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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MARCUS A. ROBERTS,
KENNETH A. CHEWEY, AND
ASHLEY M. CHEWEY, on behalf of
themselves and all others similarly
situated,

Plaintiffs,

v.

AT&T MOBILITY LLC,

Defendant.

Case No. 3:15-cv-3418-EMC

CLASS ACTION

SECOND AMENDED COMPLAINT FOR:

- (1) VIOLATION OF BUSINESS & PROFESSIONS CODE § 17200;**
- (2) VIOLATION OF BUSINESS & PROFESSIONS CODE § 17500;**
- (3) VIOLATION OF THE CONSUMERS LEGAL REMEDIES ACT (“CLRA”), CALIFORNIA CIVIL CODE §1750, *ET SEQ*;**
- (4) NEGLIGENT MISREPRESENTATION;**
- (5) MISREPRESENTATION;**
- (6) FRAUDULENT CONCEALMENT;**
- (7) BREACH OF EXPRESS WARRANTY/ CONTRACT; AND**
- (8) UNJUST ENRICHMENT**

JURY TRIAL DEMANDED

1 Plaintiffs Marcus A. Roberts, Kenneth A. Chewey, and Ashley M. Chewey (collectively,
2 “Plaintiffs”), on behalf of themselves and all others similarly situated, file this Second Amended
3 Complaint against Defendant AT&T Mobility LLC, and for their causes of action respectfully
4 allege as follows:

5 **INTRODUCTION**

6 1. Plaintiffs bring this action on behalf of themselves and all other similarly situated
7 California consumers who have been harmed by Defendant’s deceptive and unfair practice of
8 marketing its wireless service plans as being “unlimited,” when in fact those plans are subject to a
9 number of limiting conditions that either are not disclosed or inadequately disclosed to
10 consumers.

11 2. Defendant lured consumers into purchasing smartphones, wireless data cards and
12 mobile service plans by aggressively promoting “unlimited” data service plans without
13 disclosing, or adequately disclosing, that its so-called “unlimited” plans are actually limited.
14 Defendant failed to disclose to consumers, including Plaintiffs and the Class, that it “throttles”
15 (*i.e.*, intentionally slows) the data speed on cellular phones or wireless cards when the consumer
16 has approached or exceeded Defendant’s internally proscribed monthly data usage limits. These
17 internally proscribed data usage thresholds are not adequately disclosed to consumers.

18 3. Defendant’s throttling practices alleged herein have the effect of significantly
19 limiting consumers’ access to data and services, rendering internet access and other wireless
20 functions on their phones difficult or impossible, and thus unreasonably interfering with the
21 supposedly “unlimited” service that the consumers paid for.

22 4. Defendant’s throttling of the data speed of its “unlimited” data plan customers is of
23 such a degree that consumers, including Plaintiffs and Class members, have been effectively
24 unable to access data for the remainder of a billing cycle.

25 5. As a result of Defendant’s deceptive and material representations, bad faith, and
26 unfair and unlawful conduct alleged herein, Plaintiffs and members of the proposed Class have
27 suffered damages, including, without limitation, payment for services that were not as advertised.
28

6. Plaintiffs bring this action on behalf of themselves and other similarly situated California consumers who have purchased the products or services identified herein so as to halt the dissemination of deceptive and misleading advertising, to correct the deceptive and misleading perception Defendant has created in the minds of consumers, and to obtain redress. Plaintiffs seek injunctive and monetary relief for themselves and the proposed Class.

7. Plaintiffs also, individually, seek public injunctive relief pursuant to their UCL, FAL, and CLRA claims alleged herein, to stop and prevent Defendant from disseminating false and misleading advertising to the consuming public in California regarding “unlimited” data service plans.

THE PARTIES

8. Plaintiff Marcus A. Roberts is a citizen and resident of San Mateo County, California.

9. Plaintiffs Kenneth A. Chewey and Ashley M. Chewey are citizens and residents of Placer County, California.

10. Defendant AT&T Mobility LLC is a Delaware limited liability company with its principal office or place of business at 1025 Lenox Park Boulevard NE, Atlanta, GA 30319. AT&T Mobility LLC transacts or has transacted business in this District and throughout the United States.

11. Whenever reference in this Complaint is made to any act of Defendant, or other corporate Defendant as may be named in the future, the allegation shall be deemed to mean that the officers, directors, agents, representatives, subsidiaries, affiliates and employees of the Defendant did or authorized the act while actively engaged in the management, direction, or control of the affairs of the corporate Defendant, and while acting within the course and scope of their employment.

JURISDICTION AND VENUE

12. This Court has original jurisdiction pursuant to 28 U.S.C. § 1332(d)(2) in that the amount in controversy, exclusive of interest and costs, exceeds the sum or value of \$5,000,000; this is a class action in which there are members of the proposed Class who are citizens of a state

different from Defendant; there are more than 100 members of the proposed Class; and none of the exceptions of the subsection apply.

13. This Court has personal jurisdiction over Defendant because, without limitation: (1) Defendant has purposely availed itself of the privileges of conducting business activities in California; (2) Defendant has maintained and currently maintains systematic and continuous business contacts with California including marketing, selling, and issuing wireless services to California consumers; and (3) Defendant maintains offices and retail locations throughout California. AT&T has sufficient minimum contacts with California to render the exercise of jurisdiction by this Court permissible. Further, the claims in this case arise out of Defendant's contacts with California.

14. Venue is proper pursuant to 28 U.S.C. §1391 in that Plaintiff Marcus Roberts resides in this District; many of the acts and transactions giving rise to this action occurred in this District; Defendant is authorized to conduct business in this District, has intentionally availed itself of the laws and markets within this District through distribution and sale of its products in this District, does substantial business in this District, and is subject to personal jurisdiction in this District.

15. Intra-District Assignment: This action is properly assigned to the San Francisco/Oakland Division, where Plaintiff Marcus Roberts resides.

