August 9, 2011

Via Electronic Filing

The Honorable Julius Genachowski
Chairman, Federal Communications Commission
445 12th Street SW
Washington, D.C. 20554

Via U.S. Mail

The Honorable Eric Holder, Jr.
Attorney General of the United States
950 Pennsylvania Avenue NW
Washington, D.C. 20530

Catherine J.K. Sandoval
Commissioner, California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102

Re: AT&T Inc. and Deutsche Telekom AG Application Seeking FCC Consent to the Transfer of Control of the Licenses and Authorizations Held by T-Mobile Acquisition of T-Mobile USA, Inc. and its Subsidiaries to AT&T Inc., WT Docket No. 11-65

Dear Chairman Genachowski, Attorney General Holder and Commissioner Sandoval:

We write to urge you to reject AT&T Inc.'s proposed purchase of T-Mobile because it will without question lead to higher prices for consumers.

This is not conjecture; it is the lesson of history. Seven years ago, AT&T Inc.'s wholly owned subsidiary, AT&T Mobility LLC (then known as Cingular Wireless Corporation) requested permission to buy AT&T's wireless network (then known as AT&T Wireless Services, Inc.) for $41 billion. At that time, AT&T and Cingular had the first and second largest share, respectively, of wireless communications providers in the U.S. In order to get the merger approved, AT&T and an army of executives, lobbyists and allies assured regulators and consumers that the deal was in the public interest by making promises — the very same promises that we're hearing from AT&T today:

2004 AT&T–Cingular pre-merger promises	2011 AT&T–T-Mobile pre-merger promises
▪ "In addition to **improvements in network coverage and service quality, and greater availability of enhanced service offerings**, the transaction will result in **a number of synergies** which will **benefit consumers**…"[1]	▪ "This transaction will **increase spectrum efficiency to increase capacity and output, which not only improves service, but is also the best way to ensure competitive prices** and services..."[2] ▪ "The **synergies** of this transaction will create immense new capacity that will provide **enormous benefits to consumers**."[3]
▪ The merger will "accommodat[e] the **growth of existing voice and data services** for several years."[4]	▪ "This merger is about **adding capacity and improving existing voice and data services**…"[5]
▪ "[T]he transaction **increases network capacity** and provides the spectrum and compatible network resources to fill in the coverage holes of **both companies**…"[6]	▪ "[The merger] **[e]nhances network capacity, output and quality** in near term for **both companies' customers**"[7]
▪ "[C]onsumers will enjoy significant **near-term improvements in service quality**."[8]	▪ "AT&T's acquisition of T-Mobile USA … **provides an opportunity to improve network quality in the near term for both companies' customers**."[9]
▪ "[T]he merger will **alleviate spectrum capacity constraints that currently hinder the growth of Cingular and AWS**…"[10]	▪ The merger "[p]rovides fast, **efficient and certain solution to impending spectrum exhaust challenges facing AT&T and T-Mobile USA**…"[11]

1 Application for Consent to Transfer Control of Licenses and Authorizations, ULS File No. 0001656065, Exhibit 1, at 22 (Mar. 18, 2004) ("Application") *available at* https://wireless2.fcc.gov/UlsEntry/attachments/attachmentView.jsp?attachmentKey=17917140&affn=01791714040133006947560 9.

2 AT&T, *AT&T to Acquire T-Mobile USA from Deutsche Telekom*, (Mar. 20, 2011) (Press Release) *available at* http://www.att.com/gen/press-room?pid=19358&cdvn=news&newsarticleid=31703&mapcode=corporate|financial.

3 *Id.*

4 Application, *supra* note 1, Exhibit 1, at 22.

5 *AT&T Files Public Statement with FCC Supporting T-Mobile Acquisition,* AT&T (Jun. 10, 2011) (Press Release), *available at* http://www.att.com/gen/press-room?pid=20019&cdvn=news&newsarticleid=32009&mapcode=corporate|financial.

6 Application, *supra* note 1, Exhibit 1, at 9.

7 AT&T, *supra* note 2.

8 Application, *supra* note 1, Exhibit 1, at 9.

9 AT&T, *supra* note 2.

10 Application, *supra* note 1, Exhibit 1, at 9.

2004 AT&T–Cingular pre-merger promises	2011 AT&T–T-Mobile pre-merger promises
▪ "As a result [of the merger], **consumers will quickly experience improved service quality**, such as a **reduction in blocking and dropped calls**…"[12]	▪ The merger will "**improv[e] consumers' overall service quality** through faster data speeds and **fewer dropped and blocked calls**."[13]
▪ "The **public interest benefits** of the transaction are straightforward and compelling. The **combined company will be able to deliver the** … **benefits faster and more broadly than either company could on a stand alone basis**…"[14]	▪ "This transaction delivers significant customer, shareowner and **public benefits that are available at this level only from the combination of these two companies** with **complementary** network technologies, spectrum positions and operations."[15]
▪ "The **complementary** nature of the overlapping service areas … is a **particular benefit in rural areas**…"[16]	▪ **"[R]ural consumers will particularly benefi**t from real-time access to a wide range of resources that would not otherwise be as readily available."[17]
▪ "Approval of Cingular's acquisition of AWS … will benefit **public safety.**"[18]	▪ "[T]he transaction will allow us to bring these benefits to … improve education, health care and **public safety**..."[19]

11 AT&T, *supra* note 2.

12 Application, *supra* note 1, Exhibit 1, at 13.

13 AT&T, *supra* note 5.

14 Application, *supra* note 1, Exhibit 1, at 9.

15 AT&T, *supra* note 2.

16 Application, *supra* note 1, Exhibit 1, at 58.

17 Randall Stephens, *The AT&T/T-Mobile Merger*, written testimony submitted to Subcommittee on Antitrust, Competition Policy and Consumer Rights, at p.2 (May 11, 2011), *available at* http://www.mobilizeeverything.com/documents/Stephenson%20Testimony%20ATT%20T-Mobile.pdf.

18 Application, *supra* note 1, Exhibit 1, at 24.

19 Randall Stephens, *supra* note 17, at p. 3.

2004 AT&T–Cingular pre-merger promises	2011 AT&T–T-Mobile pre-merger promises
▪ "The combination of AWS and Cingular will allow the availability of these services on a **seamless, nationwide basis** far more promptly than can otherwise be achieved, if they could be achieved at all, by the companies individually."[20]	▪ "We are confident in our ability to execute a **seamless integration**, and with additional spectrum and network capabilities we can better meet our customers' current demands…"[21]
▪ AT&T is "working to make this **transition as seamless as possible** for customers of AT&T Wireless."[22]	
▪ "**[C]ustomers of both companies will continue to enjoy the benefits of their current phones, rate plans, and features, without any service interruptions**."[23]	▪ "Will T-Mobile customers have to get a new phone? No. **Their current T-Mobile phone will continue to work fine once the transaction is complete**."[24]
▪ AT&T Wireless customers were assured that they would be able to "**continue using their existing phones and rate plans but now have access to the largest digital voice and data network in the country**."[25]	▪ "Will T-Mobile customers have to move to a new plan? Will they lose their plans? No. **They will be able to keep their existing price plan**."[26]
	▪ "Once the transaction closes, **T-Mobile customers will gain access to the benefits of AT&T's network**."[27]
▪ "By acquiring **both spectrum and infrastructure,** the company can **provide expanded coverage** to consumers in the near term."[28]	▪ AT&T and T-Mobile USA customers will see **service improvements** - including **improved voice quality** - as a **result of additional spectrum, increased cell tower density and broader network infrastructure**."[29]

20 Application, *supra* note 1, Exhibit 1, at 15.

21 AT&T, *supra* note 2.

22 Second Amended Consolidated Complaint and Demand for Jury Trial at ¶32, *Coneff v. AT&T Corp.*, No. 06-944 (W.D.Wash 2006).

23 *Id*.

24 AT&T, *Message to Customers*, at Q3, http://www.mobilizeeverything.com/consumers.php (last visited Jun. 29, 2011).

25 Second Amended Consolidated Complaint and Demand for Jury Trial, *supra* note 22.

26 AT&T, *supra* note 24 at Q4.

27 *Id.* at Q6.

28 Application, *supra* note 1, Exhibit 1, at p. 22.

29 AT&T, *supra* note 2.

2004 AT&T–Cingular pre-merger promises	2011 AT&T–T-Mobile pre-merger promises
▪ "[C]onsumer benefits cannot be realized quickly by acquiring spectrum in a **piecemeal fashion.**"[30]	▪ Contrary to opponents' arguments, neither [AT&T's] massive investment [in wireline and wireless networks], **nor piecemeal technology "solutions" can solve the macro-level, system-wide constraints confronting AT&T**…[31]
▪ "Wireless telephony markets are and will remain **robustly** competitive [after the merger]"[32]	▪ "The transaction will enhance margin potential and improve the company's long-term revenue growth potential as it benefits from a **more robust mobile broadband platform** for new services.[33]

What happened after the AT&T - Cingular merger? Once the Federal Communications Commission approved the deal (after negligible scrutiny), the newly merged company – which later renamed itself AT&T Mobility LLC– betrayed its promises. It abandoned the old AT&T network, deliberately degrading the network so that AT&T customers would be forced to migrate to Cingular's own network, pay an upgrade fee of $18, buy new phones and agree to new and more expensive rate plans. These anti-consumer moves were enforced by an anti-competitive "early termination fee" of anywhere between $175 and $400, which prevented customers of AT&T from moving to another carrier.

In short, AT&T policyholders were railroaded into spending hundreds of dollars more in order to maintain their cellular service - a colossal rip-off by the same corporate executives who are now asking for permission to do it all over again.

Nothing in the terms of the proposed merger bars AT&T from engaging in a repeat performance against helpless T-Mobile customers if this deal is approved. Indeed, even as the companies mount a massive public relations campaign to win your approval, T-Mobile executives are already implicitly acknowledging that once the merger is approved, AT&T will make changes in the T-Mobile network:

> T-Mobile has no plans to alter our 3G / 4G network in any way that would make your device obsolete. The deal is expected to close in approximately 12 months. After that, **decisions about the network will be AT&T's to make**. That said, the president and CEO of AT&T Mobility was quoted in the *Associated Press* saying "there's nothing for [customers] to worry about… [network changes affecting devices] will be done over time… "[34]

30 Application, *supra* note 1, Exhibit 1, at p. 5.

31 AT&T, *supra* note 5.

32 Application, *supra* note 1, Exhibit 1, at 25.

33 AT&T, *supra* note 2.

34 T-Mobile, *Q&A: More Information about AT&T Acquisition of T-Mobile USA* (Mar. 20, 2011) (Press Release), *available at* http://newsroom.t-mobile.com/articles/more-information-att-acquires-tmobile.

Moreover, AT&T has publicly admitted that if the merger goes through, T-Mobile subscribers with 3G phones will have to replace their phones to keep their wireless broadband service.[35] AT&T plans to "rearrange how T-Mobile's cell towers work"[36] so that T-Mobile's airwaves can be used for 4G service rather than 3G. Even though AT&T will be altering T-Mobile's 3G cell towers to operate 4G services, Ralph de la Vega, president and CEO of AT&T Mobility and Consumer Markets, said that after the merger, T-Mobile 3G phones will need to be replaced with AT&T 3G phones, which "will happen as part of the normal phone upgrade process."[37] Once AT&T forces the T-Mobile subscribers with 3G phones to buy AT&T 3G phones, it is only a matter of time before AT&T pushes all of its subscribers over to the 4G network.

