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

In re:
CELLPHONE TERMINATION FEE CASES

JCCP No. 4332

Class Action

This Document Relates To:

**FIFTH AMENDED CONSOLIDATED
COMPLAINT [HANDSET LOCKING]**

JURY TRIAL DEMANDED

Meoli, et al. v. AT&T Wireless PCS, LLC, et al.
(Handset Locking Claims Against AT&T
Wireless *et al.*)

Mendoza, et al. v. Cingular Wireless LLC, et al.
(Handset Locking Claims Against Cingular
Wireless LLC *et al.*)

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 persons in the United States,
11 including Puerto Rico and all United States territories, who have or had an AT&T Wireless,
12 Cingular Wireless, and/or AT&T Mobility individual account and who purchased, directly or from
13 an indirect retailer, a wireless handset other than an Apple iPhone for use with AT&T Wireless,
14 Cingular Wireless, and/or AT&T Mobility service from March 12, 1999 to the date on which
15 Notice is issued pursuant to the Stipulation and Settlement Agreement between the parties to this
16 litigation. Any judicial officer to whom the Actions are assigned is excluded from the Settlement
17 Class. Plaintiffs contend that the practice of secretly programming handsets with SOC locks, band
18 order locks, or SIM locks is an unfair business practice which has no legitimate justification and
19 which substantially harms consumers. Plaintiffs further allege that defendants have a duty to
20 disclose that they have locked a handset before selling it to a consumer, and to disclose a handsets
21 locking code in connection with the sale of a handset, and that their failure to do so is a fraudulent
22 and deceptive business practice.

23 PARTIES

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

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

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

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

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

11 8. Defendant Cingular Wireless LLC, aka "AT&T Mobility," is a Delaware limited
12 liability company with its principal place of business in Atlanta, Georgia, which is authorized to do
13 business and doing business in California.

14 9. Defendant Pacific Telesis Mobile Services LLC is a Delaware limited liability
15 company with its principal place of business in Dallas, Texas, which is authorized to do business
16 and doing business in California.

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

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

3 12. Plaintiff Porsha Meoli ("Meoli") is a resident of Los Angeles, California. In or
4 about 2002, she entered into a 12-month service contract to receive cell phone service from AWS.
5 Meoli also purchased from AWS an Ericsson T60LX cell phone that incorporates a SOC lock and a
6 band order lock, as defined below. Meoli continues to be a subscriber to AWS's Digital Advantage
7 calling plan and continues to use the said Ericsson cell phone and AWS service for personal,
8 family or household purposes.

9 13. Plaintiff Leslie Armstrong ("Armstrong") is a resident of Contra Costa County,
10 California. Armstrong entered into a two-year agreement for wireless services with AWS on April
11 13, 2002. Those agreements, individually and/or collectively, provided, *inter alia*, that Armstrong
12 would be a subscriber to AWS's Digital Advantage calling plan, at a base rate of \$39.99 per month,
13 for a two-year period. The equipment activated at the time Armstrong signed the agreement was
14 an Ericsson R300LX cell phone, which contains a SOC lock and a band order lock, as defined
15 below. Armstrong continues to be a subscriber to AWS's Digital Advantage calling plan and
16 continues to use her Ericsson cell phone and AWS service for personal, family or household
17 purposes.

18 14. Plaintiff Sridhar Krishnan ("Krishnan") is a resident of Alameda County, California.
19 Krishnan was a subscriber to AWS service prior to January, 2003. While an AWS subscriber,
20 Krishnan used several cell phones which he purchased from AWS, including most recently a Nokia
21 8260 cell phone, which contained SOC and band order locks, as defined below. Krishnan used the
22 cell phones and the AWS service for, among other reasons, personal, family or household
23 purposes. After Krishnan terminated his AWS service on or about January 7, 2003, he purchased
24 cell phone service from one of the competitors of AWS, but found that as a result of the SOC and
25 band order locks programmed into his Nokia 8260 cell phone, he was unable to use that cell phone
26 with any carrier other than AWS. Plaintiffs Riley Clark ("Clark"), Steve Kozack ("Kozack"),
27 Jennifer Preuss ("Preuss"), Betty Jennings ("Jennings") and Joseph Panganiban ("Panganiban") are
28 residents of the State of California who were subscribers to cellphone service with AWS, and who

1 purchased locked handsets from AWS after March 12, 1999 and prior to the date on which AWS
2 merged with Cingular Wireless in 2004. Meoli, Armstrong, Krishnan, Clark, Kozack, Preuss,
3 Jennings and Panganiban are hereinafter referred to as the "AWS Plaintiffs."

