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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: *Mendoza, et al. v. Cingular Wireless LLC, et al.*
Handset Locking and Related Claims Against Cingular Wireless LLC, *et al.*

JCCP No. 4332

Class Action

**FOURTH AMENDED COMPLAINT
[HANDSET LOCKING]**

JURY TRIAL DEMANDED

FILED BY FAX

ALAMEDA COUNTY

November 20, 2008

CLERK OF
THE SUPERIOR COURT
By Rosanne Case, Deputy

CASE NUMBER:

JCCP004332

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

4 NATURE OF THE ACTION

5 1. This is a class action lawsuit filed to redress an unfair and wrongful practice
6 inflicted by defendants on California consumers: the secret locking of cell phone handsets to make
7 it impossible or impracticable for customers to switch cell phone service providers without
8 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 SIM locks, SOC locks or band order locks (all as described more fully below). Plaintiffs contend
13 that the practice of secretly programming handsets with SIM locks, SOC locks or band order 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 that their failure to do so is a fraudulent and deceptive
17 business practice.

18 PARTIES

19 3. Defendant Cingular Wireless LLC is a Delaware limited liability company with its
20 principal place of business in Atlanta, Georgia, which is authorized to do business and doing
21 business in California.

22 4. Defendant Pacific Telesis Mobile Services LLC is a Delaware limited liability
23 company with its principal place of business in Dallas, Texas, which is authorized to do business
24 and doing business in California.

25 5. Defendants Cingular Wireless LLC and Pacific Telesis Mobile Services LLC are
26 and at all times relevant hereto have been engaged in the business of providing cell phone service
27 and related products and services to the public in California and in other states. They are
28 hereinafter collectively referred to as "Cingular."

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

10 7. Plaintiff Astrid Mendoza ("Mendoza") is currently a resident of Contra Costa
11 County, California. On or about January 12, 2002, she entered into a 12-month service contract to
12 receive cell phone service from Cingular. Mendoza also purchased from Cingular a Nokia 3390
13 GSM handset which employs a SIM lock, as defined below. Mendoza continues to be a subscriber
14 to Cingular's cellphone service calling plan and continues to use the said Nokia cell phone and
15 Cingular service for personal, family or household purposes. Plaintiffs Jill Bonnington, Ron Ng,
16 Kistler & Kistler, Inc., Mike Freeland, and Richard Yates are residents of the State of California
17 who have been subscribers to cellphone service with Cingular and who purchased locked handsets
18 from Cingular on or after August 28, 1999.

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

26 9. At all relevant times alleged in this matter, each defendant acted in concert with,
27 with the knowledge and approval of and/or as the agent of the other defendants within the course
28 and scope of the agency, regarding the acts and omissions alleged.

JURISDICTION, VENUE AND APPLICABLE LAW

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

11. 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 the enforcement of consumer protection statutes and common law prohibitions is within this State's lawful authority, the relief sought herein and the adjudication of the claims which plaintiffs assert are within the jurisdiction of this Court.

12. Venue is proper in this Court. Defendants do business in this county and have entered into contracts with plaintiffs 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, plaintiffs, at times relevant to this action, resided in Alameda County.

13. 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 classes 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.

CINGULAR'S HANDSET LOCKING PRACTICES

14. Cingular does not manufacture handsets. It purchases handsets from equipment vendors such as Nokia, Motorola and Samsung. It then resells those handsets to Cingular subscribers. These handsets are referred to herein as "Cingular handsets."

15. Cellular telephone handsets, including those sold by Cingular, 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.

1 16. A Cingular handset can operate on another carrier's network without any alteration
2 or enhancement to the handset. Just as an FM radio is capable of receiving all stations in the FM
3 band, Cingular handsets, as sold, are capable of sending and receiving signals on all cellular or
4 PCS bands in use in the United States.