T-Mobile customers who are forced to migrate to AT&T's network will have to buy new phones, agree to more expensive rate plans, or cancel their contracts and pay a termination fee. Once known for its low prices, T-Mobile has already begun increasing its rates and decreasing options in anticipation of the merger. On July 20, 2011, T-Mobile discontinued its unlimited data plans, replacing them with plans that cap the amount of data a customer can use; once the customer hits the data cap, T-Mobile will substantially slow down their network speed.[38] Nine days later, AT&T, which stopped offering new unlimited data plans last year, announced it would similarly start throttling data speeds even for customers on "grandfathered" unlimited data plans.[39] AT&T is attributing its slow-down to the "serious wireless spectrum crunch."[40] In another implicit promise sure to be broken, AT&T has told its customers and regulators that "[n]othing short of completing the T-Mobile merger will provide additional spectrum capacity to address these near term challenges."[41]

Finally, T-Mobile was recently named one of the world's most ethical companies for 2011.[42] It was the only U.S. wireless telecommunication service provider that made the list.[43] By

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35 Peter Svensson, *AT&T: T-Mobile 3G phones will need to be replaced*, Associated Press (Mar. 21, 2011), *available at* http://finance.yahoo.com/news/ATT-TMobile-3G-phones-will-apf-862423457.html.

36 *Id.*

37 *Id.*

38 Cecilia Kang and Hayley Tsukayama, *AT&T to Throttle Data Speeds for Heaviest Wireless Users*, The Washington Post (Aug. 1, 2011), http://www.washingtonpost.com/business/technology/atandt-to-throttle-data-speeds-for-heaviest-wireless-users/2011/08/01/gIQAh0HBoI_story.html.

39 Nathan Olivarez-Giles, *AT&T to Slow Speed for Top 5% of Unlimited Data Plan Users*, Los Angeles Times (Jul. 29, 2011) http://latimesblogs.latimes.com/technology/2011/07/att-unlimited-data.html.

40 *Id.*

41 AT&T, *An Update for Our Smartphone Customers With Unlimited Data Plans* (Jul. 29, 2011) (Press Release) *available at* http://www.att.com/gen/press-room?pid=20535&cdvn=news&newsarticleid=32318&mapcode=corporate.

42 T-Mobile, *T-Mobile Honored as One of the "Worlds Most Ethical Companies" and Only U.S. Wireless Telecommunications Service Provider to Receive Distinction*, (Mar. 16, 2011) (Press Release) *available at* http://newsroom.t-mobile.com/articles/worlds-most-ethical-company.

43 *Id.*

contrast, complaints about AT&T's service and prices are legion.[44] Indeed, the views of millions of AT&T customers have been summarized by an online campaign known as "#attfail."[45] This merger will eliminate a U.S. wireless company that at least seemed to care about its customers.

To this day, the AT&T customers who were misled and overcharged by AT&T's actions after the 2004 merger are still fighting in the courts for refunds and other remediation arising from the merger. In 2006, lawyers for Consumer Watchdog, joined by a group of private law firms, filed a national class action lawsuit against AT&T on behalf of the millions of customers who were victimized by the merger: *Coneff v. AT&T Corp., et al.*, No. C06-0944 (W.D. Wash). In response, AT&T's lawyers claimed that when AT&T customers were forcibly moved to the new network, they simultaneously agreed to waive their right to seek refunds from AT&T in court because of a provision buried in the fine-print of AT&T's contract that required arbitration of all disputes and barred customers from joining together in an arbitration. Throughout the litigation, AT&T changed its arbitration clause several times, each time modifying various terms while retaining the arbitration clause that prohibited customers from bringing or participating in a class action, regardless of whether it is brought in arbitration or in court. In 2009, the U.S. District Court in Seattle, Washington, held that AT&T's arbitration clause was unconscionable because most AT&T customers would never obtain redress without the ability to bring a class action. Attached as Exhibit A is a copy of our complaint from *Coneff v. AT&T Corp.*, and attached as Exhibit B is the 2009 ruling of the federal district court.

The case is presently before the 9th Circuit. In its briefing, AT&T now contends that the U.S. Supreme Court's recent decision in *AT&T Mobility v. Concepcion* 563 U.S. __ (2011) should be interpreted by the courts to apply to the egregiously unfair and one-sided mandatory arbitration clauses like the one struck down in *Coneff* in 2009, which, in our case and unlike in *Concepcion*, has been shown to preclude customers' basic due process rights.

Albert Einstein defined insanity as doing the same thing over and over again and expecting different results. Considering AT&T's track record, it is irrational to expect that the AT&T and T-Mobile merger will yield different results. If the merger is approved, millions of T-Mobile customers will be subjected to the same costly and unfair practices that AT&T customers experienced after the 2004 Cingular merger. Moreover, permitting AT&T to swallow a competitor will leave the American cellular marketplace controlled by a duopoly that, through the artifice of termination fees and arbitration agreements, will effectively eliminate competition between them.

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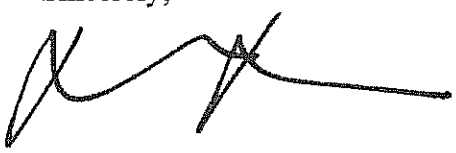
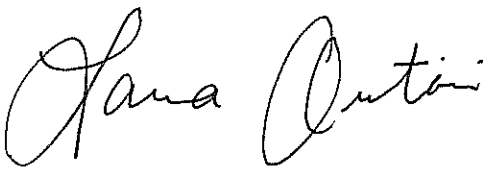
[44] *See* Will Park, *AT&T has Most Dropped Calls, Verizon has Least Says Study*, Intomobile (May 5, 2010), http://www.intomobile.com/2010/05/05/att-customers-log-the-most-dropped-call-complaints-verizon-claims-least/; John Paczkowski, *AT&T Ranked Last in Consumer Reports' Best Cellphone Service Survey*, AllThingsD (Dec. 1, 2009), http://allthingsd.com/20091201/att-ranked-last-in-consumer-reports-best-cell-phone-service-survey/; Dan Richman, *Cingular, AT&T Wireless Ring Up Most Complaints*, Seattle PI (Mar. 28 2005), http://www.seattlepi.com/business/article/Cingular-AT-T-Wireless-ring-up-most-complaints-1169604.php; Consumers Union, *Records Reveal AT&T Wireless has Four Times as Many Customer Complaints as Verizon*, Consumers Union (May 11, 2004) (Press Release) *available at* http://www.consumersunion.org/pub/campaigncellhell/001079.html.

[45] Fred Vogelstein, *Bad Connection: Inside the iPhone Network Meltdown*, Wired Magazine (Jul. 19, 2010), http://www.wired.com/magazine/2010/07/ff_att_fail/all/1.

This is a bread and butter test of the federal government's commitment to American consumers versus the Wall Street and corporate interests that too often seem to be the winners every time the federal government takes action. The Administration should ignore the lofty pronouncements of the corporate-funded academics and allies who provide cover for the glib promises of two cellular giants, along with the Wall Street firms that will reap millions in fees for providing the merger paperwork, in favor of the average American family, who, after all they have been forced to sacrifice these last few years, should not be required to pay more of their dollars for the ability to use a cell phone.

Sincerely,





Harvey Rosenfield

Laura Antonini

cc (via U.S. Mail or email):

President Barack Obama
The Honorable Michael J. Copps, Commissioner, Federal Communications Commission
The Honorable Robert McDowell, Commissioner, Federal Communications Commission
The Honorable Mignon Clyburn, Commissioner, Federal Communications Commission
The Honorable Eric T. Schneiderman, New York Attorney General
Sharis A. Posen, Chief of Staff for the Antitrust Division, United States Department of Justice
Laury E. Bobbish, Chief, Telecommunications and Media Enforcement section, United States Department of Justice
Richard A. Feinstein, Director, Bureau of Competition, Federal Trade Commission

EXHIBIT A

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Hon. Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MARYGRACE CONEFF, et al. Plaintiffs, v. AT&T CORP., et al., Defendants	Master File No. C06-0944 RSM **SECOND CONSOLIDATED AMENDED COMPLAINT** **DEMAND FOR JURY TRIAL**

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Plaintiffs Marygrace Coneff, Christine Aschero, Joanne Aschero, Alex Aschero, Jennie Bragg, Gina Franks, Amy Frerker, Addie Christine Lowry, Jeff Haymes, Harold Melendez, Michelle Johns, Kelly Petersen, Steven Knott, Liesa Krausse, Steven Shulman, S. Leonard Shulman, and Devin Gilker, on their own behalf and as representatives of a putative class of similarly situated parties, complain and allege on information and belief as follows:

I. INTRODUCTION

1. Plaintiffs bring this action to challenge conduct related to Defendant Cingular Wireless LLC's ("Cingular") acquisition of Defendant AT&T Wireless Services, Inc. ("AT&T Wireless") in 2004. Although Cingular publicly represented that the acquisition would be seamless for AT&T Wireless customers, those statements did not disclose materially adverse facts. In reality, after the acquisition, Cingular failed to maintain and dismantled the AT&T Wireless network so as to degrade the service provided to AT&T Wireless customers. Cingular did so to induce AT&T Wireless customers to transfer their AT&T plans to Cingular plans, which are generally more expensive and less favorable to consumers, and to charge AT&T Wireless customers with various fees and costs in connection with those new plans.

2. Also, in July 2006, Cingular began charging a $4.99 monthly fee to AT&T Wireless subscribers who were on a TDMA/Analog network, merely to continue use of that network. The imposition of this mandatory fee illustrates Cingular's strategy to induce AT&T Wireless subscribers to either upgrade to a more expensive Cingular plan, or to pay an early termination fee to get out of their AT&T service plan.

3. AT&T Wireless subscribers have suffered actual injury as a result of not receiving the quality of service promised by Defendants, and by being put in the position of having to choose between (I) accepting degraded service, (ii) transferring to Cingular and thereby having to pay the herein alleged fees, or (iii) changing their wireless carrier, and thereby incurring a termination fee.

/ / /

4. Plaintiffs hereby assert claims for unjust enrichment/common law restitution, violations of consumer protection laws, breach of contract, breach of implied covenant of good faith and fair dealing, and violation of the Federal Communications Act ("FCA"). This complaint does not challenge Defendants' rates, right to enter the market, or specific decisions about Defendants' physical infrastructure. Rather, this is a case about concealing materially adverse facts from consumers about how their cell phone service and costs associated therewith would be negatively impacted by the merger, and the unreasonable and discriminative charges imposed as a result thereof.

II. JURISDICTION AND VENUE

5. This Court has jurisdiction pursuant to 28 U.S.C. § 1332(d). This is a putative class action involving more than 100 class members, at least one member of the putative class is a citizen of a state different from Defendants, and the aggregate amount in controversy exceeds $5,000,000, exclusive of interest and costs.

6. Each Defendant has conducted business in this District. During the relevant time period, Defendant AT&T Wireless had its principal place of business within this District, and many of the acts alleged herein occurred in this District. Accordingly, venue in this District is proper under 28 U.S.C. § 1391(c).

III. PARTIES

A. Plaintiffs

7. Plaintiff MARYGRACE CONEFF is a resident of California. She was an AT&T Wireless subscriber who experienced degraded service as a result of Cingular's dismantling of the AT&T Wireless network. In order to obtain better phone serve, Ms. Coneff transferred to Cingular, was charged an $18 "transfer" or "upgrade" fee, purchased a Cingular phone, and was required to agree to a new service contract with Cingular on terms that were less favorable than her prior contract with AT&T Wireless.

8. Plaintiff CHRISTINE ASCHERO is a resident of California. She was an AT&T Wireless subscriber who experienced degraded service as a result of Cingular's dismantling of the AT&T Wireless network. Because of the poor service following

Cingular's acquisition of AT&T Wireless, Ms. Aschero was induced to pay an early termination fee to cancel service before the expiration of her contract term.

9. Plaintiffs JOANNE ASCHERO and ALEX ASCHERO are residents of California. They are AT&T Wireless subscribers who experienced degraded service as a result of Cingular's dismantling of the AT&T Wireless network. Notwithstanding their degraded service, they have remained AT&T Wireless subscribers under their preexisting AT&T contract terms in order to avoid payment of an early termination fee.

10. Plaintiff JENNIE BRAGG is a resident of California. She was an AT&T Wireless subscriber who experienced degraded service as a result of Cingular's dismantling of the AT&T Wireless network. In order to obtain better phone service, Ms. Bragg purchased a Cingular phone and agreed to a new service contract with Cingular on less favorable terms, which included charges for additional services she did not request.

11. Plaintiff KELLY PETERSEN is a resident of California. She was an AT&T Wireless subscriber who experienced degraded service as a result of Cingular's dismantling of the AT&T Wireless network. In an effort to get better service, she was forced to purchase a new phone, pay $18 for a new SIM card, and upgrade to a Cingular plan on terms that were less favorable than her prior contract with AT&T Wireless.

12. Plaintiff GINA FRANKS is a resident of Washington. She was an AT&T Wireless subscriber who experienced degraded service as a result of Cingular's dismantling of the AT&T Wireless network. In an effort to obtain better phone service, Ms. Franks entered into a new service contract with Cingular on terms less favorable than her previous contract with AT&T Wireless.

13. Plaintiff AMY FRERKER is a resident of Washington. She was an AT&T Wireless subscriber who experienced degraded service as a result of Cingular's dismantling of the AT&T Wireless network.

14. Plaintiffs STEVEN SHULMAN and S. LEONARD SHULMAN are residents of Washington who are doing business as Leschim Market. They were AT&T Wireless subscribers who experienced degraded service as a result of Cingular's

dismantling of the AT&T Wireless network. In an effort to obtain better service, they upgraded to a more expensive Cingular service plan, purchased a new phone, and paid $18 for a new SIM card. The subject phones are used, in part, for business purposes.

15. Plaintiff STEVEN KNOTT is a resident of Alabama. He was an AT&T Wireless subscriber who experienced degraded service as a result of Cingular's dismantling of the AT&T Wireless network. When Mr. Knott complained to Defendants about the degraded service, he was advised that he should "upgrade" and purchase new phones, or pay an early termination fee of $175. Mr. Knott upgraded to a Cingular plan that cost almost twice as much as his AT&T plan, was forced to purchase two Cingular phones, and was charged an $18 upgrade fee.

16. Plaintiff JEFF HAYMES is a resident of Arizona. He was an AT&T Wireless customer for many years and experienced degraded service as a result of Cingular's dismantling of the AT&T Wireless network. In an effort to obtain better service, Mr. Haymes paid an $18 fee to upgrade to a Cingular phone plan on terms less favorable than his previous AT&T Wireless plan.

17. Plaintiff HAROLD MELENDEZ is a resident of Arizona. He was an AT&T Wireless customer who experienced degraded service as a result of Cingular's dismantling of the AT&T Wireless network. After complaining to Defendants about the poor service, Mr. Melendez upgraded to a less favorable Cingular service plan and purchased a new phone and SIM card.

18. Plaintiff ADDIE CHRISTINE LOWRY is a resident of Florida. She was an AT&T Wireless subscriber with multiple phones who experienced degraded service as a result of Cingular's dismantling of the AT&T Wireless network. The service she received was so poor that one of her four phone lines became completely unusable. When Ms. Lowry complained to Defendants about the poor service, she was informed that she could either upgrade to a more expensive plan, or pay a termination fee to cancel service. Ms. Lowry chose to wait out the contract for three lines and pay the termination fee to cancel the fourth line that was rendered unusable. Since September 2006, Cingular

has been charging Ms. Lowry an extra $4.99 a month merely to remain on the TDMA/Analog network.

19. Plaintiff DEVIN GILKER is a resident of Illinois. He was an AT&T Wireless subscriber who experienced degraded service as a result of Cingular's dismantling of the AT&T Wireless network. In an effort to obtain better service, he paid "upgrade," "transfer" or "SIM" fees to Cingular following its merger with and acquisition of AT&T Wireless.

20. Plaintiff LIESA KRAUSSE is a resident of New Jersey. She was an AT&T Wireless subscriber who experienced degraded service as a result of Cingular's dismantling of the AT&T Wireless network. After numerous dropped phone calls, including one during a phone call from her mother reporting a medical emergency, Ms. Krausse complained to Defendants. She was informed that her options were to drive 20 miles to be closer to a network tower, to upgrade to a new phone, or to cancel her AT&T plan and incur an early termination fee. Because Ms. Krausse believed the service provided under her AT&T service plan was inadequate, she cancelled the contract and asked that the termination fee be waived. Cingular assessed a $175 early termination fee anyway.

21. Plaintiff MICHELLE JOHNS is a resident of Virginia. She had been an AT&T Wireless subscriber for several years before Cingular dismantled the AT&T network. Thereafter, Ms. Johns' service became so degraded and unreliable that she had no choice but to purchase a Cingular phone and transfer to a Cingular service plan that is less favorable than the plan she had with AT&T Wireless.

B. Defendants

22. Defendant CINGULAR WIRELESS LLC is a Delaware limited liability company with its principal place of business in Atlanta, Georgia. Cingular Wireless LLC was formed in April 2000 as a joint venture between SBC Communications Inc. and Bell South Corporation, and provides wireless phone services.

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23. Defendant CINGULAR WIRELESS CORPORATION is a Delaware corporation with its principal place of business in Atlanta, Georgia. Cingular Wireless Corporation is a holding company for Defendant Cingular Wireless LLC and has no material assets other than Cingular Wireless LLC. Like Cingular Wireless LLC, Cingular Wireless Corporation is jointly controlled by SBC Communications, Inc. and Bell South Corporation. As used herein, "Cingular" refers to Cingular Wireless Corporation and its alter ego, Cingular Wireless LLC.

24. Defendant AT&T WIRELESS SERVICES, INC. ("AT&T Wireless") was formed in July 2001 as a Delaware corporation. At all relevant times, AT&T Wireless had its principal place of business in Redmond, Washington. In October 2004, AT&T Wireless was acquired by Cingular and renamed New Cingular Wireless Services, Inc.

25. Defendant NEW CINGULAR WIRELESS SERVICES, INC. ("New Cingular") is a New York corporation with its principal place of business in Atlanta, Georgia. New Cingular was formed in October 2004 as the successor-in-interest to Defendant AT&T Wireless. New Cingular is a wholly-owned subsidiary of Defendant Cingular Wireless LLC.

C. Agency / Joint Venture

26. At all times herein mentioned, Defendants, and each of them, were agents or joint venturers of each of the other Defendants, and in doing the acts alleged herein were acting within the course and scope of such agency. Each Defendant had actual and/or constructive knowledge of the acts of each of the other Defendants, and ratified, approved, joined in, acquiesced in, and/or authorized the wrongful acts of each co-defendant, and/or retained the benefits of said wrongful acts.

IV. FACTUAL ALLEGATIONS

A. Cingular's Acquisition of AT&T Wireless

27. At the end of 2003, Cingular was the second largest provider of wireless communication services in the United States in terms of subscribership. Cingular had 24 million customers as of December 31, 2003, and reported $15.5 billion in revenues for

2003. Cingular provided its customers wireless voice and data service over a nationwide wireless network which it maintained. The Cingular network provided extensive coverage throughout the United States. In addition, Cingular entered into network access agreements with other network operators in the United States to provide additional network coverage for Cingular subscribers.

28. At the end of 2003, AT&T Wireless was the third largest provider of wireless communications services in the United States based on subscribership. AT&T Wireless had 22 million customers as of December 31, 2003, and reported $16.7 billion in revenues for 2003. AT&T Wireless provided wireless voice and data service over a nationwide wireless network. The network operated and maintained by AT&T Wireless provided extensive coverage throughout the United States. In addition, AT&T Wireless entered into network access agreements with other network operators in the United States to provide additional network coverage for AT&T Wireless subscribers.

29. On February 17, 2004, Cingular and AT&T Wireless entered into an agreement whereby Cingular would acquire AT&T Wireless for $41 billion. Upon completion of the acquisition, AT&T Wireless would be renamed New Cingular Wireless Services, Inc. and would operate as a solely-owned subsidiary of Cingular.

30. Cingular's acquisition of AT&T Wireless was completed on October 26, 2004.

B. Cingular's Concealments and Material Omissions

31. Cingular publicly represented that its acquisition of AT&T Wireless would result in "increased network and spectrum capacity in areas where Cingular and AT&T Wireless are already providing service," and would "greatly improve service quality and coverage." *See* Memorandum Opinion & Order, FCC 04-255, ¶29 (Oct. 26, 2004), attached hereto as Exhibit A.

32. On October 26, 2004, Cingular issued a press release stating that Cingular would "allow customers of both companies to use the new, combined network without roaming charges," and that "customers of both companies will continue to enjoy the

benefits of their current phones, rate plans and features, without any service interruption." Stan Sigman, Cingular's President and Chief Executive Officer, stated that the company was "working to make this transition as seamless as possible for customers of AT&T Wireless." Sigman assured AT&T Wireless customers that they would be able to "continue using their existing phones and rate plans but now have access to the largest digital voice and data network in the country."

33. On October 29, 2004, Cingular issued a press release to unveil its new "Raising the Bar" advertising campaign. The press release stated:

> "Raising the Bar" is more than a tagline, it's about providing the type of service that customers expect from their wireless company . . . The most tangible example of how Cingular is "Raising the Bar" is the newly combined network, the largest digital voice and data network in the United States. Cingular is calling it the "ALLOVER" network. People will quickly begin to see more bars in more places . . . Our "Raising the Bar" tagline and "ALLOVER" network branding campaign allows us to clearly communicate a real improvement in network and service quality.

C. Cingular's Dismantling of the AT&T Wireless Network

34. Contrary to Cingular's assurances that AT&T Wireless customers would have access to a "combined network," Cingular instead made financial decisions with regard to the old AT&T Wireless network and Cingular's network which effectively made the AT&T network inferior. The AT&T network was not maintained, and the effect was to induce AT&T customers to transfer to the Cingular network.

35. Cingular substantially diminished its maintenance of the AT&T Wireless network facilities. According to published reports, Cingular "has been spending next to nothing to maintain the [AT&T Wireless] network, leaving customers who don't upgrade [to the Cingular network] in the lurch." *Why You Still Can't Hear Me Now*, The Wall Street Journal, May 25, 2005, at D1. It has also been reported that "industry analysts believe that Cingular is investing close to nothing" to maintain the AT&T Wireless network. *How Cellular Services Rank On Complaints: Cingular Tops FCC List With*

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Most Gripes Per Customer, Dropped Calls, Billing Errors, The Wall Street Journal, March 29, 2005, at D1, D5.