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

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

18 JURISDICTION, VENUE AND APPLICABLE LAW

19 17. Defendants conduct substantial business in the State of California.

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

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

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

9 THE HANDSET LOCKING PRACTICES OF AWS AND CINGULAR

10 21. Neither AWS nor Cingular manufacture handsets. They purchase handsets from
11 equipment vendors such as Nokia, Ericsson and Samsung. They then resell those handsets to AWS
12 and Cingular subscribers. These handsets are referred to herein as "AWS handsets."

13 22. Cellular telephone handsets, including those sold by AWS and Cingular, are
14 manufactured to industry standards so that they can be used to obtain service from many different
15 carriers – for example, when "roaming" off the original carrier's network. This allows the original
16 carrier to enter into network-sharing or roaming agreements with other carriers, and thereby expand
17 coverage and generate more service revenues.

18 23. An AWS or Cingular handset can operate on another carrier's network without any
19 alteration or enhancement to the handset. Just as an FM radio is capable of receiving all stations in
20 the FM band, AWS and Cingular handsets, as sold, are capable of sending and receiving signals on
21 all cellular or PCS bands in use in the United States.

22 24. AWS, Cingular and other cellular/PCS carriers are members of industry standard
23 setting bodies such as the Cellular Telephone & Internet Association ("CTIA"), GSM Association,
24 and other industry groups. Through CTIA and other standard setting organizations, AWS and
25 Cingular conspired with other cellular/PCS carriers and equipment manufacturers to develop locks
26 for cellular/PCS handsets. AWS and Cingular also conspired with other wireless carriers and
27 equipment manufacturers, *inter alia*, through the CTIA Certification Program, which was designed
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1 to certify that cellular/PCS handsets meet the specifications required for the carriers to program and
2 lock them for use on their respective networks.

3 25. AWS provides cellular/PCS service using one of two digital signaling technologies:
4 Global System for Mobile communications (GSM) or Time Division Multiple Access (TDMA).
5 Cingular provides cellular/PCS services using GSM technology.

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

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

14 28. AWS and Cingular require equipment vendors to alter GSM handsets sold to them
15 by locking them with SIM locks and by setting the SIM Unlock Code based on a secret algorithm
16 provided by AWS and Cingular. AWS and Cingular also require their GSM equipment vendors to
17 transmit those SIM Unlock Codes to them. AWS and Cingular do not consider a shipment of GSM
18 handsets complete, and will not make payment to an equipment vendor, until they receive the SIM
19 Unlock Codes.

20 29. The SIM locks employed by AWS and Cingular prevent GSM handsets from
21 operating if a SIM card from another cellular/PCS carrier is inserted into the handset. This
22 effectively prevents the activation of the handset on the facilities of any carrier other than AWS or
23 Cingular unless the phone is unlocked.

24 30. SIM locks cannot be unlocked without a secret code provided by the carrier, or
25 special equipment and expertise which ordinary consumers typically lack. However, with
26 appropriate equipment and expertise or with knowledge of the unlocking codes, it takes only a few
27 minutes to enter the SIM Unlock Code through the handset keypad and reprogram the handset for
28 use on another network, thus restoring the handset's ability to be activated on another network.

1 Indeed, a SIM Unlock Code can be entered to unlock a handset in less time than it takes to dial a
2 long distance phone number, since it contains fewer digits – eight digits for a SIM Unlock Code
3 compared to ten for a phone number (with area code).

4 31. The TDMA phones marketed by AWS and Cingular are programmed with System
5 Operator Code (“SOC”) locks and/or band order locks.

6 32. A system operator code is a 3- or 4-digit number assigned to a cellular/PCS carrier.
7 For example, the International SOC code for AWS is 801 (hex), 2049 (decimal). The SOC code
8 programmed into the handset must match the code of the carrier providing service. However,
9 when these handsets are locked, the SOC code cannot be changed. This SOC lock effectively
10 ensures that handsets programmed by AWS cannot be reprogrammed for activation on a rival
11 carrier’s network.

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

14 34. A band order lock restricts the frequencies or channels on which handsets will
15 operate. AWS employs band order locks in conjunction with SOC locks.