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

13 18. Cingular's GSM handsets utilize SIM (subscriber information module) cards. A
14 SIM card is a wafer-thin card measuring approximately 7/8-inch by 5/8-inch that stores computer-
15 readable information. The subscriber's identifying information is written onto the SIM card, which
16 is read by the handset and transmitted to the carrier's network. A handset employing a SIM card
17 has a receptacle into which the card can be placed, typically behind the handset battery.

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

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

26 21. The SIM locks employed by Cingular prevent GSM handsets from operating if a
27 SIM card from another cellular/PCS carrier is inserted into the handset. This effectively prevents
28

1 the activation of the handset on the facilities of any carrier other than Cingular unless the phone is
2 unlocked.

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

11 23. The TDMA phones marketed by Cingular are programmed with System Operator
12 Code (“SOC”) locks and/or band order locks.

13 24. A system operator code is a 3- or 4-digit number assigned to a cellular/PCS carrier.
14 The SOC code programmed into the handset must match the code of the carrier providing service.
15 However, when these handsets are locked, the SOC code cannot be changed. This SOC lock
16 effectively ensures that handsets programmed by Cingular cannot be reprogrammed for activation
17 on a rival carrier's network.

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

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

22 27. Cellular/PCS services operate on the 800 MHz band or the 1900 MHz band. The
23 800 MHz band contains two channel sets: Block “A” and Block “B”. The 1900 MHz band
24 contains six channel sets: Blocks “A” through “F”. Each carrier typically operates on only one or
25 two such blocks within a given geographic area. While cellular/PCS handsets are generally
26 capable of operating across the entire range of frequencies allocated for cellular/PCS services --
27 i.e., the entire 800 MHz band and the entire 1900 MHz band -- each carrier is licensed to operate
28 only on certain restricted channel sets, or blocks, within those bands.

1 (b) that whatever limitations may exist on the handset's ability to be activated on or
2 make use of the networks of rival carriers who use compatible technology are the result of
3 Cingular's deliberate and systematic degradation of the functionality of the handsets through the
4 use of SIM, SOC and band order locks;

5 (c) that Cingular handsets are locked with SIM locks, SOC locks and/or band order
6 locks to create an impediment to activation on non-Cingular Wireless networks;

7 (d) that Cingular handsets can be unlocked in seconds by entering the unlock code
8 through the handset keypad or otherwise;

9 (e) that once unlocked, Cingular handsets can be activated on non-Cingular Wireless
10 networks; and

11 (f) the lock codes themselves for the handsets sold to plaintiffs and the other Class
12 members.

13 33. The Concealed Facts were known to Cingular at all relevant times.

14 34. The Concealed Facts are important facts which consumers could not have
15 discovered because handset locks are not visible to a purchaser visually inspecting the handset.
16 Nor is there any disclosure about the locks on the packaging or materials provided with the handset
17 at the time of purchase. In the ordinary course, a purchaser would not discover the locking
18 software until attempting to activate the handset with another carrier. Thus, when purchasing a
19 Cingular handset, plaintiffs were not aware that the handset had been altered and locked as
20 described above. Nor were other Class members aware that the handsets they purchased from
21 Cingular had been altered and locked as described above.

22 35. Plaintiffs did not know the Concealed Facts when purchasing a Cingular handset.
23 Nor did other Class members.

24 36. Cingular intended to deceive plaintiffs and the other Class members by concealing
25 the Concealed Facts.

26 37. Plaintiffs and the other Class members reasonably relied on Cingular's deception by
27 purchasing Cingular handsets, activating those handsets on Cingular's network, and remaining
28 Cingular subscribers.

