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13 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
14 **FOR THE COUNTY OF LOS ANGELES**

15 The Foundation for Taxpayer and Consumer)
16 Rights, on Behalf of the General Public,)

17 Plaintiff,)

18 vs.)

19)
20 AT& T Wireless Services, Inc., a Delaware)
Corporation, T-Mobile USA, Inc., a Delaware)
21 Corporation, Cingular Wireless, LLC., a)
Delaware Corporation, and DOES 1 Through)
22 25, inclusive,)

23 Defendants,)
24)
25)
26)
27)
28)

Case No.:

COMPLAINT FOR:

**Unlawful Business Practice in Violation
of California Bus. & Prof. Code §§17200 *et*
seq. and §§17500 *et seq.***

1 Plaintiff, on behalf of the general public, by its attorneys, alleges upon information and
2 belief based upon, *inter alia*, the investigation made by and through its attorneys, as follows:

3 **NATURE OF THE ACTION**

4 1. The California Unfair Competition Law (“UCL”) (Bus. & Prof. Code §§17200 *et*
5 *seq.*) prohibits “any unlawful, unfair or fraudulent business act or practice.” The conduct of the
6 defendant cell phone carriers, as alleged herein, violates the UCL.

7 2. On November 24, 2003, federal regulations regarding cell phone number
8 portability went into effect that permit cell phone customers to keep their old cell phone
9 telephone numbers when they switch carriers. However, cell phone carriers effectively are
10 thwarting the regulations by locking the subscribers’ handsets. While customers can keep their
11 old phone numbers, they cannot use their old cell phones (referred to as “handsets”) when they
12 switch carriers *because the handsets are locked by the carriers* specifically to prevent handset
13 portability between compatible networks that use the same wireless standard. In order to use the
14 carrier’s service, the subscriber must purchase that carrier’s authorized handset.

15 3. The practice by defendants AT&T Wireless, Cingular Wireless and T-Mobile is
16 particularly egregious. All three companies employ a technology called GSM (short for Global
17 System Mobile communications) that, unlike other wireless standards such as CDMA and
18 TDMA supported by other nationwide carriers, permits a seamless swapping of phones between
19 services.

20 4. Instead of having to purchase a new handset in order to use the respective
21 defendants’ services, GSM customers could use their old handsets and simply replace their SIM
22 cards (an easily accessible chip that comes with the cell phone and that contains customer
23 specific information) with SIM cards from another carrier. All the user would have to do is open
24 the phone’s case and swap out the thumb-nail size SIM card issued by the first company and pop
25 in a new one issued by another GSM carrier. Indeed, the SIM card originally was specifically
26 designed so that a handset could work with different SIM cards to access different GSM
27 networks. Moreover, since GSM is the standard throughout much of the world, frequent
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1 international travelers, for example, could buy SIM cards with prepaid service for overseas calls
2 to avoid the steep roaming charges imposed by their GSM carriers.

3 5. But Defendants don't allow customers to use the same handset and swap in
4 another carrier's SIM card because they lock the phones (sometimes called "SIM Locking") to
5 prevent their handsets from operating on competitors' networks, thus ensuring that the handset
6 will work only on their networks and not on the networks of rival GSM carriers. This is an
7 "unfair" business practice in violation of the UCL.

8 6. Further, in order to use the carrier's network, the customer must purchase only
9 that carrier's handset. This practice not only is unfair, it is "unlawful" in further violation of the
10 UCL because Defendants' conduct constitutes an illegal "tying arrangement" (which prohibits
11 the sale of one product or service but only on the condition that the buyer also buy a different
12 product or service) and otherwise restricts open competition in violation of California's antitrust
13 statute, the Cartwright Act (Bus. & Prof. Code §§16720 *et seq.*).

14 7. Defendants' conduct also violates the "fraudulent" prong of the UCL because
15 Defendants' conduct is deceptive and likely to deceive consumers. When consumers sign up for
16 cell phone service, they are not adequately informed or made aware that the handsets that they are
17 receiving are locked, that the handsets are not portable and that the handsets cannot be used if
18 they switch carriers, even to a carrier within a compatible network that uses the same wireless
19 standard.

20 8. Consumer confusion further is exacerbated by cell phone number portability. As
21 Defendants already charge subscribers for portability, consumers are likely to be deceived that
22 their handsets also are portable.

23 9. Defendants also engage in false advertising regarding handset locking in violation
24 of California Business & Professions Code §§17500 *et seq.* Defendants' advertisements fail to
25 adequately notify potential customers of the existence of handset locking. Further, Defendants'
26 advertisements, which tout that customers who sign up for Defendants' service can receive an
27 inexpensive or discounted price on a handset, fail to adequately disclose that the handset is
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1 locked, that the handset is not portable and that the handset cannot be used on another carrier's
2 compatible network.

3 10. By this action, plaintiff seeks to enjoin the practice of cell phone handset locking,
4 particularly for cell phones on the GSM standard. Plaintiff seeks an injunction requiring
5 Defendants to, *inter alia*, provide unlocking codes and/or unlocking software for the phones
6 already sold by them free of charge and to provide only unlocked phones in the future. Plaintiff
7 also seeks to enjoin and correct Defendants' false advertising.

8 JURISDICTION AND VENUE

9 11. This Court has jurisdiction over this action pursuant to Code of Civil Procedure
10 §410.10.

11 12. Venue is proper in this Court because the acts of the defendant occurred in this
12 County.

13 THE PARTIES

14 13. Plaintiff Foundation for Taxpayer and Consumer Rights ("FTCR") is a nationally
15 recognized, California-based, non-profit education and advocacy group organized under section
16 501(c)(3) of the Internal Revenue Code. Founded in 1985, FTCR employs teams of public-
17 interest lawyers, policy experts, strategists, public educators, and grassroots activists to advance
18 and protect the interests of consumers and taxpayers. FTCR has, since its inception, been
19 particularly involved in representing the interests of consumers in regulatory matters, especially
20 emphasizing the interests of utility ratepayers in California in matters before the Legislature, the
21 courts and state agencies. FTCR sues in a representative capacity on behalf of the general public
22 pursuant to the Private Attorney General provisions of the Unfair Competition Laws embodied in
23 California Bus. & Prof. Code §17200.

24 14. Defendant T-Mobile USA, Inc. is a Delaware corporation with its principal place
25 of business in Bellevue, Washington and is qualified to do business in California.

26 15. Defendant AT&T Wireless Services, Inc. is a Delaware corporation with its
27 principal place of business in Redmond, Washington and is qualified to do business in
28 California.

1 modifiable memory storage. The SIM card performs a number of cryptographic security
2 functions and holds a variety of information relating to the subscriber, such as speed dial
3 numbers and other personalized features. Every GSM service provider issues a SIM card for
4 each subscriber. When the user plugs in the SIM card, the subscriber specific information is
5 made available to the handset.

6 22. With SIM Locking, the handset is electronically locked to operate only with SIM
7 cards from the carrier's own network. Defendants program their handsets with SIM locks to
8 prevent the handsets from operating if a different SIM card is inserted into the handset. Inserting
9 a card from another Defendant's network into a SIM-locked handset results in an error message
10 on the display, and the phone will not operate.

11 23. For example, if a customer had a phone from Network A and wanted to use the
12 services of Network B, he or she could not simply use the Network A phone and insert the
13 Network B SIM card. The customer would either have to continue to use a Network A handset
14 with the existing SIM card and pay roaming charges or purchase a new handset from Network B
15 in order to use the SIM card from Network B. Once a SIM-lock is removed, the handset will
16 operate with any SIM card, and the handset can be used with a different carrier.

17 24. Soon after SIM-locked phones appeared in Europe, the European Commission
18 ("EC") ruled that such handset locking would be harmful to competition and would prevent the
19 establishment of a common market for goods. The EC warned all European handset
20 manufacturers and network operators not to produce or sell SIM-locked phones and requested
21 that the GSM Standards Committee remove a proposed SIM-lock modification from the
22 standards.

23 25. In the United States, GSM operators still sell SIM-locked phones. AT&T refuses
24 to remove the lock or reveal the code that will unlock a particular handset. Cingular provides a
25 phone's unlocking code only if the user switches carriers after a Cingular contract has expired. T-
26 Mobile provides unlocking codes only after customers have subscribed for a number of months.

27 26. Customers are unable to purchase handsets directly from equipment
28 manufacturers because the equipment manufacturers ordinarily do not sell directly to subscribers.

1 27. Defendants' conduct as alleged herein violates §§17200 *et. seq.* which prohibits
2 "any unlawful, unfair or fraudulent business act or practice." While the statute is phrased in the
3 disjunctive and plaintiff need satisfy only one of the elements to prove a violation of the statute,
4 Defendants' conduct violates all *three* prongs of §§17200 *et. seq.*

5 **SIM-Locking is an "Unfair" Business Practice**

6 28. GSM network providers, such as Defendants, claim one primary reason for SIM-
7 locking: network operators want to protect the handset subsidy that they pay to dealers for selling
8 handsets to customers at low prices. As Ritch Blasi, a spokesman for AT&T, has said "We
9 subsidize the phone and want to make our money back."

10 29. That rationale does not withstand scrutiny and does not justify the unfair business
11 practice of cellular handset locking.

12 30. Handset locking is unnecessary to recover subsidies because Defendants "make
13 their money back" through hefty early termination fees which should more than cover the cost of
14 any handset subsidies and through the rates they pay for service every month or over the term of
15 the contract. While subsidies may appear to save consumers the up-front cost of paying full price
16 for a phone, in fact, consumers bear the cost of the subsidies through rates and fees.

17 31. Defendants also "make their money back" through the amounts Defendants
18 already charge customers for phone number portability. Fees for number portability are included
19 in the "Regulatory Programs Fees" charged by AT&T and T-Mobile and the "Regulatory Cost
20 Recovery Fee" charged by Cingular. The fees assessed and collected by Defendants more than
21 cover the subsidy for handsets.

22 32. Defendants' argument regarding subsidies further fails because subsidies would
23 not be necessary in the first place if handsets were portable. Portability of handsets will drive the
24 handset makers to figure out ways to make cheaper phones, thereby driving down the costs of
25 handsets. Eliminating handset locking would put competitive pressure on handset prices by
26 allowing handset retailers to compete in handset sales.

27 33. Moreover, by allowing customers to come to carriers with phones they already
28 own, the need for handset subsidies can be eliminated entirely.

1 34. In addition, handsets stay locked even well after carriers have “made their money
2 back” and recovered the subsidy in the form of monthly fees. There is absolutely no excuse for
3 locking handsets any time after the subsidy has been repaid or the contract has expired. As it is,
4 customers are locked into their contracts for much longer than it takes for the handset subsidy to
5 be recovered.

6 35. Handset locking is nothing more than an unfair and anticompetitive stratagem by
7 Defendants to discourage subscribers from changing carriers. Defendants use handset locking
8 simply to lock customers into their networks. However, Defendants already lock customers into
9 their networks through contractual obligations. As long as the subscriber is under a contract for
10 service to the carrier, it should make no difference which handset the subscriber uses. The
11 subscriber is still paying for the carrier’s service and is contractually committed during that
12 period regardless of the brand of handset used by the subscriber.

13 36. On the other hand, handset locking is patently unfair to consumers. To switch
14 GSM carriers, consumers now have to acquire a new handset, making switching unnecessarily
15 expensive.

16 37. Defendants’ conduct also has caused artificially high market prices for wireless
17 service and handsets by increasing costs to consumers associated with switching networks.
18 Defendants effectively have created a floor below which switching costs cannot fall, by ensuring
19 that a subscriber who wishes to change carriers must also purchase another handset.

20 38. Further, it is unnecessarily expensive and wasteful for consumers to have to throw
21 out perfectly good and otherwise functional and compatible phones simply because the consumer
22 changes networks and the carrier will not unlock the handset.

23 39. Eliminating wireless handset locking also will have a positive effect on the public
24 generally. For example, eliminating handset locking will encourage developments in handset
25 technology. Defendants’ practices have stifled the development of important handset
26 technologies. Eliminating handset locking will incentivize manufacturers to bring innovative
27 products – such as a chipset that works on multiple digital signaling protocols, such as both
28 CDMA and GSM – that would be compatible with nearly all the networks of the national

1 carriers. There is little incentive to build handsets that use this chip if these carriers require
2 consumers to discard the handset when they switch wireless providers.

3 40. Eliminating handset locking also is good for the environment. Americans are
4 discarding over 100 million wireless cell phones a year, which means that tons of trash including
5 toxic materials such as arsenic, mercury, lead, copper, antimony, beryllium, cadmium, zinc and
6 brominated flame retardants, are being released into the air and groundwater.

7 **SIM-Locking is a “Deceptive” Business Practice**

8 41. Defendants’ conduct also is deceptive and is likely to deceive consumers in
9 violation of the “fraudulent” prong of §17200. Defendants’ emphasis on number portability is
10 likely to deceive customers that their handsets likewise also are portable. Defendants already
11 provide cell number portability. Defendants also charge and collect fees for cell number
12 portability (far exceeding the actual costs of number portability). As they already are paying for
13 portability, consumers are likely to be deceived that their handsets, as well as their numbers, are
14 portable.

15 42. Consumers further are deceived and/or likely to be deceived because, when they
16 sign up for service and receive a cell phone, subscribers are not adequately informed or made
17 aware that their handsets are locked. Consumers are deceived and misled that their handsets are
18 portable and can be used if they switch to a carrier within a compatible network that uses the
19 same wireless GSM standard.

20 43. Defendants’ conduct also disguises the price of the components consumers are
21 buying. Since the price of the handset and the price of the service cannot be readily distinguished
22 by the consumer, the consumer cannot reasonably comparison shop for those items based on
23 price.