GENERAL ALLEGATIONS

A. Defendant Falsely Advertises Certain Service Plans as Providing "Unlimited" Data.

16. Defendant markets and sells wireless service plans to hundreds of millions of subscribers in the United States, including millions in California. Such service plans include wireless data, allowing subscribers to use their phones to browse websites, send and receive emails, use smartphone applications, watch videos and stream music, and use GPS navigation.

17. Prior to approximately June 2010, Defendant pervasively offered to the consuming public service plans that purported to include "unlimited" data each month. Defendant aggressively promoted its "unlimited" plan in order to capture the burgeoning smartphone market.

Between 2007 and 2010, AT&T was the sole service plan provider for the Apple iPhone and, upon information and belief, Defendant's offer of an unlimited data plan was a requirement of its deal with Apple.

18. Defendant's advertising and packaging of its phones and "unlimited" service plans pervasively featured the word "unlimited" in prominent font. Examples of Defendant's advertisements and representations regarding its "unlimited" data plans include the following:

AT&T Plans for iPhone

To use iPhone, you'll need to sign up for a 2-year service agreement or a renewed 2-year service agreement if you are already an AT&T customer. Plans start at \$59.99 and include Visual Voicemail, Unlimited Data (email and web), and 200 SMS text messages—for use in the U.S. You can add more text messages for a little more a month. You can browse the internet and send emails as often as you like without being charged extra.

AT&T Nation™

All plans include:

Unlimited Data (Email/Web) | Visual Voicemail
200 Text Messages | Rollover*
Unlimited Mobile to Mobile

Anytime Minutes	450	900	1350	UNLIMITED
Night & Weekend Minutes	5000	UNLIMITED	UNLIMITED	—
Additional Minutes	.45¢	.40¢	.35¢	N/A
Per Month	\$59.99	\$79.99	\$99.99	\$119.99

AT&T Nation

	\$59.99	\$79.99	\$99.99	\$119.99	\$169.99	\$219.99
Minutes	450	900	1350	2000	4000	6000
Unlimited Data (email/web)	✓	✓	✓	✓	✓	✓
Visual Voicemail	✓	✓	✓	✓	✓	✓
SMS Text Messaging	200	200	200	200	200	200
Night & Weekend Minutes	5000	Unlimited	Unlimited	Unlimited	Unlimited	Unlimited
Rollover Minutes*	✓	✓	✓	✓	✓	✓
Unlimited Mobile to Mobile	✓	✓	✓	✓	✓	✓
Additional Minutes	45¢/min	40¢/min	35¢/min	25¢/min	25¢/min	20¢/min

INCLUDED FEATURES: Nationwide Long Distance and Roaming, Voicemail, Call Forwarding, Call Waiting, 3-Way Calling and Caller ID.

AT&T Plans for iPhone 3G (U.S. Coverage Packages)**AT&T Nation™**

	UNLIMITED Data (Email/Web) Visual Voicemail Rollover* UNLIMITED Mobile to Mobile			UNLIMITED UNLIMITED Data (Email/Web) Visual Voicemail
Anytime Minutes	450	900	1350	UNLIMITED
Night & Weekend Minutes	5000	UNLIMITED	UNLIMITED	—
Additional Minutes	.45¢	.40¢	.35¢	N/A
Per Month	\$69.99	\$89.99	\$109.99	\$129.99

AT&T FamilyTalk™

Includes 2 Lines

	UNLIMITED Data (Email/Web) Visual Voicemail Rollover* UNLIMITED Mobile to Mobile UNLIMITED Nights & Weekends						UNLIMITED UNLIMITED Data (Email/Web) Visual Voicemail
Shared Anytime Minutes	700	1400	2100	3000	4000	6000	UNLIMITED
Additional Minutes	.45¢	.40¢	.35¢	.25¢	.20¢	.20¢	N/A
Per Month	\$129.99	\$149.99	\$169.99	\$209.99	\$259.99	\$359.99	\$259.99
Additional iPhone Line	\$39.99 per line (up to 3 additional lines).						\$129.99

Enterprise data access is not available online. Please add this feature within myWireless after ordering an activation.

Calling Features

Early Nights and Weekends for Families ▼
no thanks

\$16.99 a month ☐N/A ☒

Data Features

[Data Plan for iPhone ▲](#)

\$30.00 a month ☒

Data Plan for iPhone includes unlimited data in the U.S. Access rich HTML email and desktop-level web browsing, as well as Visual Voicemail to listen to voicemail messages in any order you choose.

Please note: AT&T is Apple's exclusive carrier partner for iPhone in the United States. An eligible data plan for iPhone is required. This data plan covers data usage in the United States and does not cover international data usage and charges. If AT&T determines that you are using an iPhone on your account without an eligible data plan, AT&T reserves the right to add an eligible data plan to your account and bill you the appropriate monthly fee.

[DataPro 2GB for iPhone ▼](#)

\$25.00 a month ☐

[DataPlus 200MB for iPhone ▼](#)

\$15.00 a month ☐

[Estimate usage with the AT&T Data Calculator](#)

1 19. Defendant’s pervasive representations of “unlimited” data plans appeared, *inter*
2 *alia*, on television, radio, print advertising, in Defendant’s stores, and on Defendant’s website.

3 20. Defendant temporarily stopped offering “unlimited” plans to new customers in or
4 around June 2010, but allowed existing “unlimited” plan subscribers to be “grandfathered” into
5 those plans, expressly representing that such subscribers would continue to enjoy “unlimited”
6 data.

7 21. Defendant made this “grandfathering” offer in the hopes that its “unlimited”
8 subscribers would not switch to another service provider. This was particularly important to
9 Defendant when, in 2011, it ceased to be the sole service provider for the Apple iPhone and given
10 that many competing smartphones offered by competing service providers had been introduced in
11 the market by that time.

12 22. Defendant’s offer was effective: Upon information and belief, millions of
13 subscribers—including at least hundreds of thousands in California—kept their unlimited plans
14 rather than switching to a new plan or leaving AT&T. In fact, these subscribers value their
15 purportedly “unlimited” data so much that they have elected to forego opportunities to receive
16 phone upgrades for little or no cost. Accepting such phone upgrade offers often requires or
17 required customers to give up their “unlimited” data plans. Defendant’s “unlimited” data promise
18 is material to consumers.