HARMS TO PLAINTIFFS AND THE CLASS

1
2 38. Plaintiffs and the other Class members have suffered an injury in fact resulting in a
3 loss of money and property due to Cingular's handset locking practices and deception because (i)
4 they have been locked in to the service of Cingular and impeded from switching to another carrier,
5 (ii) they have incurred or may incur costs to have the handsets unlocked, (iii) they have been, may
6 be or are unable to use their handsets when switching carriers, (iv) the handsets they acquired from
7 Cingular are of diminished value, (v) Cingular's practices deprived them of the full enjoyment of
8 their rights of ownership over the handsets that they purchased, and/or (vi) the option to switch
9 carriers without having to purchase a new cellphone has economic value, the deprivation of which
10 has harmed plaintiffs and the members of the Class.

11 39. Cingular's deception was a substantial factor in causing these harms to plaintiffs and
12 the other Class members.

CINGULAR'S DUTY TO DISCLOSE THE CONCEALED FACTS

13
14 40. Cingular owed a duty to plaintiffs and the other Class members to disclose the
15 handset locks. There are at least five bases for such duty.

16 41. *First*, Cingular owes a duty to release the unlock codes by virtue of the sale of the
17 handset. Cingular itself does not consider a handset shipment from the manufacturer to Cingular to
18 be completed until the unlock code is transmitted to Cingular, and will not pay for a handset until it
19 has received the unlock code. This demonstrates that Cingular itself regards the unlock code as an
20 essential part of the sale, and essential to obtaining full rights of ownership and use of the handset.
21 Similarly, the transfer of the handsets from Cingular to plaintiffs is not complete because Cingular
22 has not disclosed the unlock codes to plaintiffs. Cingular has thus deprived plaintiffs of full rights
23 of ownership and use of that handset by withholding the unlock code. Cingular would not have
24 paid the manufacturers, for those handsets until the manufacturers provided the unlock codes to
25 Cingular. Cingular thus had a duty, upon receipt of payment from plaintiffs to disclose the unlock
26 codes to plaintiffs so as to transfer to them the full rights of ownership and use of the handset that
27 Cingular itself had received from the manufacturers.

1 band order locks (the "Class"). Within the Class is a subclass (the "Subclass") consisting of all
2 members of the Class who are "consumers" as defined by Civil Code section 1761.

3 48. The Class and Subclass are composed of hundreds of thousands or even millions of
4 people, whose joinder in this action would be impracticable. The disposition of their claims
5 through this class action will benefit both the parties and this Court. The identities of individual
6 members of the Class and Subclass are ascertainable through the billing records of the defendants
7 named herein.

8 49. There is a well-defined community of interest in the questions of law and fact
9 involved affecting the members of the Class and Subclass. Questions of law and fact common to
10 the Class and Subclass predominate over questions which may affect only individual class
11 members, including, but not limited to, the following:

12 a. Whether Cingular misrepresented and/or concealed the fact that the handsets
13 are locked and the manner in which they are locked;

14 b. Whether Cingular should be enjoined to offer to unlock the handsets
15 purchased by plaintiffs and the Class and Subclass;

16 c. Whether Cingular should be enjoined from secretly programming and selling
17 locked handsets; and

18 d. Whether Cingular should be enjoined to make appropriate disclosures of the
19 existence and effects of its handset locks.

20 50. Plaintiffs are asserting claims that are typical of the claims of the Class and
21 Subclass, and plaintiffs will fairly and adequately represent and protect the interests of the Class
22 and Subclass. Plaintiffs do not have any interests antagonistic to the interests of the Class and
23 Subclass. Plaintiffs have retained counsel who are competent and experienced in the prosecution
24 of class action litigation.

25 51. Absent a class action, defendants' practices will irreparably injure the members of
26 the Class and Subclass by defrauding consumers by concealing from them the qualities of the
27 handsets they purchase from Cingular and by secretly imposing unfair and improper obstacles to
28 switching to a carrier other than Cingular. Because of the size of the individual class members'

1 claims, few, if any, class members could afford to seek legal redress on an individual basis for the
2 wrongs complained of herein. Absent a class action, the class members will continue to suffer
3 losses and the violations of law described herein will continue without remedy and Cingular will
4 retain the proceeds of its misdeeds. Cingular continues, to this day, to engage in the unlawful and
5 unfair conduct which is the subject of the complaint.