16 35. Cellular/PCS services operate on the 800 MHz band or the 1900 MHz band. The
17 800 MHz band contains two channel sets: Block “A” and Block “B”. The 1900 MHz band
18 contains six channel sets: Blocks “A” through “F”. Each carrier typically operates on only one or
19 two such blocks within a given geographic area. While cellular/PCS handsets are generally
20 capable of operating across the entire range of frequencies allocated for cellular/PCS services --
21 i.e., the entire 800 MHz band and the entire 1900 MHz band -- each carrier is licensed to operate
22 only on certain restricted channel sets, or blocks, within those bands.

23 36. AWS and Cingular TDMA handsets are designed to be compatible with the
24 channels and networks of many carriers, and they are manufactured in such a way that band-order
25 settings are reprogrammable. A band order lock employs software to restrict handsets to AWS’s
26 channel blocks and combat the reprogrammability of the handsets, which reinforces the limitations
27 imposed by the SOC locks.

1 **AWS'S CONCEALED FACTS**

2 41. AWS intentionally concealed and continues to conceal the following material facts
3 (hereafter, the "AWS Concealed Facts"):

4 (a) its handset locking practices.

5 (b) that, contrary to AWS's representations to existing and/or potential subscribers,
6 AWS handsets, as sold, and without alteration or enhancement, *are compatible with and will work*
7 *with services provided by other wireless carriers;*

8 (c) that whatever limitations may exist on the handset's ability to be activated on or
9 make use of the networks of rival carriers who use compatible technology are the result of AWS's
10 deliberate and systematic degradation of the functionality of the handsets through the use of SIM,
11 SOC and band order locks;

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

16 (e) that AWS handsets are locked with SIM locks, SOC locks and/or band order
17 locks to create an impediment to activation on non-AWS networks;

18 (f) that AWS handsets can be unlocked in seconds by entering the unlock code
19 through the handset keypad or otherwise;

20 (g) that once unlocked, AWS handsets can be activated on non-AWS networks; and

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

23 42. The AWS Concealed Facts were known to AWS at all relevant times.

24 43. The AWS Concealed Facts are important facts which consumers could not have
25 discovered because handset locks are not visible to a purchaser visually inspecting the handset.
26 Nor is there any disclosure about the locks on the packaging or materials provided with the handset
27 at the time of purchase. In the ordinary course, a purchaser would not discover the locking
28 software until attempting to activate the handset with another carrier. Thus, when purchasing an

1 AWS handset, Plaintiffs were not aware that the handset had been altered and locked as described
2 above. Nor were other Class members aware that the handsets they purchased from AWS had been
3 altered and locked as described above.

4 44. Plaintiffs did not know the Concealed Facts when purchasing an AWS handset. Nor
5 did other Class members.

6 45. AWS intended to deceive Plaintiffs and the other Class members by concealing the
7 Concealed Facts.

8 46. Plaintiffs and the other Class members reasonably relied on AWS's deception by
9 purchasing AWS handsets, activating those handsets on AWS's network, and remaining AWS
10 subscribers.

11 CINGULAR'S MISREPRESENTATIONS

12 47. Cingular makes representations that are materially false, misleading, and likely to
13 deceive a reasonable consumer and have directly caused economic injury in fact to plaintiffs.
14 Plaintiffs and the members of the class, and to their money and property. These include: (i)
15 representations that Cingular handsets are "PCS Phones," which convey to the reasonable
16 consumer that the handsets will function on all PCS bands, (ii) representations that Cingular
17 handsets are "GSM" handsets, which convey to the reasonable consumer that the handsets will
18 function on GSM networks, (iii) representations that Cingular handsets are "TDMA" handsets,
19 which convey to the reasonable consumer that the handsets will function on TDMA networks, (iv)
20 representations that Cingular handsets are dual- or tri-mode, or dual- or tri-band handsets, which
21 suggest functionality not limited to Cingular's network, and (v) representations that Cingular
22 handsets are brand name handsets, such as Nokia, Motorola or Samsung, etc., which convey to the
23 reasonable consumer that the handsets will have functionality similar to unaltered handsets sold
24 under those brand names (hereafter the "Cingular Misrepresentations"). The AWS
25 Misrepresentations and the Cingular Misrepresentations are hereinafter referred to as the
26 "Misrepresentations".
27
28

1 **CINGULAR'S CONCEALED FACTS**

2 48. Cingular intentionally concealed and continues to conceal the following material
3 facts (the "Cingular Concealed Facts");

4 (a) its handset locking practices.