24 **SIM-Locking is “Unlawful”**

25 44. Defendants’ conduct also violates the “unlawful” prong of the Unfair Business
26 Practices Act in that requiring customers to purchase a carrier’s authorized handset in order to
27 access the carrier’s wireless network is an unlawful tying arrangement in violation of California’s
28 antitrust statute, the Cartwright Act (Bus. & Prof. Code §§16720, 16726, 16727).

1 45. An illegal tying arrangement under the Cartwright Act is an agreement to sell a
2 product (the tying product) but only on the condition that the buyer also purchase a different (or
3 tied) product. Here, the tying product is the wireless telephone services offered by the provider
4 (under Bus. & Prof. Code §§16720, 16726) and/or the SIM card (under Bus. & Prof. Code
5 §16727), and the tied product is the handsets.

6 46. Tying arrangements are illegal *per se* under Bus. & Prof. Code §§16720, 16726 if
7 the party has sufficient economic power and substantially forecloses competition in the relevant
8 market. Even when not *per se* illegal, a tying arrangement violates the Cartwright Act if it
9 unreasonably restrains trade. A tying arrangement is illegal *per se* under Bus. & Prof. Code
10 §16727 when the seller has power over the tying market or if a substantial volume of commerce
11 in the tied product is restrained.

12 47. Tying agreements serve no purpose beyond the suppression of competition. They
13 deny competitors free access to the market for the tied product, not because the party imposing
14 the tying requirements has a better product or a lower price but because of his power or leverage
15 in another market.

16 48. Here, the sale of the tying product is linked to the sale of the tied product. Each of
17 the Defendants purchases handsets from equipment manufacturers and resells the handsets to
18 consumers. The Defendants require consumers or subscribers to purchase one of their selected
19 handsets in order to be able to use the customer's existing SIM card and/or to subscribe to and
20 receive service on their wireless networks. As a result of Defendants' practices, subscribers must
21 purchase handsets from the same carrier that provides the wireless service to which they intend to
22 subscribe. Defendants' tying arrangements prevent consumers from purchasing handsets directly
23 from handset manufacturers or other carriers.

24 49. Defendants and each them also have sufficient economic power in the tying
25 market to impose an appreciable restraint on the free competition of the tied product (here,
26 handsets) and/or restrain a substantial volume of commerce in the tied product.

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1 1. A temporary, preliminary and/or permanent order for injunctive relief enjoining
2 Defendants from pursuing the policies, acts and practices complained of herein;

3 2. A temporary, preliminary and/or permanent order for injunctive relief enjoining
4 the practice of cell phone handset locking, particularly for cell phones on the GSM standard;
5 requiring Defendants to provide, free of charge, unlocking codes and/or unlocking software for
6 the phones already sold by them; requiring Defendants to provide only unlocked phones in the
7 future; and/or requiring Defendants to adequately notify customers before and at the time that
8 they sign up for cellular service that the handset they are receiving is locked, is not portable and
9 cannot be used on another carrier's compatible network;

10 3. A temporary, preliminary and/or permanent order for injunctive relief requiring
11 Defendants to correct their false advertising by adequately notifying potential customers of the
12 existence of handset locking and enjoining advertising phone subsidies if a customer signs up for
13 the carrier's service without adequately disclosing that the phone is locked and cannot be used on
14 a competing carrier's service;

15 4. A temporary, preliminary and/or permanent order for injunctive relief requiring
16 Defendants to undertake an immediate public information campaign to inform members of the
17 general public as to their prior practices and notifying affected members as to changes to
18 Defendants' policies;

19 5. An order, as appropriate, requiring imposition of a constructive trust and/or
20 disgorgement of Defendants' ill-gotten gains and requiring Defendants to pay restitution and to
21 restore to the public all funds acquired by means of any act or practice declared by this Court to
22 be an unlawful, fraudulent or unfair business act or practice, a violation of laws, statutes or
23 regulations, or constituting unfair competition; and for distribution of any monies recovered on
24 behalf of the general public, to prevent Defendants from retaining the benefits of their wrongful
25 conduct;

26 6. Reasonable attorneys' fees pursuant to, *inter alia*, Code of Civil Procedure,
27 §1021.5;

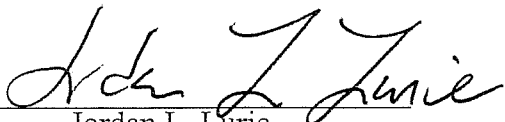
28 7. Costs of this suit;

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- 8. Pre- and post-judgment interest; and
- 9. Such other and further relief as the Court may deem necessary or appropriate.

Dated: June 7, 2004

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