6 **COUNT I**

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

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

12 53. COUNT I is brought against Cingular by plaintiffs individually, on behalf of the
13 Class and on behalf of the general public.

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

18 55. Cingular's handset locking practices violated the "fraudulent" prong of the UCL by
19 making the Misrepresentations and by concealing the Concealed Facts.

WHEREFORE, plaintiffs prays 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 56. Plaintiffs incorporate by reference all allegations of all prior paragraphs as though
25 fully set forth herein.

26 57. COUNT II is brought against Cingular by plaintiffs individually, on behalf of the
27 Class and on behalf of the general public.

28 58. Cingular 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 59. Cingular violated the “unlawful” prong of the UCL by violating the Consumer
2 Legal Remedies Act, Civil Code §§ 1770 (a)(5) – (7) and (9) as set forth in COUNT IV, below.

3 60. Cingular violated the “unlawful” prong of the UCL by violating the Consumers
4 Legal Remedies Act, Civil Code § 1770(a)(14) and (19), as set forth in Count VI, below.

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

22 62. Cingular violated the “unlawful” prong of the UCL by violating the Cartwright Act,
23 Bus. & Prof. Code § 16727, by unlawfully tying the sale of cellular/PCS handsets and services.
24 Cellular/PCS services and handsets are two separate products. Cingular coerces subscribers to
25 purchase handsets only from Cingular as a condition of obtaining service through Cingular’s
26 network and refuses to provide service with handsets purchased from other sources. Cingular has
27 economic power in the tying product market, the provision of cellular/PCS services in the State of
28 California, by virtue of its extensive portfolio of spectrum licenses, the high cost to consumers of

1 switching to another service, and otherwise. Cingular's tying arrangements have substantially
2 lessened competition by creating barriers to entry to the handset market, by reducing the number of
3 handset manufacturers from several dozen in the mid-1990s to a mere ten or so manufacturers
4 today, by preventing the development of handset technology that would allow handsets to access
5 signals provided by multiple providers of wireless services, by increasing the cost of handsets, and
6 by increasing the cost of handset and services bundles. Cingular's tying arrangements affect a
7 substantial amount of commerce since Cingular has millions of subscribers in California.

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

17 64. Cingular violated the "unlawful" prong of the UCL by violating the FCC's bundling
18 rule. Due to concerns about the potential anticompetitive impact of tying arrangements, in 1992
19 the FCC clarified its policy with respect to the bundling of wireless phones and services. The FCC
20 stated its "concern that customers have the ability to choose their own CPE [handset] and service
21 packages to meet their own communication needs and that they not be forced to buy unwanted
22 carrier-provided CPE [handsets] in order to obtain necessary services." *In The Matter Of Bundling
23 Of Cellular Customer Premises Equipment And Cellular Service*, CC Docket No. 91-34, 1992 WL
24 689944 (F.C.C. June 10, 1992), at ¶ 6. Given these concerns, the FCC permitted cellular carriers to
25 offer handsets and services as a bundled package, provided that cellular service was also offered
26 separately on a nondiscriminatory basis. In other words, the FCC permitted carriers to bundle
27 handsets and service on the condition that the carriers offer service regardless of whether the
28 subscriber purchased a bundled phone from the carrier or an unbundled phone from a source other

1 than the carrier. *See id.* Cingular does not offer service separately, without the purchase of a
2 bundled Cingular handset, in violation of this rule. Cingular's handset locking practices, including
3 Cingular's conspiracy with other carriers and sellers of handsets, is an integral part of Cingular's
4 violation of this FCC rule.

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

6 **COUNT III**
7 **Unfair Competition In Violation Of**
8 **California Business & Professions Code §§ 17200 Et Seq.**
9 **(Unfair Business Practices)**

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

12 66. COUNT III is brought against Cingular by plaintiffs individually, on behalf of the
13 Class and on behalf of the general public.

