them under
 3 California law, when such contract terms are prohibited by California law. AT&T continues to
 4 violate this provision by making such representations to its subscribers.

5 102. CLRA section 1770(a)(19) prohibits "Inserting an unconscionable provision in
 6 the contract." AT&T violated this provision by inserting unconscionable provisions in its form
 7 customer agreements, including an unconscionable arbitration clause, class or representative action
 8 waiver, and limitations of remedies.

9 WHEREFORE, Plaintiffs pray for relief as hereinafter set forth.

10 **PRAYER FOR RELIEF**

11 WHEREFORE, plaintiffs and the Class and Subclass pray for judgment against defendants,
 12 and each of them as follows:

13 **On COUNTS I, II and III**

14 1. For an order directing defendants to appropriately disclose the existence and effects
 15 of the handset locks defendants have employed;

16 2. For an order directing defendants to offer to unlock handsets that they have locked,
 17 free of charge, and to publicize such offer in a suitable manner;

18 3. For an order enjoining defendants from secretly programming and selling handsets
 19 with SIM locks, SOC locks or band order locks;

20 4. For an order enjoining defendants from continuing to disseminate materials that
 21 represent that SIM locks, SOC locks or band order locks are "software necessary to use [AT&T
 22 Wireless] Service"; and

23 5. For restitution and/or disgorgement of all amounts wrongfully charged to Plaintiffs
 24 and members of the Class.

25 **On COUNT IV**

26 6. For an order directing defendants to appropriately disclose the existence and effects
 27 of the handset locks defendants have employed;

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DEMAND FOR JURY TRIAL

Plaintiffs hereby demand a trial by jury.

Dated: November 19, 2008

Respectfully submitted,

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