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

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

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

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

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

17 49. The Cingular Concealed Facts were known to Cingular at all relevant times.

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

26 51. Plaintiffs did not know the Concealed Facts when purchasing a Cingular handset.
27 Nor did other Class members.

1 rights of ownership and use of the handset. Similarly, the transfer of the handsets from AWS and
2 Cingular to Plaintiffs is not complete because AWS and Cingular have not disclosed the unlock
3 codes to Plaintiffs. AWS and Cingular have thus deprived Plaintiffs of full rights of ownership and
4 use of that handset by withholding the unlock code. AWS and Cingular would not have paid the
5 manufacturers, for those handsets until the manufacturers provided the unlock codes to them.
6 AWS and Cingular thus had a duty, upon receipt of payment from Plaintiffs to disclose the unlock
7 codes to Plaintiffs so as to transfer to them the full rights of ownership and use of the handset that
8 AWS and Cingular themselves had received from the manufacturers.

9 59. *Second*, as sellers, AWS and Cingular have a duty to disclose the Concealed Facts
10 because they are known to AWS and Cingular but are not accessible to consumers purchasing
11 AWS and Cingular handsets. *See, e.g., Nussbaum v. Weeks* (1989) 214 Cal. App.3d 1589, 1600
12 (“seller has a general duty to disclose material facts that are not accessible to the buyer”), *citing* 5
13 Witkin, Summary of Cal. Law. (9th ed. 1988) Torts § 700, at 801-02.

14 60. *Third*, AWS and Cingular have a duty to disclose the Concealed Facts to correct the
15 Misrepresentations which are false, misleading, and likely to deceive reasonable consumers in the
16 absence of such disclosure. *See, e.g., Restatement (Second) of Torts* § 551.

17 61. *Fourth*, AWS and Cingular have a duty to disclose the Concealed Facts to prevent
18 harm to Plaintiffs and the Class. *See Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 397
19 (recognizing a duty to disclose based on “the balancing of various factors, among which are the
20 extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to
21 him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection
22 between the defendant’s conduct and the injury suffered, the moral blame attached to the
23 defendant’s conduct, and the policy of preventing future harm.”). Such a duty arises here because
24 the Concealed Facts are integral to a transaction that was intended to affect Plaintiffs and the Class,
25 the harm to Plaintiffs and the Class was foreseeable (indeed, it was *intended* and *purposeful*), and
26 AWS’s and Cingular’s conduct are closely connected to the injuries suffered.

27 62. *Fifth*, the substantive legal provisions under which Plaintiffs bring their claims
28 herein, including without limitation Business & Professions Code §§17200 *et seq.* and the

1 Consumer Legal Remedies Act, Civil Code §§1750 *et seq.*, impose on AWS and Cingular a duty
2 not to engage in unfair, unlawful, fraudulent and deceptive business practices and not to conceal
3 facts the disclosure of which is necessary to avoid violating the said provisions.

4 CLASS ALLEGATIONS

5 63. Plaintiffs bring this action on their own behalf and on behalf of all other persons
6 similarly situated.

7 64. Plaintiffs seek to represent a class defined as all persons in the United States who
8 have or had an AT&T Wireless, Cingular Wireless, and/or AT&T Mobility individual account and
9 who purchased, directly or from an indirect retailer, a wireless handset other than an Apple iPhone
10 for use with AT&T Wireless, Cingular Wireless, and/or AT&T Mobility service from March 12,
11 1999 to the date on which Notice is issued pursuant to the Settlement Agreement. Any judicial
12 officer to whom the Actions are assigned is excluded from the Settlement Class.

13 65. The Class and Subclass are composed of hundreds of thousands or even millions of
14 people, whose joinder in this action would be impracticable. The disposition of their claims
15 through this class action will benefit both the parties and this Court. The identities of individual
16 members of the class are ascertainable through the billing records of the defendants named herein.

17 66. There is a well-defined community of interest in the questions of law and fact
18 involved affecting the members of the Class and Subclass. Questions of law and fact common to
19 the Class and Subclass predominate over questions which may affect only individual class
20 members, including, but not limited to, the following:

21 a. Whether AWS and/or Cingular misrepresented and/or concealed the fact that
22 the handsets defendants sell are locked, the manner in which they are locked or the purpose or
23 effects of the locks;

24 b. Whether AWS and/or Cingular should be enjoined to make appropriate
25 disclosures of the existence and effects of its handset locks;

26 c. Whether AWS and/or Cingular should be enjoined to offer to unlock, or
27 provide the codes to unlock, the handsets purchased by Plaintiffs and the Class and Subclass;

1 d. Whether AWS and/or Cingular should be enjoined from secretly
2 programming and selling locked handsets; and

3 e. Whether the representation made in AWS's form customer agreements that
4 the locks are "software necessary to use [AWS] Service" is false, misleading, likely to deceive, or
5 constitutes a violation of California law and the laws of other states.

6 67. Plaintiffs are asserting claims that are typical of the claims of the Class and
7 Subclass, and plaintiffs will fairly and adequately represent and protect the interests of the Class
8 and Subclass. Plaintiffs have no interests antagonistic to the interests of the Class and Subclass.
9 Plaintiffs have retained counsel who are competent and experienced in the prosecution of class
10 action litigation.

11 68. Absent a class action, defendants' practices will irreparably injure the members of
12 the Class and Subclass by defrauding consumers by concealing from them the qualities of the
13 handsets they purchase from AWS and Cingular, and by secretly imposing unfair and improper
14 obstacles to switching to a carrier other than AWS or Cingular. Because of the size of the
15 individual class members' claims, few, if any, class members could afford to seek legal redress on
16 an individual basis for the wrongs complained of herein. Absent a class action, the class members
17 will continue to suffer losses and the violations of law described herein will continue without
18 remedy and AWS will retain the proceeds of its misdeeds. AWS and Cingular continue, to this
19 day, to engage in the unlawful and unfair conduct which is the subject of this complaint.

20 **COUNT I**
21 **Unfair Competition In Violation Of**
22 **California Business & Professions Code §§ 17200 *Et Seq.* and Other Similar Statutory**
23 **Enactments of Other States**
24 **(Fraudulent and Deceptive Business Practices)**

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

27 70. COUNT I is brought against AWS and Cingular by plaintiffs individually, on behalf
28 of the Class and on behalf of the general public.

71. AWS and Cingular are subject to the Unfair Competition Law, Business &
Professions Code section 17200 *et seq.* (the "UCL"). The UCL provides, in pertinent part: "Unfair

1 competition shall mean and include unlawful, unfair or fraudulent business practices and unfair,
2 deceptive, untrue or misleading advertising...”

3 72. AWS’s and Cingular’s handset locking practices violated the “fraudulent” prong of
4 the UCL and comparable provisions of the laws of the other 49 states by making the
5 Misrepresentations and by concealing the Concealed Facts.

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

7 **COUNT II**
8 **Unfair Competition In Violation Of**
9 **California Business & Professions Code §§ 17200 *Et Seq.* and Other Similar Statutory**
10 **Enactments of Other States**
11 **(Unlawful Business Practices)**

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

14 74. COUNT II is brought against AWS and Cingular by plaintiffs individually, on
15 behalf of the Class and on behalf of the general public.

16 75. AWS and Cingular are subject to the UCL and other similar statutory enactments of
17 other states. The UCL provides, in pertinent part: “Unfair competition shall mean and include
18 unlawful, unfair or fraudulent business practices and unfair, deceptive, untrue or misleading
19 advertising...”

20 76. AWS and Cingular violated the “unlawful” prong of the UCL and other similar
21 statutory enactments of other states by violating the Consumer Legal Remedies Act, Civil Code §§
22 1770 (a)(5) – (7) and (9), and other similar statutory enactments of other states, as set forth in
23 COUNT IV, below.

24 77. AWS and Cingular violated the “unlawful” prong of the UCL and other similar
25 statutory enactments of other states by violating the Cartwright Act, Bus. & Prof. Code § 16720
26 and other similar statutory enactments of other states, by conspiring with other cellular/PCS
27 carriers, such as the membership of CTIA, including, for example, each other and other carriers, by
28 conspiring to restrain trade by locking handsets to tie the sale of cellular/PCS handsets and
services. Beginning at a date unknown to plaintiffs, but at least as early as April 1, 2002, and
continuing to the present, AWS, Cingular, their co-conspirators, and unknown Doe defendants