19 23. Defendant continues to represent to remaining “grandfathered” customers that they
20 will receive “unlimited” data service each month.

21 24. After it had stopped offering “unlimited” plans to new customers, Defendant
22 resumed offering “unlimited” plans to new customers in or around 2016. Since that time,
23 Defendant has continued to aggressively market and advertise “unlimited” plans, up to and
24 through the time of this filing. As before, since resuming offering “unlimited” plans to the
25 consuming public, Defendant has continued to pervasively and aggressively promote these plans
26 as being “unlimited.” Defendant’s pervasive advertisements of “unlimited” data plans have
27 appeared, *inter alia*, on television, radio, print advertising, in Defendant’s stores, and on
28 Defendant’s website.

1 25. Defendant's marketing of its "unlimited" data plans has at all relevant times
2 prominently featured the word "unlimited. Defendant has pervasively labeled and represented
3 that the plans are "unlimited" because Defendant knows that term is material to consumers,
4 induces consumers to purchase and renew wireless service through Defendant, and causes
5 consumers to assign greater value to the service.

6 26. In contrast to the representations made to its "unlimited" data subscribers,
7 Defendant disclosed the exact monthly allotment of data that subscribers are able to use (*e.g.*, 3
8 GB, 50 GB) with respect to Defendant's "tiered" mobile data plans. Defendant also stated that
9 additional fees will apply if a "tiered" subscriber exceeds the monthly allowance.

10 **B. Defendant Imposes Secret Data Caps on and Regularly Throttles "Unlimited"**
11 **Subscribers' Service Plans.**

12 27. Despite its representations that "grandfathered" unlimited plan subscribers would
13 continue to have access to "unlimited" data each month, starting in or around October 2011,
14 Defendant began to systematically "throttle" (*i.e.* slow down) those subscribers' data speed,
15 usually without warning, once those subscribers exceeded secret monthly data usage caps. Prior
16 to that time, Defendant did not engage in such throttling policy or practice for "unlimited" plan
17 customers.

18 28. The speeds at which Defendant throttles the subscribers are so slow that they are
19 unable to use their phones for certain intended and advertised purposes, such as streaming video
20 or music or even browsing webpages.

21
22 29. Defendant throttled the customers once they reached the secret data usage caps no
23 matter whether the customer used their device for an unauthorized purpose or whether
24 Defendant's network was not congested at the time and was capable of handling the customers'
25 data usage at regular speeds. Once throttled, customers' data speeds remained throttled until the
26 next month.

27 30. Defendant initially had different monthly data usage caps applicable to residents of
28 different cities. In some places, Defendant's data usage cap was as low as 2GB per month.

1 31. Beginning in or around March 2012, Defendant implemented a nationwide secret
2 monthly data usage cap of 3GB for all devices using Defendant’s 3G network (e.g., iPhone 3G,
3 3GS, 4) and HSPA+ network (e.g., iPhone 4S), and 5 GB per billing cycle for devices using
4 Defendant’s LTE network (e.g., iPhone 5, 5S, 6, 6 Plus).

5 32. In or around the middle of 2015, Defendant again modified its throttling practice
6 for “unlimited” plan subscribers. The modified practice—which Defendant has applied to both
7 the “grandfathered” and the newer unlimited plan subscribers—continued to be based on secret
8 and/or inadequately disclosed monthly data usage caps, and remained an across-the-board
9 practice, applied systematically by Defendant without regard to whether the customers use their
10 devices for unauthorized purposes. Under Defendant’s modified practice, once “unlimited” plan
11 subscribers exceed the monthly data usage caps, they are subject to throttling by Defendant (i.e.,
12 they may be, and very often are, throttled by Defendant after they exceed the cap). The specific
13 monthly data caps (i.e., the numerical amounts of GB that constitute the cap) that Defendant has
14 imposed have changed some over the years, but a version of this cap and throttling practice
15 remains in place as of this filing.

16 33. As before, after modifying its throttling practice in or around the middle of 2015,
17 AT&T continued to fail to adequately disclose its data usage caps and throttling practice for
18 “unlimited” plan customers, either to the “grandfathered” subscribers (who were promised
19 continued access to “unlimited” data service) or to new “unlimited” subscribers. As with the pre-
20 mid-2015 iterations of the practice, Defendant’s modified practice was and is fundamentally
21 inconsistent with Defendant’s prominent representations and promises that these data service
22 plans are “unlimited.”

23 C. **Defendant Does Not Adequately Disclose its Throttling Practice or Secret**
24 **Data Usage Caps to its “Unlimited” Subscribers.**

25 34. Defendant’s marketing of its unlimited mobile data plans—prior to and after
26 Defendant transitioned to offering tiered plans to new customers, and prior to and after Defendant
27 modified its throttling practice in or around the middle of 2015—has failed to disclose or
28 adequately disclose Defendant’s throttling practices, and indeed the limits applied pursuant to

1 Defendant's throttling practices are wholly inconsistent with Defendant's repeated and
2 emphasized representations that its unlimited mobile data plans are "unlimited."

3 35. Defendant has failed to adequately disclose its data usage limits to customers and
4 potential customers, or to disclose the extremely slow speeds at which customers will be throttled
5 and how that will impact their data service and usability of their devices.

6 36. Defendant's Wireless Customer Agreement applicable to Defendant's wireless
7 service plans does not disclose or adequately disclose the data usage caps that Defendant has
8 applied to "unlimited" subscribers or Defendant's practice of regularly and systematically
9 throttling "unlimited" customers. Instead, it merely prohibits the usage of data for certain
10 activities, such as tethering phones to a computing device so that the computing device may use
11 the phones' data. This has remained true even as the language of Defendant's Wireless Customer
12 Agreement has evolved. Even assuming *arguendo* buried language in the Wireless Customer
13 Agreement *could* override or cure Defendant's false and misleading statements that these plans
14 were "unlimited" (they do not) and even assuming *arguendo* that any purported restrictions in the
15 Wireless Customer Agreement applied to "unlimited" plans, the contract language itself is in all
16 events incorrect and misleading, if anything has only furthered the deception, and failed to
17 disclose or adequately disclose Defendant's actual practices.

18 37. The only "disclosure" Defendant made regarding throttling prior to implementing
19 its throttling practice was the following brief "message" included within some customers'
20 monthly bill for the July or August 2011 billing cycle:

21 **Important Update for Unlimited Data Plan Customers**

22 To provide the best possible network experience, starting 10/01/11,
23 smartphone customers with unlimited data plans whose usage is in
24 the top 5% of users can still use unlimited data but may see reduced
25 data speeds for the rest of their monthly billing cycle. We'll alert
26 you if you near the top 5%. To avoid slowed speeds you may use
27 Wi-Fi or choose a tiered data plan. Details @ att.com/dataplans.

28 38. This statement did not adequately disclose, or even truthfully describe,
Defendant's throttling practice for "unlimited" plans. Among other things, the statement
misrepresents that only the top 5% of users will be throttled, when in fact any users that exceeded

Defendant's secret data usage caps were throttled without regard to whether they were in the top 5% of users. It also misrepresents that Defendant will alert customers as they reach those data limits, when in fact Defendant often throttles customers without ever alerting them to the fact. Further, it fails to disclose the speeds at which customers' data will be reduced or how such speeds will impact customers' ability to use data.

39. On its website, under the heading "Info for smartphone customers with legacy unlimited data plans," Defendant similarly misled "grandfathered" unlimited plan customers (to the extent any of them even saw this language) about the nature of its throttling practice:

In line with common industry standards, we have implemented network management practices to assure that our network resources are used for the benefit of all our mobile broadband customers especially during periods when network demand exceeds available network resources (also known as "congestion").

One such practice applies when a minority of smartphone customers on unlimited data plans using 3G, 4G, or 4G LTE smartphones exceed certain data usage thresholds in a billing period (3GB for 3G/4G smartphones and 5GB for 4G LTE smartphones). When affected by this practice, these customers *may* experience reduced data speeds and increased latency *during periods of congestion* as compared to other customers using the same cell site. (emphasis added).

40. Instead of truthfully disclosing the exact nature of its throttling practice, Defendant's website "disclosure" implied that any throttling "might" occur during periods of network congestion, when in fact, at least through the middle of 2015 if not later, Defendant *always* throttled "unlimited" subscribers' data once they exceeded the data thresholds regardless of whether the network was congested at the time.

41. Even the few text messages or emails that Defendant sends to some subscribers as they approach or exceed the secret data usage caps do not adequately disclose Defendant's throttling practice. They do not disclose the secret data caps or the speeds at which subscribers will be throttled or the practical impact of same.

42. Defendant's unfair and deceptive conduct has continued after Defendant modified its throttling practice in around the middle of 2015, and continues as of this filing. Defendant has continued to falsely and misleadingly represent that "unlimited" plan subscribers will have

1 “unlimited” data service each month (always prominently featuring the word “unlimited” in its
2 marketing and other pervasive representations about the plans), and has continued to fail to
3 adequately disclose Defendant’s throttling practices or the practical consequences thereof in terms
4 of the usability of the customers’ devices.

5 43. In 2019, AT&T entered into a settlement agreement with the Federal Trade
6 Commission. Pursuant to Defendant’s settlement with the FTC, Defendant has provided, or will
7 be providing, limited monetary relief to certain “unlimited” plan customers—including some of
8 the members of the proposed Class in this case. The FTC settlement does not provide any
9 monetary relief for some members of the proposed Class in this case, and does not provide
10 complete relief to any members of the proposed Class in this case. Based on representations
11 made by Defendant and the FTC in the FTC proceedings, most recipients of monetary benefits
12 from the FTC settlement, where such payments are effectuated, will receive approximately
13 \$12.00.

14 44. The FTC settlement also includes injunctive relief terms. The FTC settlement has
15 apparently caused Defendant to make certain changes to its disclosures (as specified in the FTC
16 settlement) but Defendant’s advertising and practices regarding “unlimited” plans remain unfair
17 and deceptive in several material respects. Among other things, Defendant continues to falsely
18 and misleadingly label and advertise these plans, to customers and the consuming public, as
19 “unlimited” when in fact Defendant continues to impose monthly data usage caps or limits
20 beyond which “unlimited” plan customers are subject to throttling. Additionally, Defendant still
21 does not disclose or adequately disclose to customers and potential customers the practical
22 consequences of Defendant’s throttling practices on customers’ ability to use their devices.
23 Further, the FTC settlement does not require Defendant to train its customer service personnel so
24 that they are informed about Defendant’s throttling practices and can accurately and fulsomely
25 explain same to customers and potential customers (a problem that Plaintiffs Ashley and Kenneth
26 Chewey experienced personally, as alleged below).

27 45. Defendant’s “unlimited” plan misrepresentations and its failure to adequately
28 disclose its secret data caps and throttling practices were and are a deceptive act or practice. In

1 making and disseminating the statements regarding its “unlimited” data plans as alleged herein,
 2 Defendant knew and should have known that its statements were untrue, deceptive, and
 3 misleading.

4 **D. Defendant’s Practice of Throttling “Unlimited” Subscribers’ Data is**
 5 **Contrary to those Subscribers’ Expectations.**

6 46. Reasonable consumers are likely to be misled by Defendant’s promise of
 7 “unlimited” data, particularly in combination with Defendant’s advertisements that encourage
 8 customers to use smartphones and data plans in typical ways such as browsing the internet,
 9 streaming or downloading music and videos, running apps, and using GPS navigation—uses
 10 which Defendant knew caused many “unlimited” plan customers to reach and exceed the data
 11 usage thresholds.

12 47. Once customers discover the truth about Defendant’s “unlimited” plans, customers
 13 are outraged by Defendant’s lies and bad faith practices. Thousands of customers have
 14 complained to Defendant and have submitted complaints to third party consumer protection
 15 entities such as the Better Business Bureau and consumeraffairs.com.

16 48. Upon information and belief, Defendant has conducted internal research and focus
 17 groups revealing that customers believe the word “unlimited” to mean no restrictions on data, and
 18 that Defendant’s practice of throttling data is inconsistent with its “unlimited” representations.
 19 Nevertheless, Defendant has continued and continues to use the false and misleading “unlimited”
 20 label and represent that these plans provide “unlimited” data.

21 49. The imposition of data usage thresholds and speed reductions is antithetical to the
 22 term “unlimited.” Defendant was and is aware that its use (and continued use) of the word
 23 “unlimited” to describe its data plans is and was likely to, and did and does, mislead and deceive
 24 consumers.

25 **E. Defendant’s Goal in Throttling Was to Encourage Customers to Switch to**
 26 **Limited Plans in Order to Make More Money.**

27 50. Defendant’s goal in implementing its throttling program, beginning in or around
 28 October 2011, was to make more money. Ultimately, Defendant desired to push grandfathered

1 subscribers off of the “unlimited” plans onto the “tiered” service plans that are either more
2 expensive than the grandfathered plans or that hit subscribers with overage fees once they exceed
3 the set data thresholds.

4 51. As one article noted, “unlimited” plan subscribers were faced with the choice of
5 continuing to “pay \$30 for ‘unlimited’ service where you’re actually only getting 2 GB of data
6 before your phone becomes useless, or sign up for a 3GB tier for the same price so you’re in line
7 to get socked with the usage overages of tomorrow.” *See*
8 <http://www.dslreports.com/shownews/118235> (last accessed on 7/22/15).

9 52. Defendant’s goal is exemplified by certain unfair practices Defendant imposed
10 only on its “unlimited” plan subscribers. For example, Defendant restricted the popular iPhone
11 application FaceTime—which allows telephone calls via video—such that it may be used only
12 over Wi-Fi, and not over its cellular network, for “unlimited” subscribers. In contrast,
13 Defendant’s tiered plan subscribers were allowed to access Defendant’s cellular network when
14 using FaceTime.

15 53. In addition, Defendant did not throttle its tiered plan subscribers’ data. Indeed, for
16 years Defendant continued to throttle “unlimited” plan subscribers at secret data caps of 3GB or
17 5GB even though it offered tiered service plans with up to 50GBs of data or more per month.

18 54. Defendant’s continued false and misleading advertising regarding the “unlimited”
19 plans, and its continued throttling practices, including since Defendant resumed offering
20 “unlimited” plans to new customers, have likewise been in furtherance of making Defendant
21 more money.

22 55. Defendant profits from misleading consumers about its “unlimited” service plans
23 and throttling “unlimited” subscribers’ data in numerous ways. By representing its plans as being
24 “unlimited,” Defendant is able to induce customers into keeping, and signing up for, Defendant’s
25 “unlimited” plans rather than switching to, or signing up with, a different service provider,
26 increases demand for the service, and causes consumers to assign higher value for the service. In
27 addition, Defendant has induced customers to switch to tiered plans to avoid throttling, which
28 often either cost more money (depending on the amount of data provided for in the plan) or which

1 come with overage charges once a customer exceeds the data limits subject to those plans.
 2 Further, Defendant has collected substantial early termination fees from “unlimited” plan
 3 subscribers who cancelled service after being throttled.

4 56. Plaintiffs and Class members have been damaged, including by paying for
 5 products and services which were not delivered as represented, and by paying more than they
 6 otherwise would have paid.

7 **INAPPLICABLE OR UNENFORCEABLE ARBITRATION CLAUSE**

8 57. At all relevant times, Defendant’s Wireless Customer Agreement has included
 9 materially the same arbitration provision that, according to its terms and as drafted by Defendant,
 10 is null and void in its entirety here.

11 58. Under California law, parties may not agree to waive the right to seek public
 12 injunctive relief under California’s UCL, FAL, and CLRA in any forum, and any such
 13 agreements are contrary to California public policy and are unenforceable. *McGill v. Citibank,*
 14 *N.A.*, 393 P.3d 85 (Cal. 2017).

15 59. As the Court has already held in this case, and as the Ninth Circuit has affirmed
 16 (and as multiple other courts have held), the arbitration provision in Defendant’s Wireless
 17 Customer Agreement purports to bar the parties from seeking public injunctive relief in any
 18 forum. Such a provision is unenforceable under *McGill*.

19 60. Defendant’s arbitration agreement also includes a non-severability (or “poison
 20 pill”) provision, providing that if the prohibition on seeking public injunctive relief in any forum
 21 “is found to be unenforceable, then the entirety of this arbitration provision shall be null and
 22 void.” As the Court has already held in this case, and as the Ninth Circuit has affirmed (and as
 23 multiple other courts have held), because the prohibition on seeking public injunctive relief in the
 24 Wireless Customer Agreement is unenforceable under California law, the “entirety” of the full
 25 arbitration agreement is “null and void.” Therefore, the claims brought in this lawsuit are not
 26 subject to any of the requirements of Defendant’s arbitration agreement.

27 61. Defendant’s arbitration agreement is also unenforceable because it is procedurally
 28 and substantively unconscionable.

CLASS ACTION ALLEGATIONS

62. As detailed below in the individual counts, Plaintiffs bring this lawsuit on behalf of themselves and all others similarly situated, pursuant to Rule 23(a), (b)(2) and (b)(3) of the Federal Rules of Civil Procedure.

63. Plaintiffs seek to represent the following “Class”:

All consumers residing in California who purchased an unlimited data plan from AT&T Mobility LLC and whose data usage was subject to throttling prior to the expiration of the plan.

Excluded from the above Class are Defendant and its officers, directors and employees.

64. ***Numerosity.*** Members of the Class are so numerous that joinder of all members is impracticable. While the exact number of Class members remains unknown at this time, upon information and belief, there are at least hundreds of thousands of putative Class members.

65. ***Existence and Predominance of Common Questions of Law and Fact.*** This action involves common questions of law and fact, which predominate over any questions affecting individual Class members. These common legal and factual questions include, but are not limited to, the following:

a. whether Defendant’s representations that its service plans were “unlimited,” and practice of regularly throttling “unlimited” plan customers, constitute deceptive and unfair trade practices in violation of the California Business & Professions Code § 17200 and § 17500, *et. seq.*;

b. whether Defendant’s conduct had a tendency to deceive reasonable consumers;

c. whether Defendant breached its express warranties with Plaintiffs and the Class;

d. whether Defendant has been unjustly enriched to the detriment of Plaintiffs and the Class;

e. whether Plaintiffs and the Class have sustained damages as a result of the conduct alleged herein and, if so, what is the proper measure of such damages;

1 f. whether Plaintiffs and the Class are entitled to restitution and, if so, what is
2 the proper measure of restitution; and

3 g. whether Plaintiffs and Class are entitled to declaratory and/or injunctive
4 relief.

5 66. **Typicality.** Plaintiffs' claims are typical of the claims of the members of the Class
6 because, *inter alia*, Plaintiffs and all Class members were injured through the common, systemic
7 misconduct described above and were subject to Defendant's deceptive "unlimited" data plan
8 representations. Plaintiffs are advancing the same claims and legal theories on behalf of
9 themselves and all members of the Class.

10 67. **Adequacy of Representation.** Plaintiffs will fairly and adequately protect the
11 interests of the members of the Class. Plaintiffs have retained counsel experienced in complex
12 consumer class action litigation, and Plaintiffs intend to prosecute this action vigorously.
13 Plaintiffs have no adverse or antagonistic interests to those of the Class.

14 68. **Superiority.** A class action is superior to other available methods for the fair and
15 efficient adjudication of this controversy. The expense and burden of individual litigation would
16 make it impracticable or impossible for proposed Class members to prosecute their claims
17 individually. Most individual Class members have little ability to prosecute an individual action
18 due to the complexity of the issues involved in this litigation and the significant costs attendant to
19 litigation on this scale compared to the relatively small damages suffered by individual Class
20 members. Further, individualized litigation would create the danger of inconsistent or
21 contradictory judgments arising from the same set of facts. Individualized litigation would also
22 increase the delay and expense to all parties and the court system from the issues raised by this
23 action. By contrast, a class action provides the benefits of adjudication of these issues in a single
24 proceeding, economies of scale, and comprehensive supervision by a single court, and presents no
25 unusual management difficulties under the circumstances here. Trial of Plaintiffs' and Class
26 members' claims is manageable as a class action, and economies of time, effort, and expense will
27 be fostered and uniformity of decisions will be insured. Without a class action, the Class
28

1 members will continue to suffer damages and Defendant's violations of law will proceed without
2 remedy while Defendant continues to retain and reap the proceeds of its wrongful conduct.

3 69. Defendant has acted and refused to act on grounds generally applicable to the
4 Class, including by engaging in deceptive and misleading representations and material omissions
5 regarding its unlimited data plans that misled Plaintiffs and the Class, thereby making appropriate
6 final injunctive relief with respect to the Class as a whole.

7 **PLAINTIFF SPECIFIC FACTS**

8 **Plaintiff Marcus Roberts**

9 70. In 2008, Plaintiff Marcus Roberts purchased an iPhone 3G with an AT&T
10 "unlimited" data plan through Defendant.

11 71. Prior to making his purchase, Plaintiff Marcus Roberts had viewed and heard
12 advertisements for the AT&T "unlimited" data plan sold with the iPhone. All of the
13 advertisements indicated that he would receive "unlimited" data without restriction. There was
14 no indication that his data usage would be throttled when he reached a particular data usage
15 threshold.

16 72. Plaintiff Marcus Roberts read and relied on, in purchasing his iPhone 3G,
17 subsequent versions of the iPhone, and unlimited data plan, Defendant's representations that the
18 plan would provide "unlimited" data service.

19 73. From 2008-2014, Plaintiff Marcus Roberts upgraded to newer versions of the
20 iPhone. Each such time, Defendant offered to "grandfather" him in, allowing him the opportunity
21 to continue with his "unlimited" data plan, rather than requiring him to switch to Defendant's
22 tiered data plans required for new customers. Plaintiff Marcus Roberts renewed his "unlimited"
23 plan in or around June 2012 and September 2014. In making these subsequent device purchases
24 and in continuing to subscribe to the unlimited data plan through Defendant, Plaintiff Marcus
25 Roberts continued to rely on Defendant's representations that the data plan was "unlimited."

26 74. Defendants' representations of "unlimited" data were a substantial factor in
27 Plaintiff Marcus Roberts' initial and subsequent purchase decisions.
28

1 75. In approximately August 2012, Plaintiff Marcus Roberts began noticing that by
2 approximately the middle of the month his internet connection was much slower and his ability to
3 download was hampered severely. He believed the slowed speed was due to overall service
4 issues by Defendant, as his friends with service through other carriers seemingly had faster
5 service.

6 76. After he experienced slowed data speeds in or around August 2012, Plaintiff
7 Marcus Roberts continued to experience slowed data speeds other times with that phone and with
8 the subsequent versions of the iPhone that he purchased, including in one or more months after
9 July 2015.

10 77. Defendant's filings in this case indicate that Plaintiff Marcus Roberts was throttled
11 by Defendant for the first time in August 2012 and was throttled by Defendant in multiple months
12 after that. Defendant's filings in this case to date do not address whether or to what extent
13 Plaintiff Marcus Roberts was throttled after July 2015, but as alleged above he experienced
14 throttling after that time.

15 78. On or about July 6, 2015, Plaintiff Marcus Roberts received a text stating that he
16 had used 75% of his allotted 5GB of data usage and that he may experience reduced speeds when
17 using data services. This text was the first such notice he had received from Defendant.

18 79. Upon receipt of this text, Plaintiff Marcus Roberts called Defendant to question
19 why he had received such a message given that he had purchased an "unlimited" data plan.
20 Defendant's representative on the phone told him, for the first time, that, even though he had an
21 "unlimited" data plan, his data usage was actually restricted in that it would be throttled when he
22 reached 5GB of data usage.

23 80. Defendant failed to adequately advise Plaintiff Marcus Roberts of the limits that
24 Defendant's throttling program imposed on his supposedly unlimited mobile data plan. The
25 information that Defendant concealed from him would have been material to him.

26 81. When Plaintiff Marcus Roberts purchased and renewed his "unlimited" data plan
27 with Defendant, he reasonably believed that he would have unlimited data service, and not be
28

1 subject to data usage restrictions or throttling when he reached an internally-mandated data usage
2 threshold.

3 82. Plaintiff Marcus Roberts was harmed by Defendant's misleading representations
4 and omissions, including by paying for products and services that were not as advertised and by
5 paying more for his products and services than he otherwise would have paid.

6 83. Plaintiff Marcus Roberts remains a current AT&T unlimited plan customer. He
7 has been a customer of AT&T for over a decade, continues to desire to purchase and/or renew
8 unlimited wireless data service if available, continues to be exposed to AT&T's pervasive
9 "unlimited" plan advertisements and representations, and would absolutely consider purchasing
10 and/or renewing, and very well might purchase and/or renew, an AT&T unlimited plan again in
11 the future.

12 84. Plaintiff Marcus Roberts desires to be able to rely and more confidently rely on the
13 truthfulness of AT&T's advertisements regarding "unlimited" plans.

14 **Plaintiffs Kenneth and Ashley Chewey**

15 85. Plaintiffs Kenneth and Ashley Chewey were existing customers of Defendant
16 when they purchased an iPhone 3G with an AT&T family share plan with "unlimited" data in
17 approximately 2007.

18 86. Prior to making their purchase, Plaintiffs Kenneth and Ashley Chewey had viewed
19 and heard advertisements for the AT&T "unlimited" data plan sold with the iPhone. All of the
20 advertisements indicated that with the family share plan, they would receive "unlimited" data
21 without restriction. There was no indication that their data usage would be throttled when they
22 reached a particular data usage threshold.

23 87. Plaintiffs Kenneth and Ashley Chewey read and relied, in purchasing their iPhone
24 3G and family share plan with unlimited data, on Defendant's representations that the plan would
25 provide "unlimited" data service.

26 88. In approximately December 2011, Plaintiffs Kenneth and Ashley Chewey began
27 noticing that by approximately the middle of the month their internet connection for their iPhone
28

1 was significantly slower, to the point where their ability to access the internet using the device
2 was hampered severely.

3 89. After Plaintiff Kenneth Chewey noticed this slowing, he called Defendant to
4 inquire about the issue. He was told by a representative for Defendant that the problem was due
5 to his being in a high congestion area or his attempting to access the internet during a congested
6 time of day. The representative affirmatively stated to Plaintiff Kenneth Chewey that the problem
7 was not due to throttling by Defendant.

8 90. Plaintiffs Kenneth and Ashley Chewey renewed their “unlimited” plan in or
9 around October 2012. They chose to continue to have a “grandfathered” unlimited data plan
10 instead of a tiered data plan. In continuing to subscribe to the unlimited data plan through
11 Defendant, Plaintiffs Kenneth and Ashley Chewey continued to rely on Defendant’s
12 representations that the data plan was “unlimited.”

13 91. Defendants’ representations of “unlimited” data were a substantial factor in
14 Plaintiffs Kenneth and Ashley Chewey’s initial and subsequent purchase decisions.

15 92. Subsequent to the conversation with Defendant’s customer service representative,
16 the data service for Plaintiffs Kenneth and Ashley Chewey slowed on other occasions, including
17 sometimes to the point that there was no internet connection at all.

18 93. Defendant’s filings in this case indicate that Plaintiffs Kenneth and Ashley
19 Chewey were throttled by Defendant for the first time in December 2011, and were throttled by
20 Defendant in multiple months after that between 2012 and 2015. Defendant’s filings in this case
21 to date do not address whether or to what extent Plaintiffs Kenneth and Ashley Chewey were
22 throttled after July 2015, but they believe that they were.

23 94. On or about July 7, 2015, only seven (7) days into the current billing cycle,
24 Plaintiff Kenneth Chewey received two text messages stating that he was reaching a data usage
25 limit. This message was confusing to him, because he had understood from Defendant’s
26 representations that his data service was unlimited pursuant to his “unlimited” plan.

95. Defendant failed to adequately advise Plaintiffs Kenneth and Ashley Chewey of the limits that Defendant's throttling program imposed on their supposedly unlimited mobile data plan. The information that Defendant concealed from them would have been material to them.

96. When Plaintiffs Kenneth and Ashley Chewey purchased and renewed their family share plan with "unlimited" data, they reasonably believed that they would have unlimited data service, and not be subject to data usage restrictions or throttling when they reached an internally-mandated data usage threshold.

97. Plaintiffs Kenneth and Ashley Chewey were harmed by Defendant's misleading representations and omissions, including by paying for products and services that were not as advertised and by paying more for their products and services than they otherwise would have paid.

98. Plaintiffs Kenneth and Ashley Chewey were customers of AT&T for a decade, including AT&T unlimited plan customers for many years. While they are not presently AT&T customers (they currently have wireless service through another carrier), they continue to desire to purchase unlimited wireless data service if available, continue to be exposed to Defendant's pervasive "unlimited" plan advertisements and representations, other than issues raised herein had a generally favorable view of the quality of AT&T's services, and would absolutely consider purchasing, and very well might purchase, an AT&T unlimited plan again in the future.

99. Plaintiffs Kenneth and Ashley Chewey desire to be able to rely and more confidently rely on the truthfulness of AT&T's advertisements regarding "unlimited" plans.

CAUSES OF ACTION

FIRST CAUSE OF ACTION

(Violation of California Business & Professions Code § 17200 *et seq.*)

100. Plaintiffs incorporate by reference all allegations set forth in this Second Amended Complaint as though fully set forth herein.

101. California Business & Professions Code § 17200 *et seq.* prohibits any unfair, unlawful, or a fraudulent business practice.

1 102. Defendant violated the “unlawful” prong of the UCL, including by making
2 material false and misleading representations that its data plans offer “unlimited” data service,
3 when in fact Defendant regularly throttles “unlimited” plan customers’ data after they reach
4 certain monthly data usage thresholds or limits, and by concealing such material information, in
5 violation of California’s Consumer Legal Remedies Act, Cal. Civ. Code § 1750 *et seq.*

6 103. Defendant’s practice of regularly throttling customers’ “unlimited” data, after they
7 reach certain monthly data usage thresholds or limits, violated the “unfair” prong of the UCL
8 because it is immoral, unethical, oppressive, unscrupulous, unconscionable, and/or substantially
9 injurious to Plaintiffs and Class members. Defendant’s conduct is also contrary to legislatively
10 declared public policy (including as such public policy is reflected in Cal. Civ. Code § 1750 *et*
11 *seq.* and Cal. Civ. Code §§ 1709-1710), and the harm it caused to consumers outweighed its
12 utility, if any.

13 104. Defendant violated the “fraudulent” prong of the UCL, including by making
14 material false and misleading representations that its data plans were “unlimited” when they were
15 not, and by failing to disclose or adequately disclose and actively concealing material information
16 regarding its practice of regularly throttling “unlimited” plan customers’ data. These material
17 false and misleading representations and nondisclosures were likely to mislead consumers.

18 105. Defendant’s false and misleading representations and nondisclosures deceive or
19 have a tendency to deceive reasonable consumers and the general public.

20 106. Defendant’s false and misleading representations and nondisclosures are material,
21 in that a reasonable person would attach importance to the information and would be induced to
22 act on the information in making purchase decisions. Defendant had a duty to disclose the truth,
23 including because of its affirmative false and misleading statements and because of its unique and
24 superior knowledge of the truth.

25 107. Plaintiffs and the Class members reasonably relied on Defendant’s material false
26 and misleading representations and nondisclosures, and would not have purchased, or would have
27 paid less money for, Defendant’s service plans, phones and other products had they known the
28

1 truth. Plaintiffs and the Class paid for products and services which were not delivered as
2 represented.

3 108. As a direct and proximate result of Defendant's unfair, unlawful, and fraudulent
4 conduct, Plaintiffs and the Class members lost money or property and were damaged.

5 109. Defendant's conduct has caused substantial injury to Plaintiffs and Class members.
6 Defendant's unlawful, unfair, and deceptive conduct is ongoing. Plaintiffs, on behalf of
7 themselves and the Class, seek an order enjoining Defendant from committing such unlawful,
8 unfair, and fraudulent business practices, and seek restitution and/or restitutionary disgorgement
9 of profits. Plaintiffs also seek attorneys' fees and costs under Cal. Code Civ. Proc. § 1021.5.

10 110. Plaintiffs individually seek public injunctive relief, under the UCL, to stop, and
11 protect the general public in California from, Defendant's false and misleading advertising.

12 **SECOND CAUSE OF ACTION**

13 (Violation of California Business & Professions Code § 17500 *et seq.*)

14 111. Plaintiffs incorporate by reference all allegations set forth in this Second Amended
15 Complaint as though fully set forth herein.

16 112. Defendant has committed acts of untrue and misleading advertising, as defined by
17 California Business and Professions Code § 17500 *et seq.*, including by making material false and
18 misleading representations that its data plans were "unlimited" when they were not, and by failing
19 to disclose or adequately disclose and actively concealing material information regarding its
20 practice of regularly throttling "unlimited" plan customers' data.

21 113. Defendant's false and misleading representations and nondisclosures deceive or
22 have a tendency to deceive reasonable consumers and the general public.

23 114. Defendant's false and misleading representations and nondisclosures are material,
24 in that a reasonable person would attach importance to the information and would be induced to
25 act on the information in making purchase decisions. Defendant had a duty to disclose the truth,
26 including because of its affirmative false and misleading statements and because of its unique and
27 superior knowledge of the truth.
28

115. Plaintiffs and the Class members reasonably relied on Defendant's material false and misleading representations and nondisclosures, and would not have purchased, or would have paid less money for, Defendant's service plans, phones and other products had they known the truth. Plaintiffs and the Class paid for products and services which were not delivered as represented.

116. As a direct and proximate result of Defendant's conduct, Plaintiffs and the Class members lost money or property and were damaged.

117. Defendant's conduct has caused substantial injury to Plaintiffs and the Class members. Defendant's false and misleading advertising is ongoing. Plaintiffs, on behalf of themselves and the Class, seek an order enjoining Defendant from committing such practices and from throttling Plaintiffs and the Class members, and seek restitution and/or restitutionary disgorgement. Plaintiffs also seek attorneys' fees and costs under Cal. Code Civ. Proc. § 1021.5.

118. Plaintiffs individually seek public injunctive relief, under the FAL, to stop, and protect the general public in California from, Defendant's false and misleading advertising.

THIRD CAUSE OF ACTION

(Violation of the California Consumers Legal Remedies Act, Cal. Civ. Code § 1750 *et seq.*)

119. Plaintiffs incorporate by reference all allegations set forth in this Second Amended Complaint as though fully set forth herein.

120. Defendant is a "person" within the meaning of Civil Code §§1761(c).

121. Plaintiffs and the Class members are "consumers," as defined by Cal. Civ. Code §1761(d).

122. The data service plans, phones, and other products that Defendant marketed and sold constitute "goods" and "services," as defined by Cal. Civ. Code §1761(a) and (b).

123. The purchases of Defendant's service plans, phones, and other products by Plaintiffs and Class members constitute "transactions," as defined by Cal. Civ. Code § 1761(e).

1 124. Plaintiffs and Class members purchased Defendant's service plans, phones, and
2 other products for personal, family, and household purposes as meant by Cal. Civ. Code
3 § 1761(d).

4 125. