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18 **UNITED STATES DISTRICT COURT**  
19 **WESTERN DISTRICT OF WASHINGTON**  
20 **AT SEATTLE**

21 MARYGRACE CONEFF, et al.

22 Plaintiffs,

23 v.

24 AT&T CORP., et al.,

25 Defendants

) Master File No. C06-0944 RSM

) **SECOND CONSOLIDATED**  
) **AMENDED COMPLAINT**

) **DEMAND FOR JURY TRIAL**

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

7 **I. INTRODUCTION**

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

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

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

28 ///

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

9 **II. JURISDICTION AND VENUE**

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

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

18 **III. PARTIES**

19 **A. Plaintiffs**

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

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

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

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

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

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

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

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

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

1 dismantling of the AT&T Wireless network. In an effort to obtain better service, they  
2 upgraded to a more expensive Cingular service plan, purchased a new phone, and paid  
3 \$18 for a new SIM card. The subject phones are used, in part, for business purposes.

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

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

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

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



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

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

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

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

23 **B. Defendants**

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

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

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

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

17 **C. Agency / Joint Venture**

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

24 **IV. FACTUAL ALLEGATIONS**

25 **A. Cingular's Acquisition of AT&T Wireless**

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



1 2003. Cingular provided its customers wireless voice and data service over a nationwide  
2 wireless network which it maintained. The Cingular network provided extensive  
3 coverage throughout the United States. In addition, Cingular entered into network access  
4 agreements with other network operators in the United States to provide additional  
5 network coverage for Cingular subscribers.

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

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

18 30. Cingular's acquisition of AT&T Wireless was completed on October 26,  
19 2004.

20 **B. Cingular's Concealments and Material Omissions**

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

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

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

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

9 “Raising the Bar” is more than a tagline, it’s about providing the type  
 10 of service that customers expect from their wireless company . . .  
 11 The most tangible example of how Cingular is “Raising the Bar” is  
 12 the newly combined network, the largest digital voice and data  
 13 network in the United States. Cingular is calling it the “ALLOVER”  
 14 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.

15 **C. Cingular’s Dismantling of the AT&T Wireless Network**

16 34. Contrary to Cingular’s assurances that AT&T Wireless customers would  
 17 have access to a “combined network,” Cingular instead made financial decisions with  
 18 regard to the old AT&T Wireless network and Cingular’s network which effectively  
 19 made the AT&T network inferior. The AT&T network was not maintained, and the  
 20 effect was to induce AT&T customers to transfer to the Cingular network.

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

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

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

16 **D. Cingular’s Implementation of a Mandatory \$4.99 Monthly Fee**

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

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

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

24 The rates for your service on Cingular’s TDMA/Analog network are  
25 increasing. As early as September, a TDMA/Analog network charge  
26 of \$4.99 per line will appear on your bill each month. Alternatively,  
27 you have the option to upgrade to a handset and rate plan on our new  
28 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.

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

6 41. Because most current AT&T Wireless subscribers use phones that operate  
7 on the TDMA/Analog network, Cingular is effectively targeting current AT&T Wireless  
8 subscribers and using the \$4.99 monthly charge to make it economically disadvantageous  
9 to keep their current service. What Cingular has omitted from the \$4.99 fee statement is  
10 the fact that it will charge an early termination fee to AT&T subscribers who do not wish  
11 to incur the \$4.99 charge or who do not wish to pay for a new phone and get locked into a  
12 2-year Cingular plan. Cingular's implementation of the mandatory \$4.99 monthly fee is a  
13 pretextual tactic to compel current AT&T subscribers to forfeit their existing AT&T  
14 calling plans and to purchase new telephones and accessories for a more expensive  
15 Cingular plan. Cingular's program leaves AT&T Wireless subscribers with no  
16 meaningful alternative. Similar to its dismantling of the AT&T Wireless network,  
17 Cingular's imposition of the \$4.99 monthly charge is designed to wrongfully induce  
18 migration to Cingular.

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

22 **E. No Enforceable Agreement to Arbitrate**

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

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

5 44. The mandatory arbitration provision and, particularly, the class action  
6 waiver provision in these types of contracts have repeatedly been held unenforceable.  
7 *See, e.g., Ting v. AT&T Corp.*, 319 F.3d 1126 (9th Cir. 2003), *cert. denied*, 540 U.S. 811  
8 (2003); *Discover Bank v. Superior Court (Boehr)*, 36 Cal.4th 148 (2005); *Ball v. Cingular*  
9 *Wireless, LLC*, Case No. 04CC06353, Order Denying Motion of Defendant Cingular  
10 Wireless, LLC to Compel Arbitration And Stay Action (Cal. Superior Court Feb. 7, 2005)  
11 (Cingular's arbitration clause found unconscionable); *In re Cellphone Termination Fee*  
12 *Cases*, J.C.C.P. 4332, Order Denying Motions of AT&T and Cingular to Compel  
13 Arbitration (Cal. Superior Court Jan. 20, 2004) (AT&T's arbitration clause and three  
14 different forms of Cingular's arbitration clauses found unconscionable); *Tamayo v.*  
15 *Brainstorm, USA*, 154 Fed.Appx. 564 (9th Cir. 2005) (class action waiver in an  
16 arbitration clause contained in adhesive contract found unconscionable and not valid  
17 under California law); *Kinkel v. Cingular Wireless, LLC*, 357 Ill.App.3d 556 (Ill.App.  
18 2005) (motion for leave to appeal denied); *aff'd* 2006 WL 2828664 (Ill. Oct. 5, 2006);  
19 *Muhammad v. County Bank of Rehoboth Beach, Delaware*. \_\_\_ A.2d \_\_\_, 2006 WL  
20 2273448 (N.J., Aug. 9, 2006) (provision in consumer loan agreement that forbade class-  
21 wide arbitration was unconscionable and, therefore, unenforceable).

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

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



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

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

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



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

3 **V. CLASS ACTION ALLEGATIONS**

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

7 **The "Class" is defined as all subscribers of AT&T Wireless in the**  
8 **United States as of October 26, 2004.**

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

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

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

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

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

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

- 3 a. whether Cingular has maintained the AT&T Wireless network since  
4 its acquisition of AT&T Wireless;
- 5 b. whether Defendants fulfilled their service obligations to Plaintiffs  
6 and the putative Class pursuant to the AT&T Wireless Contracts;
- 7 c. whether Defendants charged Plaintiffs and the putative Class fees in  
8 violation of the AT&T Wireless Contracts;
- 9 d. whether Defendants concealed from Plaintiffs and the putative Class  
10 that they would not have access to a higher network quality as  
11 promised by Defendants;
- 12 e. whether Defendants caused AT&T Wireless customers to migrate to  
13 Cingular by virtue of the conduct herein alleged;
- 14 f. whether Plaintiffs and the putative Class were wrongfully induced to  
15 cancel their AT&T Wireless plans, thereby incurring termination  
16 fees;
- 17 g. whether Plaintiffs and the putative Class were wrongfully induced to  
18 enter into service contracts with Cingular, thereby incurring the fees  
19 and costs associated with new service plans;
- 20 h. whether Defendants violated the Washington Consumer Protection  
21 Act, Wash. Code Rev. § 19.86.010, *et seq.*, or alternatively, whether  
22 Defendants violated the similar consumer protection laws of other  
23 States; and
- 24 i. whether Defendants violated Sections 201 and/or 202 of the FCA.