1 have engaged in a continuing contract, combination and conspiracy in unreasonable restraint of
2 trade and commerce, as evidenced by the foregoing acts and practices, among others. This
3 contract, combination, and conspiracy had the purpose and effect of unreasonably restraining trade
4 and commerce. The contract, combination, and conspiracy alleged herein consisted of a continuing
5 agreement, understanding, and concert of action among the defendants and their co-conspirators,
6 the substantial terms of which were to lock handsets so that each carrier would be the only source
7 of handsets for that carrier's subscribers, and each carrier's handsets would be locked for use only
8 on that carrier's network, and to create an impediment to activation on other networks. For the
9 purpose of forming and effectuating the contract, combination, and conspiracy, AWS, Cingular and
10 their co-conspirators, including, *inter alia*, CTIA, did those things which they contracted,
11 combined, and conspired to do, including but not limited to the acts, practices, and course of
12 conduct set forth above.

13 78. AWS and Cingular violated the "unlawful" prong of the UCL and other similar
14 statutory enactments of other states by violating the Cartwright Act, Bus. & Prof. Code § 16727,
15 and other similar statutory enactments of other states, by unlawfully tying the sale of cellular/PCS
16 handsets and services. Cellular/PCS services and handsets are two separate products. AWS and
17 Cingular coerce subscribers to purchase handsets only from them as a condition of obtaining
18 service through their network and refuse to provide service with handsets purchased from other
19 sources.

20 79. AWS and Cingular both have economic power in the tying product market, the
21 provision of cellular/PCS services in the State of California, by virtue of their extensive portfolio of
22 spectrum licenses, the high cost to consumers of switching to another service, and otherwise.
23 AWS's and Cingular's tying arrangements have substantially lessened competition by creating
24 barriers to entry to the handset market, by reducing the number of handset manufacturers from
25 several dozen in the mid-1990s to a mere ten or so manufacturers today, by preventing the
26 development of handset technology that would allow handsets to access signals provided by
27 multiple providers of wireless services, by increasing the cost of handsets, and by increasing the
28 cost of handset and services bundles. AWS's and Cingular's tying arrangements affect a

1 substantial amount of commerce since AWS and Cingular each have millions of subscribers in
2 California.

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

13 81. AWS and Cingular violated the “unlawful” prong of the UCL and other similar
14 statutory enactments of other states by violating the FCC’s bundling rule. Due to concerns about
15 the potential anticompetitive impact of tying arrangements, in 1992 the FCC clarified its policy
16 with respect to the bundling of wireless phones and services. The FCC stated its “concern that
17 customers have the ability to choose their own CPE [handset] and service packages to meet their
18 own communication needs and that they not be forced to buy unwanted carrier-provided CPE
19 [handsets] in order to obtain necessary services.” *In The Matter Of Bundling Of Cellular Customer*
20 *Premises Equipment And Cellular Service*, CC Docket No. 91-34, 1992 WL 689944 (F.C.C. June
21 10, 1992), at ¶ 6. Given these concerns, the FCC permitted cellular carriers to offer handsets and
22 services as a bundled package, provided that cellular service was also offered separately on a
23 nondiscriminatory basis. In other words, the FCC permitted carriers to bundle handsets and service
24 on the condition that the carriers offer service regardless of whether the subscriber purchased a
25 bundled phone from the carrier or an unbundled phone from a source other than the carrier. *See id.*
26 AWS and Cingular do not offer service separately, without the purchase of a bundled handset, in
27 violation of this rule. AWS’s and Cingular’s handset locking practices, including their conspiracy
28

1 with each other and with other carriers and sellers of handsets, is an integral part of their violation
2 of this FCC rule.

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

4 **COUNT III**

5 **Unfair Competition In Violation Of**
6 **California Business & Professions Code §§ 17200 *Et Seq.* and Other Similar Statutory**
7 **Enactments of Other States**
8 **(Unfair Business Practices)**

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

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

13 84. AWS and Cingular are subject to the UCL and other similar statutory enactments of
14 other states. The UCL provides, in pertinent part: "Unfair competition shall mean and include
15 unlawful, unfair or fraudulent business practices and unfair, deceptive, untrue or misleading
16 advertising..."

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

23 86. AWS and Cingular violated the "unfair" prong of the UCL and other similar
24 statutory enactments of other states because their handset locking practices threaten an incipient
25 violation of the Cartwright Act, Bus. & Prof. Code § 16720, and § 16727, and other similar
26 statutory enactments of other states, as described above, and violate the policy or spirit of those
27 laws because the effects of their handset locking practices are comparable to or the same as a
28 violation of the law, or otherwise significantly threaten or harm competition.

87. AWS and Cingular violated the "unfair" prong of the UCL and other similar
statutory enactments of other states because their handset locking practices threaten an incipient

1 violation of the FTC Act, 15 U.S.C. § 45(n), as described above, and violate the policy or spirit of
2 those laws because the effects of their handset locking practices are comparable to or the same as a
3 violation of the law, or otherwise significantly threaten or harm competition.

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

11 89. AWS and Cingular violated the “unfair” prong of the UCL and other similar
12 statutory enactments of other states because their handset locking practices are contrary to the
13 public policy expressed by the United States Congress which established the promotion of
14 competition in the field of telecommunications as a fundament policy underlying the
15 Communications Act of 1934. *See* The Omnibus Budget Reconciliation Act of 1993, Pub. L. No.
16 103-66, Title VI, § 6002(b), amending the Communications Act of 1934 and codified at 47 U.S.C.
17 § 332(c).

18 90. AWS and Cingular violated the “unfair” prong of the UCL and other similar
19 statutory enactments of other states because their handset locking practices are contrary to the
20 public policy expressed by the United States Congress in the Telecommunications Act of 1996,
21 Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. § 151, *et seq.* (“the 1996 Act” or “the
22 Act”), to “promote competition and reduce regulation in order to secure lower prices and higher
23 quality services for American telecommunications consumers and encourage the rapid deployment
24 of new telecommunications technologies.” 1996 Act, preamble.

25 91. AWS and Cingular violated the “unfair” prong of the UCL and other similar
26 statutory enactments of other states because their handset locking practices are contrary to the
27 public policy expressed by the FCC rules requiring wireless carriers to provide number portability.

28 *See Telephone Number Portability, First Report and Order and Further Notice of Proposed Rule,*

1 11 F.C.C.R. 8352, 1996 WL 400225 (1996) (“First Report and Order”); 47 C.F.R. § 52.31. The
2 FCC ordered wireless number portability because it found that consumers “will be reluctant to
3 change wireless service providers unless they can keep the same number,” and “will find
4 themselves forced to stay with carriers with whom they may be dissatisfied because the cost of
5 giving up their wireless phone number in order to move to another carrier is too high.” *See CTIA v.*
6 *FCC*, 303 F.3d 502, 506-07 (D.C. Cir. 2003), quoting 17 F.C.C.R. at 14,979-80. The same
7 rationale for allowing consumers to keep their phone number when changing carriers, also supports
8 allowing consumers to keep their handsets when changing carriers. Consumers “will be reluctant
9 to change wireless services providers unless they can keep the same [handset],” and “will find
10 themselves forced to stay with carriers with whom they may be dissatisfied because the cost of
11 giving up their wireless phone [handset] in order to move to another carrier is too high.” *See id.*

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

13 **COUNT IV**

14 **Consumer Legal Remedies Act and Other Similar Statutory Enactments of Other States**

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

17 93. COUNT IV is brought by Plaintiffs individually, on behalf of the Subclass, against
18 AWS and Cingular.

19 94. By secretly locking handsets and failing to disclose the existence and effects of
20 AWS’s and Cingular’s handset locks as alleged above, AWS and Cingular have as engaged in, and
21 continue to engage in, unfair methods of competition and unfair or deceptive acts and practices in
22 violation of the Consumer Legal Remedies Act, Civil Code Sections 1750 *et seq.* (the “CLRA”),
23 including without limitation, the provisions of California Civil Code Sections 1770(a)(5)-(7) and
24 (9), and other similar statutory enactments of other states.

25 95. CLRA section 1770(a)(5) prohibits “Representing that goods or services have
26 sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not
27 have or that a person has a sponsorship, approval, status, affiliation, or connection which he or she
28 does not have.” AWS and Cingular violated this provision and other similar statutory enactments

1 of other states by making the Misrepresentations and by concealing the Concealed Facts. AWS
2 and Cingular continues to violate this provision in connection with sales of handsets to class
3 members.