36. As part of its scheme, Cingular encouraged AT&T Wireless customers suffering from degraded service to "upgrade" to Cingular. These upgrades, however, required consumers to do one or more of the following: (I) pay an $18 "transfer" fee to Cingular; (ii) purchase one or more new phones from Cingular; (iii) pay $18 for the SIM chip which enables the phone to operate; and (iv) enter into a new service contract with Cingular that is usually less favorable to the customer than the customer's existing contract with AT&T Wireless. AT&T Wireless customers who do not agree to such an "upgrade" are left with the choice of fulfilling their contract term with AT&T Wireless despite degraded or non-existent service, or paying an early termination fee of $175 to cancel service before the expiration of the 12 or 24-month contract term. This conduct was undertaken on a uniform basis, and this case does not seek to remediate any individual claims of poor service other than as a predicate to the class-wide omissions, concealments and false advertising herein alleged.

D. Cingular's Implementation of a Mandatory $4.99 Monthly Fee

37. In October of 2004, the Federal Communication Commission approved Cingular's acquisition of AT&T Wireless on the condition that Cingular keep AT&T Wireless' TDMA/Analog system in place until at least February 2008.

38. Approximately 4.7 million current AT&T Wireless customers rely on the TDMA/Analog network.

39. In July 2006, Defendants included the following statement in billing statements to Cingular and AT&T Wireless customers:

> The rates for your service on Cingular's TDMA/Analog network are increasing. As early as September, a TDMA/Analog network charge of $4.99 per line will appear on your bill each month. Alternatively, you have the option to upgrade to a handset and rate plan on our new and improved GSM network, the largest voice and data network in America, with the fewest dropped calls of any national wireless carrier.

See Exhibit B.

40. Cingular also issued a press release stating that it would start charging customers with TDMA and Analog cellphones an extra $4.99 monthly fee as early as September 2006 unless, as the language above indicates, current AT&T customers purchase a new phone and commit to a 2-year "upgraded" Cingular service contract on Cingular's GSM network.

41. Because most current AT&T Wireless subscribers use phones that operate on the TDMA/Analog network, Cingular is effectively targeting current AT&T Wireless subscribers and using the $4.99 monthly charge to make it economically disadvantageous to keep their current service. What Cingular has omitted from the $4.99 fee statement is the fact that it will charge an early termination fee to AT&T subscribers who do not wish to incur the $4.99 charge or who do not wish to pay for a new phone and get locked into a 2-year Cingular plan. Cingular's implementation of the mandatory $4.99 monthly fee is a pretextual tactic to compel current AT&T subscribers to forfeit their existing AT&T calling plans and to purchase new telephones and accessories for a more expensive Cingular plan. Cingular's program leaves AT&T Wireless subscribers with no meaningful alternative. Similar to its dismantling of the AT&T Wireless network, Cingular's imposition of the $4.99 monthly charge is designed to wrongfully induce migration to Cingular.

42. Plaintiffs do not challenge any rate, but rather allege that the imposition of this $4.99 charge was not disclosed to consumers and was yet another economic inducement to AT&T Wireless customers to transfer to Cingular.

E. No Enforceable Agreement to Arbitrate

43. Defendants have inserted clauses into customer contracts that purport to impose mandatory arbitration and a waiver of the right to participate in class actions. However, these contracts are contracts of adhesion drafted entirely by the Defendants on a take-it-or-leave-it basis in a setting in which disputes between the contracting parties predictably involve small amounts of damages. Plaintiffs had neither the bargaining power, nor the ability, to change the contractual terms. Defendants rely on the mandatory

arbitration and class action waiver provisions to shield themselves against consumers' use of the civil justice system to redress Defendants' misconduct. In practice, the waiver virtually immunizes the Defendants from responsibility for their own wrongful conduct. Such waivers are unconscionable under State and Federal law and should not be enforced.

44. The mandatory arbitration provision and, particularly, the class action waiver provision in these types of contracts have repeatedly been held unenforceable. *See, e.g., Ting v. AT&T Corp.*, 319 F.3d 1126 (9th Cir. 2003), *cert. denied*, 540 U.S. 811 (2003); *Discover Bank v. Superior Court (Boehr)*, 36 Cal.4th 148 (2005); *Ball v. Cingular Wireless, LLC*, Case No. 04CC06353, Order Denying Motion of Defendant Cingular Wireless, LLC to Compel Arbitration And Stay Action (Cal. Superior Court Feb. 7, 2005) (Cingular's arbitration clause found unconscionable); *In re Cellphone Termination Fee Cases*, J.C.C.P. 4332, Order Denying Motions of AT&T and Cingular to Compel Arbitration (Cal. Superior Court Jan. 20, 2004) (AT&T's arbitration clause and three different forms of Cingular's arbitration clauses found unconscionable); *Tamayo v. Brainstorm, USA*, 154 Fed.Appx. 564 (9th Cir. 2005) (class action waiver in an arbitration clause contained in adhesive contract found unconscionable and not valid under California law); *Kinkel v. Cingular Wireless, LLC,* 357 Ill.App.3d 556 (Ill.App. 2005) (motion for leave to appeal denied); *aff'd* 2006 WL 2828664 (Ill. Oct. 5, 2006); *Muhammad v. County Bank of Rehoboth Beach, Delaware.* ___ A.2d ___, 2006 WL 2273448 (N.J., Aug. 9, 2006) (provision in consumer loan agreement that forbade class-wide arbitration was unconscionable and, therefore, unenforceable).

45. Both AT&T Wireless and Cingular have recently and extensively litigated the enforceability of their purported arbitration clauses, including appeals, petitions for review, and petitions for certiorari to the California Court of Appeals, the California Supreme Court, the United States Court of Appeals for the Ninth Circuit, and the United States Supreme Court.

46. Despite suffering defeats in each of these courts, Defendants remain obstinate. As part of a deliberate scheme to delay meritorious litigation, Defendants

continue to bring frivolous motions to compel arbitration so that Cingular can continue to benefit and derive millions of dollars in revenue from its wrongful conduct. Such a delay imposes unnecessary and burdensome costs on customers who assert meritorious claims and ultimately discourages customers from pursuing their legal rights. *See, e.g., Ting v. AT&T Corp.*, 319 F.3d 1126 (9th Cir. 2002).

47. Plaintiffs believe that the purported arbitration agreements of AT&T Wireless and Cingular are pretextual. Based on information and belief, AT&T Wireless and Cingular have rarely, if ever, used arbitration to resolve their own claims against a customer. Instead, both have resolved millions of claims against customers by assigning them to collection agencies who then pursue a variety of means to resolve them, including filing lawsuits, but not arbitration. Based on information and belief, few, if any, customers have ever been awarded any material relief by an arbitrator pursuant to any AT&T Wireless or Cingular arbitration agreement. Moreover, despite the fact that AT&T Wireless included an arbitration clause in its terms and conditions beginning in July 1999, relatively few cases have ever been arbitrated. Given the millions of AT&T Wireless and Cingular customers, such numbers tend to show the arbitration procedure contained in the contract is illusory.

48. The subject arbitration clauses are procedurally and substantively unconscionable. The contracts are themselves contracts of adhesion, which are presented to consumers on a "take it or leave it" basis. The purported rights to bring claims in small claims court or to pursue actions to collect debts are illusory, and the purported reciprocity of those clauses does not provide the consumer with any meaningful channel to adjudicate claims other than by instituting a class action. In addition, the class action bar is itself unconscionable. That clause states: "However, even for those claims that may be taken to court, you and we both waive any claims for punitive damages and any right to pursue claims on a class or representative basis." *See* Exhibit C. Not only did the Plaintiffs have no meaningful basis to reject this contract term, that term is burdened with other provisions in the contract that limit the Plaintiffs' ability to obtain relief in a cost

effective manner, including, but not limited to, the costs of arbitration compared to the amount of any individual claim.

V. CLASS ACTION ALLEGATIONS

49. Plaintiffs bring this action as a putative class action for equitable, injunctive, declaratory, and monetary relief pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of the following Class and Sub-Class:

> **The "Class" is defined as all subscribers of AT&T Wireless in the United States as of October 26, 2004.**
>
> **The "Sub-Class" is defined as all subscribers of AT&T Wireless in the United States who have been advised that they will incur an additional $4.99 monthly fee for access to the TDMA/Analog network.**

50. Plaintiffs recognize that there is no class, nor is there a class action, until the Court certifies the case as a class action and appoints class counsel. That is why Plaintiffs refer to the putative class throughout.

51. Plaintiffs Marygrace Coneff, Christine Aschero, Joanne Aschero, Alex Aschero, Jennie Bragg, Gina Franks, Amy Frerker, Addie Christine Lowry, Jeff Haymes, Harold Melendez, Michelle Johns, Kelly Petersen, Steven Knott, Liesa Krausse, Steven Shulman, S. Leonard Shulman, and Devin Gilker are members of the putative Class. Plaintiffs Addie Christine Lowry, Joanne Aschero, and Alex Aschero are also members of the putative Sub-Class.

52. The members of the putative Class are readily ascertainable but are so numerous that joinder is impracticable. The exact number and names of the members of the putative Class are presently unknown to Plaintiffs, but can be ascertained readily through appropriate discovery. Plaintiffs believe that there are hundreds of thousands, if not millions, of members of the putative Class, whose names and addresses can be readily discovered upon examination of the records in the custody and control of Defendants.

53. There are questions of law and fact common to the putative Class. Defendants pursued a common course of conduct toward the putative Class as alleged

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herein. This action arises out of a common nucleus of operative facts. Common questions include, but are not limited to, the following:

a. whether Cingular has maintained the AT&T Wireless network since its acquisition of AT&T Wireless;

b. whether Defendants fulfilled their service obligations to Plaintiffs and the putative Class pursuant to the AT&T Wireless Contracts;

c. whether Defendants charged Plaintiffs and the putative Class fees in violation of the AT&T Wireless Contracts;

d. whether Defendants concealed from Plaintiffs and the putative Class that they would not have access to a higher network quality as promised by Defendants;

e. whether Defendants caused AT&T Wireless customers to migrate to Cingular by virtue of the conduct herein alleged;

f. whether Plaintiffs and the putative Class were wrongfully induced to cancel their AT&T Wireless plans, thereby incurring termination fees;

g. whether Plaintiffs and the putative Class were wrongfully induced to enter into service contracts with Cingular, thereby incurring the fees and costs associated with new service plans;

h. whether Defendants violated the Washington Consumer Protection Act, Wash. Code Rev. § 19.86.010, *et seq.*, or alternatively, whether Defendants violated the similar consumer protection laws of other States; and

i. whether Defendants violated Sections 201 and/or 202 of the FCA.

54. The claims of the named Plaintiffs are typical of the claims of the putative Class. Each of the named Plaintiffs suffered from degraded service due to Cingular's dismantling of the AT&T Wireless network despite promises to the contrary which failed to disclose materially adverse facts as herein alleged; paid transfer and SIM chip fees;

paid termination fees; paid the $4.99 fee to remain on the AT&T Wireless network; and/or was forced to switch to Cingular under the terms of a less favorable service contract.

55. Plaintiffs will fairly and adequately represent and protect the interests of the putative Class, and common issues of law and fact predominate.