14 67. Cingular is subject to the UCL. The UCL provides, in pertinent part: "Unfair
15 competition shall mean and include unlawful, unfair or fraudulent business practices and unfair,
16 deceptive, untrue or misleading advertising..."

17 68. Cingular violated the "unfair" prong of the UCL because Cingular's handset locking
18 practices threaten an incipient violation of the Consumer Legal Remedies Act, Civil Code §§ 1770
19 (a)(5) – (7) and (9) as set forth in COUNT IV, below, and violate the policy or spirit of those laws
20 because the effects of Cingular's handset locking practices are comparable to or the same as a
21 violation of the law, or otherwise significantly threaten or harm competition.

22 69. Cingular violated the "unfair" prong of the UCL because Cingular's handset locking
23 practices threaten an incipient violation of the Cartwright Act, Bus. & Prof. Code § 16720, and §
24 16727, as described above, and violate the policy or spirit of those laws because the effects of
25 Cingular's handset locking practices are comparable to or the same as a violation of the law, or
26 otherwise significantly threaten or harm competition.

27 70. Cingular violated the "unfair" prong of the UCL because Cingular's handset locking
28 practices threaten an incipient violation of the FTC Act, 15 U.S.C. § 45(n), as described above, and
violate the policy or spirit of those laws because the effects of Cingular's handset locking practices

1 are comparable to or the same as a violation of the law, or otherwise significantly threaten or harm
2 competition.

3 71. Cingular violated the "unfair" prong of the UCL because Cingular's handset locking
4 practices threaten an incipient violation of the FCC's bundling rules set forth in *In The Matter Of*
5 *Bundling Of Cellular Customer Premises Equipment And Cellular Service*, CC Docket No. 91-34,
6 1992 WL 689944 (F.C.C. June 10, 1992), as described above, and violate the policy or spirit of
7 those laws because the effects of Cingular's handset locking practices are comparable to or the
8 same as a violation of the law, or otherwise significantly threaten or harm competition.

9 72. Cingular violated the "unfair" prong of the UCL because Cingular's handset
10 locking practices are contrary to the public policy expressed by the United States Congress which
11 established the promotion of competition in the field of telecommunications as a fundament policy
12 underlying the Communications Act of 1934. *See* The Omnibus Budget Reconciliation Act of
13 1993, Pub. L. No. 103-66, Title VI, § 6002(b), amending the Communications Act of 1934 and
14 codified at 47 U.S.C. § 332(c).

15 73. Cingular violated the "unfair" prong of the UCL because Cingular's handset locking
16 practices are contrary to the public policy expressed by the United States Congress in the
17 Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. § 151,
18 *et seq.* ("the 1996 Act" or "the Act"), to "promote competition and reduce regulation in order to
19 secure lower prices and higher quality services for American telecommunications consumers and
20 encourage the rapid deployment of new telecommunications technologies." 1996 Act, preamble.

21 74. Cingular violated the "unfair" prong of the UCL because Cingular's handset locking
22 practices are contrary to the public policy expressed by the FCC rules requiring wireless carriers to
23 provide number portability. *See Telephone Number Portability, First Report and Order and*
24 *Further Notice of Proposed Rule*, 11 F.C.C.R. 8352, 1996 WL 400225 (1996) ("First Report and
25 Order"); 47 C.F.R. § 52.31. The FCC ordered wireless number portability because it found that
26 consumers "will be reluctant to change wireless service providers unless they can keep the same
27 number," and "will find themselves forced to stay with carriers with whom they may be dissatisfied
28 because the cost of giving up their wireless phone number in order to move to another carrier is too

1 high.” *See CTIA v. FCC*, 303 F.3d 502, 506-07 (D.C. Cir. 2003), quoting 17 F.C.C.R. at 14,979-
2 80. The same rationale for allowing consumers to keep their phone number when changing
3 carriers, also supports allowing consumers to keep their handsets when changing carriers.
4 Consumers “will be reluctant to change wireless services providers unless they can keep the same
5 [handset],” and “will find themselves forced to stay with carriers with whom they may be
6 dissatisfied because the cost of giving up their wireless phone [handset] in order to move to another
7 carrier is too high.” *See id.*

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

9
10 **COUNT IV**
Consumer Legal Remedies Act

11 75. Plaintiffs incorporate by reference all allegations of all prior paragraphs as though
12 fully set forth herein.