4 96. CLRA section 1770(a)(6) prohibits "Representing that goods are original or new if
5 they have deteriorated unreasonably or are altered, reconditioned, reclaimed, used, or secondhand."
6 AWS and Cingular violated this provision by representing that the handsets sold to Plaintiffs were
7 original or new when in fact they had been altered by AWS. AWS and Cingular continues to
8 violate this provision and other similar statutory enactments of other states in connection with sales
9 of handsets to class members.

10 97. CLRA section 1770(a)(7) prohibits "Representing that goods or services are of a
11 particular standard, quality, or grade, or that goods are of a particular style or model, if they are of
12 another." AWS and Cingular violated this provision and other similar statutory enactments of
13 other states by making the Misrepresentations and by concealing the Concealed Facts. AWS and
14 Cingular continue to violate these provisions in connection with sales of handsets to class
15 members.

16 98. CLRA section 1770(a)(9) prohibits "Advertising goods or services with intent not to
17 sell them as advertised." AWS violated this provision and other similar statutory enactments of
18 other states by advertising the sale of various handset models, including the Ericsson T60LX,
19 Ericsson R300LX, Nokia 8260 and Nokia 3390, with the intent of not selling fully functional,
20 unaltered versions of such handsets, but instead selling only such handsets as have been altered by
21 AWS. AWS continues to violate these provisions in connection with its advertising of handsets.
22 As a proximate result thereof, Plaintiffs and the members of the Subclass have been harmed as
23 alleged above and will continue to be harmed in the future unless the Court grants relief as prayed
24 for herein.

25 99. On March 12, 2003, plaintiffs Meoli, Armstrong and Krishnan, pursuant to Civil
26 Code section 1782, sent AWS a letter via certified mail, return receipt requested, advising them
27 that they are in violation of the CLRA and must correct, repair and rectify such violation or agree
28

1 to do so within thirty days. A true and correct copy of said demand is attached hereto as Exhibit A.
2 AWS never responded to the March 12, 2003 letter.

3 100. On February 27, 2004, plaintiff Mendoza, pursuant to Civil Code section 1782, sent
4 Cingular a letter via certified mail, return receipt requested, advising them that they are in violation
5 of the CLRA and must correct, repair and rectify such violation or agree to do so within thirty days.
6 A true and correct copy of said demand is attached hereto as Exhibit B. Cingular never responded
7 to the February 27, 2004 letter.

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

9 **PRAYER FOR RELIEF**

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

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

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

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

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

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

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

24 **On COUNT IV**

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

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


1 DEMAND FOR JURY TRIAL

2 Plaintiffs hereby demand a trial by jury.

3 Dated: March 23, 2010

Respectfully submitted,

4 BRAMSON, PLUTZIK, MAHLER & BIRKHAUSER, LLP

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7 By: _____

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9 BRAMSON, PLUTZIK, MAHLER & BIRKHAUSER, LLP

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PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Bramson, Plutzik, Mahler & Birkhaeuser, LLP, 2125 Oak Grove Road, Suite 120, Walnut Creek, California 94598. On March 24, 2010, I served the within documents:

FIFTH AMENDED CONSOLIDATED COMPLAINT [HANDSET LOCKING]

- by placing a copy of the document(s) listed above for collection and mailing following the firm's ordinary business practice in a sealed envelope with postage thereon fully prepaid for deposit in the United States mail at Walnut Creek, California addressed as set forth below.
- by facsimile transmission on that date. This document was transmitted by using a Canon LC 710 facsimile machine that complies with California Rules of Court Rule 2003(3), telephone number (925) 945-8792. The transmission was reported as complete and without error.
- By causing personal delivery of a copy of the document(s) listed above to the person(s) as set forth below.
- by depositing a true copy of the same enclosed in a sealed envelope with delivery fees provided for an Overnight Express/Federal Express pick up box or office designated for overnight delivery, and addressed as set forth below.
- By pdf transmission on that date. These documents were transmitted via e-mail to the following e-mail addresses as set forth below.

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18 I am readily familiar with the firm's practice of collecting and processing correspondence
19 for mailing. Under that practice it would be deposited with the U.S. Postal Service on the same
20 day with postage thereon fully prepaid in the ordinary course of business. I am aware that on
21 motion of the party served, service is presumed invalid if postal cancellation date or postage meter
22 date is more than one day after date of deposit for mailing in affidavit.

21 I declare under penalty of perjury under the laws of the State of California that the above is
22 true and correct, executed on March 24, 2010, at Walnut Creek, California.

Peggy Toovey

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Peggy Toovey