56. Plaintiffs have retained counsel competent and experienced in prosecuting complex nationwide consumer class actions.

57. Notice of this putative Class action can be provided to putative Class members by techniques and forms similar to those customarily used in consumer class actions. In this particular case, notice can be accomplished through the use of Defendants' lists of customers who can receive notice electronically in addition to other traditional methods.

58. Class certification is appropriate because Cingular has acted, or refused to act, on grounds generally applicable to the putative Class, making class-wide equitable, injunctive, declaratory, and monetary relief appropriate. In addition, the prosecution of separate actions by or against individual members of the putative Class would create a risk of incompatible standards of conduct for Defendants and inconsistent or varying adjudications for all parties. A class action is superior to other available methods for the fair and efficient adjudication of this action.

COUNT I

Unjust Enrichment/Common Law Restitution

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

60. This Count I is brought on behalf of the putative Class and Sub-Class.

61. Through the scheme described above, Defendants have charged putative Class members fees in violation of their contractual rights, and statutory and common law, including but not limited to the charge of an $18 "transfer" or "upgrade" fee and other fees and charges described above.

62. By stating its intent to charge AT&T Wireless customers with TDMA /Analog phones an additional $4.99 per month on top of their contractually agreed monthly rates, Cingular has been unjustly enriched by any amounts paid by AT&T customers to "upgrade" to a new Cingular service plan, purchase new Cingular phones, or pay an early termination fee.

63. Defendants have reaped substantial profit from the aggressive marketing and sales of "upgraded" Cingular service plans as well as the sale of new phones. Ultimately, this resulted in Defendants' wrongful receipt of profits and injury to Plaintiffs and the putative Class. As a direct and proximate result of Defendants' misconduct as set forth above, Defendants have been unjustly enriched. Plaintiffs do not request any relief that would require Defendants to provide any particular infrastructure nor change any particular rate, and seek an award of monetary damages and/or restitution under common law.

WHEREFORE, Plaintiffs and the putative Class pray for relief as set forth below.

COUNT II

Violations of the Washington Consumer Protection Act and Alternatively Violations of Similar Consumer Protection Laws in Other States

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

65. This Count II is brought on behalf of the putative Class and Sub-Class.

66. The Defendants, by their conduct alleged herein, violated the Consumer Protection Act of the State of Washington, Wash. Code Rev. § 19.86. Specifically, Defendants' conduct constitutes deceptive and unfair acts or practices in the conduct of trade or commerce in violation of Wash. Code Rev. § 19.86.020. Defendants' acts adversely affected the public interest and are a proximate cause of injury, and monetary damages, to Plaintiffs and the putative Class in an amount to be proven at trial. Defendants are liable to Plaintiffs and the putative Class for damages. In addition to

actual damages, Plaintiffs and the putative Class are entitled to recover treble damages up to $10,000 per Plaintiff and putative Class member, costs, and attorneys' fees pursuant to Wash. Code Rev. § 19.86.090.

67. Alternatively, Defendants' conduct as alleged herein violates the unfair and deceptive acts and practices laws of each of the following jurisdictions, including Washington:

a. **Washington**: Defendants' practices were and are in violation of Washington's Consumer Protection Act, Wash. Code Rev. § 19.86.010, *et seq*.

b. **California**: Defendants' practices were and are in violation of California's Unfair Competition Law, Business and Professions Code § 17200, *et seq*., California's False Advertising Act, Cal. Bus. & Prof. Code § 17500, *et seq*., and the California Consumer Legal Remedies Act, Cal. Civ. Code § 1750, *et seq*.

c. **Florida**: Defendants' practices were and are in violation of Florida's Deceptive and Unfair Trade Practices Act, Fla. Stat. § 501.201, *et seq*.

d. **Illinois**: Defendants' practices were and are in violation of Illinois' Consumer Fraud and Deceptive Business Practices Act, 815 Ill. Comp. Stat. 505/1, *et seq*.; and the Uniform Deceptive Trade Practices Act, 815 Ill. Comp. Stat. 510/1, *et seq*..

e. **Maryland**: Defendants' practices were and are in violation of Maryland's Consumer Protection Act, Md. Com. Law Code § 13-101, *et seq*.

g. **Massachusetts**: Defendants' practices were and are in violation of Massachusetts' Consumer Protection Act, Mass. Gen. Laws ch. 93A.

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h. **Michigan**: Defendants' practices were and are in violation of Michigan's Consumer Protection Act, Mich. Comp. Laws Serv. § 445.901., *et seq.*

i. **Missouri**: Defendants' practices were and are in violation of Missouri's Merchandising Practices Act, Mo. Rev. Stat. § 407.010, *et seq.*

j. **New Jersey**: Defendants' practices were and are in violation of New Jersey's Consumer Fraud Act, N.J. Stat. Ann. § 56:8-1, *et seq.*

k. **New York**: Defendants' practices were and are in violation of New York's Gen. Bus. Law § 349, *et seq.*

l. **North Carolina**: Defendants' practices were and are in violation of North Carolina's Unfair Deceptive Trade Practices Act, N.C. Gen. Stat. § 75-1, *et seq.*

m. **Tennessee**: Defendants' practices were and are in violation of Tennessee's Consumer Protection Act of 1977, Tenn. Code Ann. § 47-18-101, *et seq.*

n. **Texas**: Defendants' practices were and are in violation of Texas' Deceptive Trade Practices-Consumer Protection Act, Tex. Bus. & Com. Code Ann. § 17.41, *et seq.*

o. **Virginia**: Defendants' practices were and are in violation of Virginia's Consumer Protection Act, Va. Code Ann. § 59.1-196, *et seq.*

WHEREFORE, Plaintiffs and the putative Class pray for relief as set forth below.

COUNT III

Breach of Contract and Breach of Implied Covenant of Good Faith and Fair Dealing

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

69. This Count III is brought on behalf of the putative Class and Sub-Class.

70. Each member of the putative Class entered into a contract with AT&T Wireless under which AT&T agreed to provide wireless service to that putative Class member ("AT&T Wireless Contracts"). Although the AT&T Wireless Contracts are form contracts that were revised by AT&T Wireless from time to time, each of them is substantially in the form of the AT&T Wireless Terms and Conditions attached hereto as Exhibit C.

71. Every contract, including each of the AT&T Wireless Contracts, imposes upon each party a duty of good faith and fair dealing in its performance and enforcement.

72. The AT&T Wireless Contracts purport to govern the relationship between the subscriber and "the entity licensed to provide service in the area associated with [the subscriber's] assigned telephone, data, and/or messaging number(s)." *See* Exhibit C. Thus, as a result of Cingular's acquisition of AT&T Wireless, Cingular is a successor in interest to said contracts.

73. By failing to fulfill the promises made about a "seamless" transition after the merger, by causing the AT&T Wireless network to degrade, by charging an $18 fee to "upgrade" or "transfer" to a Cingular plan, and by inducing AT&T Wireless customers to incur additional expenses (new phone, SIM chip, and additional services), Cingular and AT&T Wireless have breached the AT&T Wireless Contracts.

74. By unilaterally assessing AT&T Wireless subscribers an additional $4.99 monthly fee, Cingular and AT&T Wireless have further breached the AT&T Wireless Contracts.

75. Plaintiffs and the putative Class have suffered monetary damages from said breaches of contract and the covenant of good faith and fair dealing, including compensatory, special and economic damages to be set forth according to proof. Plaintiffs do not request any relief that would require Defendants to provide any particular physical or technical infrastructure nor change any particular rate, and seek an award of monetary damages and/or restitution under common law.

WHEREFORE, Plaintiffs and the putative Class pray for relief as set forth below.

COUNT IV

Violation of the Federal Communications Act, §§ 201 and 202

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

77. This Count IV is brought on behalf of the putative Class and Sub-Class.

78. At all times relevant hereto, there was in full force and effect the Federal Communications Act of 1934 ("FCA"), 47 U.S.C. § 201, *et seq.*

79. Section 201(b) of the FCA provides that all charges, practices, classifications, and regulations for and in connection with communication service, shall be just and reasonable. 47 U.S.C. § 201(b).

80. Each of the fees herein alleged is unjust or unreasonable within the meaning of Section 201(b), *supra.*

81. Section 202(a) of the FCA prohibits any common carrier from making any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, or to make or give any undue or unreasonable preference or advantage to any particular person or class of persons. 47 U.S.C. § 202(a).

82. Notwithstanding the prohibitions of Section 202(a), *supra,* Plaintiffs and other AT&T Wireless customers who migrated to Cingular following its merger with AT&T were to receive the same service as Cingular customers who did not pay such fees.

83. As a direct and proximate result of Defendants' violation of 47 U.S.C. §§ 201(b) and 202(a) described above, Plaintiffs and the putative Class have been damaged. Plaintiffs do not request any relief that would require Defendants to provide any particular infrastructure or change any particular rate, and seek an award of monetary damages and/or restitution under common law.

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WHEREFORE, Plaintiffs and the putative Class pray for relief as set forth below.

VI. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs and the putative Class pray for relief as follows:

1. For an Order certifying this action as a class action on behalf of the putative Class and Sub-Class described above;
2. For restitution and/or disgorgement of all amounts wrongfully charged to Plaintiffs and members of the putative Class;
3. For damages according to proof;
4. For a judicial declaration that Defendants have breached the AT&T Wireless Contracts and, by reason of such breach, members of the putative Class may terminate those contracts without incurring a penalty in the form of an early termination fee;
5. For costs of suit herein incurred;
6. For both pre- and post-judgment interest on any amounts awarded;
7. For an award of treble or punitive damages under applicable law;
8. For an award of attorneys' fees as appropriate pursuant to the provisions of the Consumer Protection Act of Washington and other similar State laws;
9. For declaratory judgment and injunctive relief declaring the mandatory arbitration clauses and class action waiver of rights to participation as unconstitutional, unconscionable and unenforceable and enjoining enforcement thereof;
10. For declaratory judgment and injunctive relief prohibiting Defendants from charging the $4.99 monthly fee to TDMA/Anolog users, declaring said fee to be unenforceable, a violation of the contract, and enjoining enforcement thereof, including any efforts to collect;
11. For corrective advertising to ameliorate consumers' mistaken impressions created by Defendants' prior advertising; and

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12. For such other and further relief as the Court may deem proper.

DATED this 6th day of October, 2006.

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VII. DEMAND FOR JURY TRIAL

Plaintiffs, on behalf of themselves and all others similarly situated, request a jury trial on the claims so triable.

DATED this 6th day of October, 2006.

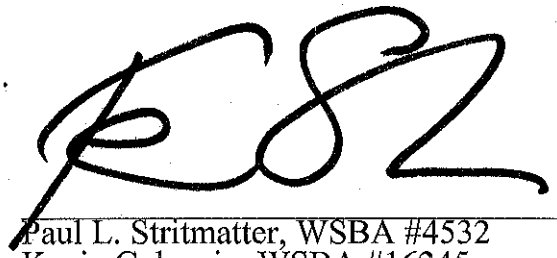

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EXHIBIT B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MARYGRACE A. CONEFF, *et al.*, Plaintiffs, v. AT&T CORP. *et al.*, Defendants.	CASE NO. C06-944 RSM ORDER DENYING DEFENDANTS' MOTION TO COMPEL ARBITRATION

I. INTRODUCTION

This matter comes before the Court on "Defendants' Amended Motion to Compel Arbitration Pursuant to the Federal Arbitration Act and to Dismiss Action." (Dkt. #133). Defendants argue that pursuant to a binding arbitration clause entered into between the parties, Plaintiffs must pursue their disputes through individualized arbitration. Defendants also argue that the Federal Arbitration Act preempts any state law defenses Plaintiffs can bring to the enforceability of the arbitration clause.

Plaintiffs respond that the arbitration provisions are unenforceable because they are substantively unconscionable. Additionally, Plaintiffs indicate that Defendants' preemption arguments have been rejected by the Ninth Circuit.

For the reasons set forth below, the Court agrees with Plaintiffs, and DENIES Defendants' motion to compel.

II. DISCUSSION

A. Background

The instant putative class action lawsuit was brought by several individuals across the United States against Defendants Cingular Wireless LLC ("Cingular"), Cingular Wireless Corporation, AT&T Wireless Services, Inc. ("AT&T Wireless"), and New Cingular Wireless Services, Inc. (*See* Dkt. #45, Second Am. Compl., ¶¶ 22-25). Plaintiffs, who were or are currently AT&T Wireless customers, allege that after Cingular merged with AT&T Wireless in October of 2004, Cingular deliberately degraded AT&T Wireless' network in order to induce AT&T Wireless customers to transfer their plans to Cingular plans, which they allege are generally more expensive and less favorable to customers. Plaintiffs also contend that Cingular's intention was to charge AT&T Wireless customers with various fees and costs in connection with those new plans.

Plaintiffs allege that Cingular's specific scheme was to encourage AT&T Wireless customers to "upgrade" to Cingular's network. These "upgrades" required customers to do one or more of the following: (1) pay an $18 transfer fee to Cingular; (2) purchase one or more new phones from Cingular; (3) pay $18 for a SIM chip to operate their current phone; and/or (4) enter into a new service contract with Cingular. Plaintiffs allege that AT&T Wireless customers who did not agree to such an "upgrade" were left with a choice to either fulfill their contract term with a degraded AT&T Wireless service, or pay a $175 early termination fee to cancel service.

Plaintiffs also allege that Cingular began charging an unnecessary and mandatory fee to all AT&T Wireless customers. As a condition for approval of the merger, the Federal Communication Commission required Cingular to keep AT&T Wireless' network in place until February of 2008. Significantly, Cingular offered its wireless services through a new and improved GSM network, whereas AT&T Wireless offered service through a TDMA/Analog network. Plaintiffs allege, however, that in July of 2006, Cingular began imposing a mandatory $4.99 monthly fee to any AT&T Wireless customer still using the TDMA/Analog network. Plaintiffs note in their complaint that major publications, including

the Wall Street Journal, reported that Cingular had "been spending next to nothing to maintain the [AT&T Wireless] network, leaving customers who don't upgrade [to the Cingular network] in the lurch." (Second Am. Compl., ¶ 35).

As a result of this conduct, Plaintiffs initiated the instant class action against Defendants in this Court on July 6, 2006. Plaintiffs assert claims under the consumer protection acts of 14 different states, the Federal Communications Act as codified by 47 U.S.C. §§ 201 *et seq.*, and several common-law doctrines. Plaintiffs also seek, among other things, a declaratory judgment that an arbitration provision contained in their contracts with Defendants is unconscionable and therefore unenforceable.

Defendants now bring the instant motion to compel arbitration on an individual basis, and to dismiss Plaintiffs' claims pursuant to the arbitration provision that Plaintiffs argue is unconscionable.[1] Although the exact wording of the various AT&T Wireless Service Agreements ("WSAs") that Plaintiffs entered into with Defendants has changed over time, the arbitration agreements have remained substantially intact. Each expressly requires customers to pursue their dispute in either individual arbitration or small claims court. The WSAs also preclude customers from bringing or participating in any class action, regardless of whether the action is brought in arbitration or in court. Counsel for Plaintiffs acknowledged during oral argument that the 2006 WSA controls in this case. This version of the WSA provides:

> YOU AND [CINGULAR/AT&T] AGREE THAT EACH MAY BRING CLAIMS AGAINST THE OTHER ONLY IN YOUR OR ITS INDIVIDUAL CAPACITY, AND NOT AS A PLAINTIFF OR CLASS MEMBER IN ANY PURPORTED CLASS OR REPRESENTATIVE PROCEEDING. Further, unless both you and [Cingular/AT&T] agree otherwise, the arbitrator may not consolidate more than one person's claims, and may not otherwise preside over any form of a representative or class proceeding.

(Dkt. #52, Decl. of Berinhout, Ex. 4 at 35; Dkt. #134, Ex. 23 at 124).

Defendants also contend that each WSA contains a choice-of-law clause selecting the Plaintiff's home state as the governing law. Defendants argue that under the law of each applicable state, the class-waiver provisions in the WSAs are neither procedurally nor

[1] It is noteworthy that Defendants' original motion to compel was filed on October 30, 2006. (Dkt. #51). However, due to extensive discovery and repeated continuances requested by the parties, the motion finally became ripe for review on March 11, 2009.

substantively unconscionable. The applicable state laws include: Alabama, Arizona, California, Florida, Illinois, Missouri, New Jersey, Virginia and Washington.

Alternatively, Defendants argue the Section 2 of the FAA preempts Plaintiffs' state-law unconscionability arguments. Defendants suggest that the FAA preempts general principles of contract law such as unconscionability if those doctrines are employed in ways that subject arbitration clauses to special scrutiny. Given the unique and "pro-consumer" nature of the arbitration agreements at-issue, Defendants contend that the Court should overlook any state-law standard that is at odds with the FAA's liberal policy in favor of arbitration.

Notably, and prior to the merger, Cingular was the second largest provider of wireless communication services in the U.S. in terms of subscribership with approximately 24 million customers, and AT&T was the third largest with over 22 million customers. After the merger, in which Cingular acquired AT&T Wireless for $41 billion, the new consolidated corporation branded as AT&T Mobility became the largest provider of wireless services. At the end of 2007, AT&T Mobility had over 70 million customers and reported approximately $42.7 billion in revenue. (Dkt. #138, Decl. of Coluccio, Ex. Q).

B. The Federal Arbitration Act

It is well settled that Congress enacted the Federal Arbitration Act ("FAA") to "overcome judicial resistance to arbitration . . . and to declare a national policy favoring arbitration of claims that parties contract to settle in that matter." *Vaden v. Discover Bank*, 129 S.Ct., 1262, 1271 (2009) (internal quotations and citations omitted). The primary purpose of the FAA is to ensure that "private agreements to arbitrate are enforced according to their terms." *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 479, (1989). The FAA clearly manifests a liberal federal policy favoring arbitration agreements. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 (1991).

Nevertheless, courts should consider "ordinary state-law principles that govern the formation of contracts" in determining whether the arbitration provision is valid. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (citations omitted). Thus, "generally applicable contract defenses such as fraud, duress, or unconscionability, may be

applied to invalidate arbitration agreements[.]" *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (citations omitted). The party opposing arbitration bears the burden of showing that the agreement is not enforceable. *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91-92 (2000).

Here, the parties do not dispute that Plaintiffs' claims fall within the scope of the arbitration agreements in the WSAs. As a result, the Court must determine whether the arbitration agreements are enforceable.

C. Applicable Law

The first issue for the Court to determine is whether the choice-of-law provisions contained in the WSAs are valid. It is undisputed that the WSAs select the law of the individually-named Plaintiff's home state or the state of the wireless phone number. (Dkt. #133 at 19, n.8). Plaintiffs maintain, however, that applying the choice-of-law clauses would violate Washington's fundamental public policy against class-action waivers in arbitration agreements.

A court sitting in diversity, as is the case here, applies the choice-of-law rules of the forum state. *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1005 (9th Cir. 2001). In Washington, "there must be an actual conflict between the laws or interests of Washington and the laws or interests of another state before Washington courts will engage in a conflict of laws analysis." *Erwin v. Cotter Health Centers*, 161 Wash.2d 676, 692 (2007) (citations omitted). Consequently, and as this district court has noted, choosing the applicable law is a two-part inquiry: first, a court must determine whether there is an actual and meaningful difference between the potentially applicable laws; and second, a court must determine whether the parties' choice-of-law is actually effective. *Carideo v. Dell, Inc.*, 520 F.Supp.2d 1241, 1244-45 (W.D. Wash. 2007).

With respect to the first inquiry, there is no question that an actual conflict exists between Washington law and the law of other states that are implicated in this lawsuit. In Washington, a class-action waiver is unenforceable in certain circumstances. *Scott v. Cingular Wireless*, 160 Wash.2d 843, 859 (2008). On the other hand, in Virginia, Illinois,

and Alabama – three states that are potentially applicable in the instant case – courts have upheld class action waivers based on a strict interpretation of the FAA, or when the corporate defendants have agreed to pay the administrative fees associated with arbitration. *See, e.g.*, *Gay v. CreditInform*, 511 F.3d 369, 390-92 (3d Cir. 2007) (applying Virginia law); *Hutcherson v. Sears Roebuck & Co.*, 342 Ill.App. 3d 109, 121-124 (2003) (applying Illinois law); *Billups v. Bankfirst*, 294 F.Supp.2d 1265, 1276-77, n. 6 (M.D. Ala. 2003) (applying Alabama law). Indeed, there is a split of authority in this country over the enforceability of class-action waivers. *See Scott*, 160 Wash.2d at 850-851 (collecting cases).

As a result, the Court must ask whether the parties' express contractual choice-of-law is effective. Washington applies § 187 of the *Restatement* to make this determination. *See Erwin*, 161 Wash.2d at 694. Section 187(2) of the *Restatement* specifically provides:

> (2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either
>
> (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or
>
> (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

Restatement (Second) of Conflict of Laws § 187 (1971).

Here, there is no dispute that Defendants' chosen state has a substantial relationship to the parties of the transaction. The states are those in which the individually named Plaintiffs respectively reside. Therefore Plaintiffs must show that the elements of § 187(2)(b) of the *Restatement* are met.

1. Washington Law Governs Absent an Enforceable Choice-of-Law Clause

As the Washington Supreme Court recently explained, the first inquiry in the choice-of-law analysis is to determine whether Washington law would apply without the provision. *McKee v. AT&T Corp.*, 164 Wash.2d 372, 384 (2008). Washington courts have applied various tests when making this inquiry, including the "most significant relationship" test from

§ 188 of the *Restatement*. This test specifies that courts should consider: (1) the place of contracting, (2) the place of negotiation of the contract, (3) the place of performance, (4) the location of the subject matter of the contract, and (5) the domicile, residence, or place of incorporation of the parties. *Restatement*, *supra*, § 188; *see also Mulcahy v. Farmers Ins. Co. of Washington*, 152 Wash.2d 92, 101 (2004) (employing the same five factors).

Other courts have examined factors outside of those listed in the *Restatement*. For example, this district court held that in a class-action lawsuit involving plaintiffs from across the nation, "the place of injury is of lower importance . . . In such a case, the state in which *the fraudulent conduct arises* has a stronger relationship to the action." *Kelley v. Microsoft Corp.*, 251 F.R.D. 544, 552 (W.D. Wash. 2008) (emphasis added). Likewise, a Washington state court acknowledged that even though a defendant corporation was incorporated outside of Washington state, Washington law nevertheless applied because "all defendants reside or conduct business in Washington . . . a Seattle attorney was involved in preparing and reviewing many transaction documents . . . and [] many of the acts of alleged fraud occurred in Washington." *Ito Intern. Corp. v. Prescott, Inc.*, 83 Wn. App. 282, 290 (1996).

In the instant case, the Court finds that the first four factors in the *Restatement* analysis are neutral. The reality of the situation presented by this case is that there is simply no place of contracting, no place of negotiation of the contract, no place of performance, and no central location of the subject matter of the contract. Instead, Defendants sent the WSAs to customers who were existing AT&T Wireless customers, and there is no evidence that the Plaintiffs repeatedly communicated with Defendants to either change or otherwise modify their plans. Therefore no true negotiation between the parties took place. Additionally, in a case involving wireless phones, there is no central place of performance, as Defendants undoubtedly have satellite towers all across the country, and customers often use their phones in multiple states. Indeed, wireless phone use is a nation-wide practice.

With respect to the last factor, this weighs in favor of applying Washington law. Defendants concede that AT&T Wireless is a Washington corporation, and Plaintiffs also allege that Washington was the primary residence of AT&T Wireless' officers, directors, and

legal department. (Dkt. #136 at 19). Defendants do not dispute these contentions. In addition, at least one named Plaintiff of the putative class is a Washington resident.

Moreover, when considering that AT&T Wireless has strong connections to this state, application of Washington law is the logical choice. Plaintiffs indicate that the AT&T Wireless executives responsible for "designing, implementing, and operating [AT&T Wireless'] national network, including network footprint expansion plans, capacity path growth, and the deployment strategy for the company's next generation wireless network" were located in Redmond, Washington. (Decl. of Coluccio, Ex. CC). Plaintiffs further indicate that the AT&T Wireless executives responsible for "marketing strategy and programs, including products and offers, advertising and marketing communications, partnerships and direct marketing" were also located in Redmond. (*Id*., Ex. DD). In addition, AT&T Wireless' legal department was located in Washington, and it appears that the initial drafts of the arbitration provisions were drafted here. (*Id*., Ex. L, Dep. of Berinhout, 105:17-22; 111:17-113:1). Defendants also do not dispute these contentions.

Nevertheless, counsel for Defendants indicated at oral argument that an unpublished Ninth Circuit case is controlling on this issue. *See In re Detwiler*, 305 Fed.Appx. 353 (9th Cir. 2008). In that case, a customer to a telecommunications provider argued that the district court erred in holding that Florida law applied if no choice-of-law clause existed in the parties' contract. The Ninth Circuit affirmed the district court's decision because the majority of the *Restatement* factors weighed against the customer, who was seeking to apply Washington law. The Ninth Circuit held that Washington law would not apply because "Florida is the place of contracting, the place of negotiation, the place of performance, the location of the subject matter, and the residence of one of the parties." *Id.* at 355. Significantly, the customer had contact with the telecommunications provider 11 times over a period of six years, and had received several guides regarding her agreement.

The Court finds that *Detwiler* is not controlling. As explained previously, the Plaintiffs in this case did not have extensive contacts or negotiations with the Defendants, and the first four factors of the *Restatement* simply have no compelling effect. Conversely, the only factor

that clearly applies weighs in favor of applying Washington law. Ultimately, the Court agrees with Plaintiffs' counsel's characterization during oral argument that Washington's choice-of-law analysis is a "messy test." It is clear that Washington courts examine various factors in determining whether Washington law would apply.

As a result, and similar to the *Kelley* and *Prescott* cases above, it is clear that a substantial portion of the allegedly fraudulent activity occurred in Washington. The application of Washington law in this case "would encourage Washington residents involved in business transactions to behave responsibly." *Prescott*, 83 Wn. App. at 290. Coupled with the fact that the *Restatement* analysis weighs slightly in favor of applying Washington law, the Court finds that Washington has the most significant relationship to this case, and that Washington law would apply absent a choice-of-law provision in the WSAs.

2. Fundamental Public Policy of Washington

There can be no doubt that Washington has a strong public policy of refusing to enforce exculpatory class action bans. *See Scott*, 160 Wash.2d at 859.[2] This policy has been reinforced by *McKee*, wherein the court stated that Washington has a "fundamental public policy to protect consumers through the availability of class action." *McKee*, 164 Wash.2d at 385. The *McKee* court further stated that "Washington's strong [CPA] policy favoring class adjudication of small-dollar claims is a 'fundamental policy' contemplated by [the *Restatement*]." *Id*. at 386.

Here, there is no doubt that the claims alleged by Plaintiffs implicate a fundamental public policy of Washington. A prohibition on the Plaintiffs' ability to initiate a class-action lawsuit would violate the rights protected by the Washington CPA and the case law that has interpreted these rights. Furthermore, and as mentioned above, there exists the possibility that in at least three of the jurisdictions that Defendants contend apply in this case, a court may

[2] In *Carideo*, this district court found that the analysis of whether a contract would violate a fundamental public policy is similar to whether it would be substantively unconscionable. 520 F.Supp.2d at 1245. However, the *McKee* court found that "[t]his question is different than determining whether a class action ban under some circumstances is substantively unconscionable." 164 Wash.2d at 385. The Ninth Circuit remanded the *Carideo* decision in light of *McKee*. Accordingly, the Court separates the analysis as well.

uphold class-action waivers under certain circumstances. *See Gay*, 511 F.3d at 392; *Hutcherson*, 342 Ill.App. 3d at 121-124; *Billups*, 294 F.Supp.2d at 1276-77, n. 6. Therefore the Court finds that this element of § 187 of the *Restatement* has been met.

3. Washington's Materially Greater Interest

The last factor for this Court to consider is whether Washington has a materially greater interest in adjudicating this dispute than the other potentially applicable states. The Court has effectively already performed this analysis in its discussions above. There can be no doubt that Washington has an interest in regulating the conduct of businesses that reside in this state. This interest is materially greater than the interests of the eight other states whose laws Defendants contend apply in this case. In those states, the only connection to this lawsuit is that the individually–named Plaintiffs reside there. Defendants do not conduct any significant business activity in such states, and therefore the states have limited interest in adjudicating the case at bar.

As a result, because the elements of § 187(2) have been met, Washington law shall apply in this case.

D. Unconscionability

Washington law recognizes two types of unconscionability, substantive and procedural. *Zuvver v. Airtouch Communications, Inc.*, 153 Wash.2d 293, 303 (2004) (citations omitted). "Substantive unconscionability involves those cases where a clause or term in the contract is alleged to be one-sided or overly harsh, while procedural unconscionability relates to impropriety during the process of forming a contract." *Schroeder v. Fageol Motors, Inc.*, 86 Wash.2d 256, 260 (1975) (citation omitted). In Washington, courts may hold that contracts are unenforceable based upon substantive unconscionability only. *See Scott*, 160 Wash.2d at 854, n.4 ("Because we find the class action waiver substantively unconscionable, we find it unnecessary to address plaintiffs' claims of procedural unconscionability.").

1. Substantive Unconscionability in Washington

Both parties are fully aware that the Washington Supreme Court has recently held that a class-action waiver provision in an arbitration agreement is substantively unconscionable. *See Scott*, 160 Wash.2d at 859. Other recent decisions involving class-action waivers and applying Washington law have found similarly. *See Lowden v. T-Mobile USA, Inc.*, 512 F.3d 1213, 1219 (9th Cir. 2008); *Luna v. Household Finance Corp. III*, 236 F.Supp.2d 1166, 1179 (W.D. Wash. 2002); *Riensche v. Cingular Wireless, LLC*, 2006 WL 3827477, *12 (W.D. Wash. 2006).

Despite this recent case law, Defendants contend that there is no categorical rule that all class-action waivers contained in arbitration provisions are substantively unconscionable. Defendants argue that *Scott* only bans class-action waivers where such a waiver would prevent vindication of consumer rights secured by the Washington CPA. Defendants further point out that the court in *Scott* held that it could "certainly conceive of situations where a class action waiver would not prevent a consumer from vindicating his or her substantive rights under the CPA and would thus be enforceable." *Scott*, 160 Wash.2d at 860, n.7.

The Court agrees that there is no *per se* ban on a class-action waiver. As this district court has previously held, "*Scott* requires the court to examine the enforceability of a class-action waiver given the totality of the circumstances." *Carideo*, 520 F.Supp.2d at 1243. As a result, the heart of this dispute is whether the specific terms of the class-action waivers are substantively unconscionable.

2. Cingular and AT&T's class-action waiver provisions

Defendants contend that there are several aspects of the applicable arbitration provisions in the WSAs that make them uniquely "pro-consumer," and therefore enforceable. These features include, among other things, the following incentives: (1) cost-free arbitration wherein Defendants agree to pay all filing, administration, and arbitrator fees; (2) the option to bring a claim in small claims court; (3) the availability of punitive damages; (4) a guaranteed minimum recovery of at least $5,000 under certain conditions; and (5) the

availability of double attorneys' fees under certain conditions while Defendants simultaneously disclaim their right to seek attorneys' fees. (Dkt. #133 at 16-17).

Defendants' expert witness Richard A. Nagareda, a law professor at Vanderbilt University, also testifies that he has "never seen an arbitration provision that has gone as far as this one to provide incentives for consumers and their prospective attorneys to bring claims." (Dkt. #53, Decl. of Nagareda, ¶ 11). Mr. Nagareda continues that the applicable arbitration provision "reduces dramatically the cost barriers to the bringing of individual consumer claims . . . and provides financial incentives for consumers (and their attorneys, if any) to pursue arbitration in the event that they are dissatisfied with whatever offer Cingular has made to settle their disputes." (*Id*.).

Notwithstanding these arguments and the allegedly unique and "pro-consumer" nature of the agreements between AT&T and Cingular and their customers, the Court finds that the class-waiver provisions are substantively unconscionable for the following five reasons.

First, the class-action waiver serves to protect Defendants "from legal liability for any wrong where the cost of pursuit outweighs the potential amount of recovery." *Scott*, 160 Wash.2d at 855. Here, there can be no doubt that the purported class in this case alleges injuries that consist of small sums of money. Specifically, Plaintiffs' second amended complaint describes the putative class members' damages as ranging from $4.99 to $175. (Second Am. Compl., ¶¶ 7-21). Such small claims are undoubtedly dwarfed by the legal complexity presented by the facts alleged in Plaintiffs' complaint. These include claims that Cingular, a multi-billion dollar corporation, intentionally degraded AT&T's pre-existing wireless network in order to exponentially increase their profits by assigning small fees to customers switching to the new network. There can be no question that the cost of pursuit would be prohibitively expensive for a customer proceeding on an individual basis.

Furthermore, Plaintiffs submit the declarations of several consumer lawyers across the country, all of whom testify "that the relatively small amount in controversy makes cases against large corporations such as AT&T impractical to pursue on an individual basis." (Dkt. #136 at 10). Each consumer lawyer additionally testifies that he or she would not represent

the named Plaintiffs in individual actions, either in court or in arbitration. (*Id.*). The Court finds the testimony of North Carolina lawyer Jerome Hartzell particularly compelling. He states that "the hourly charge would generally or invariably exceed the entire amount in controversy." (Dkt. #43, Decl. of Hartzell, ¶ 23). "[N]o lawyer concerned with *ethical propriety* would be comfortable charging a client by the hour for such services." (*Id*. at ¶ 34) (emphasis added).

Given the significant disparity presented by the facts of this case, the Court finds it clear that the cost of pursuit significantly outweighs the potential recovery if each of the Plaintiffs was to proceed on an individual basis. Indeed, "[t]he *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30." *Carnegie v. Household Intern., Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (emphasis in original) (J. Posner).