13 76. COUNT IV is brought by plaintiffs (other than Kistler & Kistler, Inc.) individually
14 and on behalf of the Subclass against Cingular.

15 77. By secretly locking handsets and failing to disclose the existence and effects of
16 Cingular’s handset locks as alleged above, Cingular has engaged in, and continues to engage in,
17 unfair methods of competition and unfair or deceptive acts and practices in violation of the
18 Consumer Legal Remedies Act, Civil Code sections 1750 *et seq.* (the “CLRA”), including without
19 limitation, the provisions of California Civil Code sections 1770(a)(5)-(7) and (9).

20 78. CLRA section 1770(a)(5) prohibits “Representing that goods or services have
21 sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not
22 have or that a person has a sponsorship, approval, status, affiliation, or connection which he or she
23 does not have.” Cingular violated this provision by making the Misrepresentations and by
24 concealing the Concealed Facts. Cingular continues to violate this provision in connection with
25 sales of handsets to class members.

26 79. CLRA section 1770(a)(6) prohibits “Representing that goods are original or new if
27 they have deteriorated unreasonably or are altered, reconditioned, reclaimed, used, or secondhand.”
28 Cingular violated this provision by representing that the handset sold to plaintiffs were original or

1 new when in fact they had been altered by Cingular. Cingular continues to violate this provision in
2 connection with sales of handsets to class members.

3 80. CLRA section 1770(a)(7) prohibits "Representing that goods or services are of a
4 particular standard, quality, or grade, or that goods are of a particular style or model, if they are of
5 another." Cingular violated this provision by making the Misrepresentations and by concealing the
6 Concealed Facts. Cingular continues to violate this provision in connection with sales of handsets
7 to class members.

8 81. CLRA section 1770(a)(9) prohibits "Advertising goods or services with intent not to
9 sell them as advertised." Cingular violated this provision by advertising the sale of various handset
10 models with the intent of not selling fully functional, unaltered versions of such handsets, but
11 instead selling only such handsets as have been altered by Cingular. Cingular continues to violate
12 this provision in connection with its advertising of handsets. As a proximate result thereof,
13 plaintiffs and the members of the Subclass have been harmed as alleged above and will continue to
14 be harmed in the future unless the Court grants relief as prayed for herein.

15 82. On February 27, 2004, plaintiff Mendoza, pursuant to Civil Code section 1782, sent
16 defendants a letter via certified mail, return receipt requested, advising them that they are in
17 violation of the CLRA and must correct, repair and rectify such violation or agree to do so within
18 thirty days. A true and correct copy of said demand is attached hereto as Exhibit A.

19 83. Defendants never responded to plaintiff Mendoza's February 27, 2004 letter.

20 WHEREFORE, plaintiffs (other than Kistler & Kistler) pray for relief as hereinafter set
21 forth.

22 **COUNT V**
23 **Declaratory Relief**

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

26 85. COUNT V is brought by plaintiffs individually and on behalf of the Class against
27 Cingular.
28

1 86. Plaintiffs are informed and believes that the form contract imposed by Cingular on
2 its subscribers includes the following provision:

3 ...[I]nstead of suing in court, CINGULAR and you agree to arbitrate any
4 and all disputes and claims (including but limited to claims based on or
5 arising from an alleged tort) arising out of relating to this Agreement, or to
6 any prior Agreement for products or service between you and CINGULAR
7 or any of your or CINGULAR's affiliates or predecessors in interest. The
8 arbitration of any dispute or claim shall be conducted in accordance with the
9 wireless industry arbitration rules ("WIA Rules") as modified by this
10 agreement and as administered by the American Arbitration Association
11 ("AAA")...Except where prohibited by law CINGULAR and you agree that
12 no Arbitrator has the authority to: (1) award relief in excess of what this
13 agreement provides; (2) award punitive damages or any other damages not
14 measured by the prevailing party's actual damages; or (3) order
15 consolidation or class arbitration. The Arbitrator(s) must give effect to the
16 limitations on CINGULAR's liability as set forth in this agreement, any
17 applicable tariff, law or regulation....CINGULAR, you and the arbitrator(s)
18 shall not disclose the existence, content or results of any arbitration.
19 Judgment on the award rendered by the Arbitrator(s) may be rendered in any
20 Court having jurisdiction thereof. Notwithstanding the foregoing, either
21 party may bring an action in small claims court.

22 87. An actual and justiciable controversy exists between the parties as to their respective
23 rights and obligations under the form contracts imposed on subscribers by Cingular.

24 88. Specifically, plaintiffs believe and thereon allege that the above provision that
25 purports to compel arbitration and preclude plaintiffs and the class members from participating in a
26 class or representative action against Cingular is procedurally and substantively unconscionable,
27 and is therefore unenforceable. In addition to the provision purporting to prohibit class actions or
28 consolidation in arbitration, the provisions mandating confidentiality (which prevent subscribers
from sharing information with each other about awards against CINGULAR) and requiring the
arbitrator to employ the WIA Rules are unconscionable.

 89. Plaintiffs believe and thereon allege that these provisions are 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 Cingular on a "take
it or leave it basis." Plaintiffs are also informed and believes and thereon alleges that other cellular
telephone service providers also impose similar provisions in their form contracts and that it would
be difficult if not impossible for plaintiffs and the class members to reject the terms of the said
provision and obtain similar services elsewhere without the offending provision.

1 waiver, and limitations of remedies. Cingular continues to violate this provision by inserting such
2 provisions in its form customer agreements.

3 WHEREFORE, plaintiffs (other than Kistler & Kistler, Inc.) pray for relief as hereinafter
4 set forth.

5 **PRAYER FOR RELIEF**

6 WHEREFORE, Plaintiffs and the Class and Subclass pray for judgment against defendants,
7 and each of them as follows:

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

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

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

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

15 4. For restitution and/or disgorgement of all amounts wrongfully charged to plaintiffs
16 and the members of the Class.

17 **On COUNT IV**

18 5. For an order directing defendants to appropriately disclose the existence and effects
19 of the handset locks defendants have employed;

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

22 7. For an order enjoining defendants from secretly programming and selling handsets
23 with SIM locks, SOC locks or band order locks;

24 8. For damages incurred by plaintiffs and the Subclass.

25 **On COUNTS V and VI**

26 9. For a judicial declaration that plaintiffs and the members of the Class may bring and
27 participate in a class or representative action against Cingular and that the provision in the form
28 contract that purports to compel arbitration and prohibit plaintiffs and the class members from

1 bringing or participating in a class or representative action is procedurally and substantively
2 unconscionable and is therefore void and unenforceable;

3 **On ALL COUNTS**

4 10. For an order certifying this action as a class action on behalf of the Class and
5 Subclass;

6 11. For costs of suit herein incurred;

7 12. For both pre- and post-judgment interest on any amounts awarded;

8 13. For an award of attorneys' fees as appropriate pursuant to the provisions of Code of
9 Civil Procedure section 1021.5 and/or Civil Code section 1780(d); and

10 14. For such other and further relief as the court may deem proper.

11 **DEMAND FOR JURY TRIAL**

12 Plaintiffs hereby demand a trial by jury.

13 Dated: November 19, 2008

Respectfully submitted,

14
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