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

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

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

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

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

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

20 **COUNT I**

21 **Unjust Enrichment/Common Law Restitution**

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

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

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



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

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

7 a. **Washington:** Defendants' practices were and are in violation of  
8 Washington's Consumer Protection Act, Wash. Code Rev. §  
9 19.86.010, *et seq.*

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

15 c. **Florida:** Defendants' practices were and are in violation of  
16 Florida's Deceptive and Unfair Trade Practices Act, Fla. Stat. §  
17 501.201, *et seq.*

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

22 e. **Maryland:** Defendants' practices were and are in violation of  
23 Maryland's Consumer Protection Act, Md. Com. Law Code §  
24 13-101, *et seq.*

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

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

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

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

10 72. The AT&T Wireless Contracts purport to govern the relationship between  
11 the subscriber and “the entity licensed to provide service in the area associated with [the  
12 subscriber’s] assigned telephone, data, and/or messaging number(s).” *See* Exhibit C.

13 Thus, as a result of Cingular’s acquisition of AT&T Wireless, Cingular is a successor in  
14 interest to said contracts.

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

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

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

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

2 **COUNT IV**

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

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

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

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

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

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

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

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

22 83. As a direct and proximate result of Defendants' violation of 47 U.S.C. §§  
23 201(b) and 202(a) described above, Plaintiffs and the putative Class have been damaged.  
24 Plaintiffs do not request any relief that would require Defendants to provide any  
25 particular infrastructure or change any particular rate, and seek an award of monetary  
26 damages and/or restitution under common law.

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

2 **VI. PRAYER FOR RELIEF**

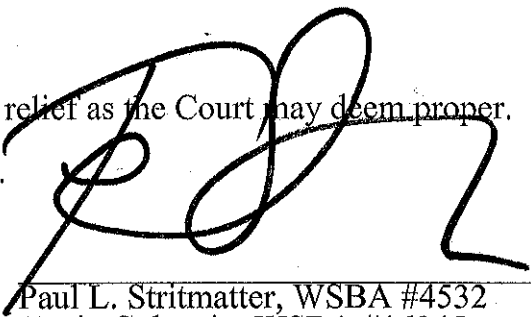
3 WHEREFORE, Plaintiffs and the putative Class pray for relief as follows:

- 4 1. For an Order certifying this action as a class action on behalf of the putative
- 5 Class and Sub-Class described above;
- 6 2. For restitution and/or disgorgement of all amounts wrongfully charged to
- 7 Plaintiffs and members of the putative Class;
- 8 3. For damages according to proof;
- 9 4. For a judicial declaration that Defendants have breached the AT&T
- 10 Wireless Contracts and, by reason of such breach, members of the putative
- 11 Class may terminate those contracts without incurring a penalty in the form
- 12 of an early termination fee;
- 13 5. For costs of suit herein incurred;
- 14 6. For both pre- and post-judgment interest on any amounts awarded;
- 15 7. For an award of treble or punitive damages under applicable law;
- 16 8. For an award of attorneys' fees as appropriate pursuant to the provisions of
- 17 the Consumer Protection Act of Washington and other similar State laws;
- 18 9. For declaratory judgment and injunctive relief declaring the mandatory
- 19 arbitration clauses and class action waiver of rights to participation as
- 20 unconstitutional, unconscionable and unenforceable and enjoining
- 21 enforcement thereof;
- 22 10. For declaratory judgment and injunctive relief prohibiting Defendants from
- 23 charging the \$4.99 monthly fee to TDMA/Analog users, declaring said fee
- 24 to be unenforceable, a violation of the contract, and enjoining enforcement
- 25 thereof, including any efforts to collect;
- 26 11. For corrective advertising to ameliorate consumers' mistaken impressions
- 27 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 6<sup>th</sup> day of October, 2006.



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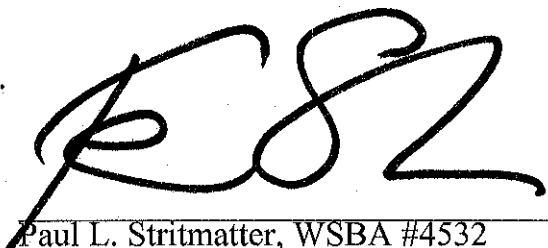
*Attorneys for Plaintiff Devin Gilker*



**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 6<sup>th</sup> day of October, 2006.



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