The second reason in support of a finding of substantive unconscionability is that Defendants significantly overstate the "premiums" contained in their WSAs. The Court gives no weight to the fact that Defendants will pay for arbitration fees as well as attorneys' fees in the event a customer wishes to pursue individual arbitration. As *Scott* clearly held, "[s]hifting the cost of arbitration to Cingular does not seem likely to make it worth the time, energy, and stress to pursue such individually small claims." *Scott*, 160 Wash.2d at 855-56; *see also McKee v. AT&T Corp.*, 164 Wash.2d at 398 ("The agreement allows for small claims court action, but even the availability of small claims court or low-cost arbitration does not make it practicable for an individual to pursue such small amounts.").

In addition, Defendants also overstate the provision in their WSAs that allow consumers to potentially recoup a $5,000 award. Defendants repeatedly argue throughout their briefings that this $5,000 minimum payment is clearly a meaningful recovery that would turn the concept of unconscionability on its head. However, the $5,000 payment is awarded *only upon the condition* that "the arbitrator awards the customer more than [AT&T Mobility's] last written settlement offer before an arbitrator was selected." (Dkt. #133 at 16) (internal quotations omitted). Therefore the award is not guaranteed. Defendants are in full control of

ensuring that such an amount is never awarded by offering a settlement offer that is significantly lower than $5,000, but remains significantly higher than the nominal claims that the individuals are bringing in this case. This reasoning applies with equal force to the provision in Defendants' WSAs that awards double attorneys' fees should this condition occur. As a result, and as the *Scott* court pointed out, while these "premiums" are laudable, "it appears . . . that these provisions do not ensure that a remedy is practically available." *See Scott*, 160 Wash. 2d at 856.

Third, and perhaps most compelling, is that the Court has tangible evidence which reveals that Defendants' "pro-consumer" provisions are not having their intended effect. For example, Plaintiffs indicate that since 2003, fewer than 200 consumer arbitrations involving Defendants have been conducted nationwide, and only 265 small claims court cases have been filed against Defendants nationwide. (Dkt. #136 at 33). To place this in perspective, it is worthwhile to reiterate that Defendants' client base is currently over 70 million customers. Therefore the actual percentage of customers utilizing Defendants' allegedly "pro-consumer" provisions represents an infinitesimal amount. [3]

Plaintiffs further point out that the Foundation for Taxpayer and Consumer Rights – a non-profit consumer advocacy organization – received more than 4,700 complaints regarding service after the merger, and over 1,800 web-based complaints within 24 hours of the press announcement that followed the filing of this class action lawsuit. (Dkt. #144, Decl. of Heller, ¶¶ 8, 11). Thus, the miniscule amount of customers pursuing arbitration proves that the customers are either unaware of their right to take advantage of these "pro-consumer" provisions, or the customers have no incentive to bring their claims against Defendants given the prohibitively expensive costs of individual adjudication. In either circumstance, Defendants are utilizing the provisions in the WSAs to effectively exculpate themselves from any potential liability for unfair or deceptive acts or practices in commerce, conduct that is expressly barred by the Washington Supreme Court. *Scott*, 160 Wash.2d at 854 ("Contract

[3] Defendants report that they have conducted nearly 270 arbitrations. Regardless, the tiny fraction of those pursuing individual arbitration remains essentially the same.

provisions that exculpate the author for wrongdoing, especially intentional wrongdoing, undermine the public good."). This Court will not condone such a broad and exculpatory practice.

Relatedly, and in light of *Scott's* holding that not all class-waivers are *per se* unconscionable, Defendants' consistently challenged Plaintiffs during oral argument to imagine an arbitration provision that would not violate substantive unconscionability. No such burden exists. Plaintiffs must only show that the WSAs in this case are shielding Defendants from a substantial amount of potential liability. Defendants attempts to focus this Court's attention on the "pro-consumer" provisions of the WSAs are not persuasive.

The fourth reason in support of a finding of substantive unconscionability is that class action lawsuits are necessary and effective avenues for consumers whose economic positions vis-à-vis their corporate opponents would not allow them to proceed on a case-by-case basis. Washington clearly has "a state policy favoring aggregation of small claims for purposes of efficiency, deterrence, and access to justice." *Scott*, 160 Wash.2d at 851. "[A] class-based remedy is the only effective method to vindicate the public's rights." *Id*. at 852.

Nevertheless, Defendants contend that class action settlements are often worth nothing to individuals, given that the actual award to individuals is nominal. However, the actual award to the individuals that comprise a class is only one of the principal aims of a class action lawsuit. Another primary purpose of a class action lawsuit is to allow "[p]rivate citizens [to act] as private attorneys general in protecting the public's interest against unfair and deceptive acts and practices in trade and commerce." *Scott*, 160 Wash.2d at 853 (citing *Lightfoot v. MacDonald*, 86 Wash.2d 331, 335-36 (1976)). Curbing fraudulent business practices is a fundamental principle of any class action lawsuit. As the *Scott* court noted when citing a California Supreme Court decision:

> Individual actions by each of the defrauded consumers [are] often impracticable because the amount of individual recovery would be insufficient to justify bringing a separate action; *thus an unscrupulous seller retains the benefits of its wrongful conduct*. A class action by consumers produces several salutary by-products, *including a therapeutic effect upon those sellers who indulge in fraudulent practices*, aid to legitimate business enterprises by *curtailing illegitimate competition*, and avoidance to

> the judicial process of the burden of multiple litigation involving identical claims. The benefit to the parties and the courts would, in many circumstances, be substantial.

Scott, 160 Wash.2d at 852 (citing *Vazquez v. Superior Court of San Jouquin County*, 4 Cal. 3d 800, 808 (1971)) (emphasis added).

Lastly, the Court recognizes that recent jurisprudence views class-action waivers unfavorably. Dating back to the beginning of 2008, there have been at least seven different courts in five different jurisdictions that have refused to enforce class-action waivers. *See Hoffman v. Citibank (South Dakota), N.A.*, 546 F.3d 1078, (9th Cir. 2008); *In re Apple & AT&T Antirust Litig.*, 596 F.Supp.2d 1288 (N.D. Cal. 2008); *In re American Express Merchants' Litigation*, 554 F.3d 300 (2d Cir. 2009); *McKee v. AT&T Corp.*, 164 Wash.2d 372 (2008); *Olson v. The Bon, Inc.*, 144 Wn. App. 627 (2008); *Fiser v. Dell Comp. Corp.*, 144 N.M. 464 (2008); *Woods v. QC Financial Services*, --- S.W.3d ---, 2008 WL 5454124 (Mo. App. E.D. 2008). And as the Court noted above, even the *Carideo* case in which Defendants heavily rely upon has recently been remanded by the Ninth Circuit. *See In re Carideo*, 550 F.3d 846 (9th Cir. 2008). This ruling is therefore consistent with the modern trend.

As a result, the Court finds that class waiver provisions in the instant case are unconscionable. Defendants are effectively exculpated from any liability as a result of the provisions contained in their WSAs. This conduct contravenes Washington's fundamental public policy favoring the availability of class actions as a mechanism for enforcing a consumer's rights.

Defendants indicate that if the class-action waiver provision is unenforceable, the entire arbitration agreement should be unenforceable. Accordingly, the Court finds that all language in the applicable WSAs touching upon arbitration is unenforceable under Washington law.

E. Preemption

Defendants nevertheless argue that the FAA preempts the substantive unconscionability laws of Washington State. In support of this argument, Defendants indicate that § 2 of the FAA mandates that arbitration provisions "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. §

2. Defendants argue that this section preempts general principles of contract law where those doctrines are employed in a way to subject arbitration clauses to special scrutiny. (Dkt. #133 at 53) (citing *Iberia Credit Bureau, Inc v. Cingular Wireless LLC*, 379 F.3d 159, 167 (5th Cir. 2004)). In other words, courts "may not invalidate arbitration agreements under state laws applicable *only* to arbitration provisions." *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (emphasis in original).

However, the arguments raised by Defendants have been squarely rejected by the Ninth Circuit. For example, in *Shroyer v. New Cingular Wireless Servs., Inc*., the court recognized that Congress never intended to place arbitration agreements on a different footing than other contracts. 498 F.3d 976, 989 (9th Cir. 2007); *see also Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404, n. 12 (1967) ("As the 'savings clause' in § 2 indicates, the purpose of Congress . . . was to make arbitration agreements as enforceable as other contracts, but not more so."). Nonetheless, the Court held that this purpose "does not appear to be frustrated or undermined in any way by a holding that class arbitration waivers in contracts of adhesion, like class action waivers in such contracts, are unconscionable." *Shroyer*, 498 F.3d at 990. The court concluded "that applying California's generally applicable contract law to refuse enforcement of the unconscionable class action waiver in this case *does not stand as an obstacle to the purposes or objectives of the [FAA]*." *Id.* at 993 (emphasis added).

The Ninth Circuit subsequently upheld *Shroyer* in a case implicating Washington State's law on substantive unconscionability. *See Lowden v. T-Mobile USA, Inc.*, 512 F.3d 1213 (9th Cir. 2008). The court expressly held that "[j]ust as the FAA does not preempt California's unconscionability law, *it does not preempt Washington's unconscionability law.*" *Id*. at 1221 (emphasis added). The court based this finding on the concern that "when the potential for individual gain is small, few if any plaintiffs will pursue either individual arbitration *or* litigation, thereby greatly reducing the aggregate liability a company faces when it has exacted small sums from millions." *Id*. (emphasis in original).

The same concerns raised in *Shroyer* and *Lowden* apply with equal force here. The Court is not extending or otherwise employing a unique rule of law in finding that the class-

action waiver provisions in this case are substantively unconscionable. In fact, the principles utilized by the Court are general doctrines of unconscionability law that would apply to any two parties to a contract. The fact that the individuals here are precluded from proceeding as a class is not strictly limited to situations where such a provision is embedded in an arbitration provision. Whenever a party is effectively exculpating itself from allegedly fraudulent activity, general principles of unconscionability would potentially apply.

Defendants attempt to make one last plea to escape from the umbrella of these holdings by arguing that a recent Supreme Court case supersedes *Shroyer* and *Lowden*. *See Preston v. Ferrer*, 128 S.Ct. 978 (2008). This argument is not persuasive. In *Preston*, the Supreme Court addressed the narrow issue of whether a state statute assigning primary jurisdiction to a state labor commission is superseded by the FAA. *Id.* at 981. In holding that the statute was indeed preempted by the FAA, the Court upheld the general principle in favor of arbitrating disputes. *Preston* did not discuss or otherwise impact the more specific principle that "generally applicable contract defenses such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements[.]" *Casarotto*, 517 U.S. at 687.

III. CONCLUSION

Having reviewed the relevant pleadings, the declarations and exhibits attached thereto, and the remainder of the record, and having considered the oral argument of the parties, the Court hereby finds and ORDERS:

(1) "Defendants' Amended Motion to Compel Arbitration Pursuant to the Federal Arbitration Act and to Dismiss Action" (Dkt. #133) is DENIED. Defendants are directed to file an answer to Plaintiffs' second amended complaint no later than thirty (30) days from the date of this Order. Once Defendants respond, the Court will issue its initial scheduling order.

(2) The Clerk is directed to forward a copy of this Order to all counsel of record.

DATED this 22nd day of May, 2009.

RICARDO S. MARTINEZ
UNITED STATES DISTRICT JUDGE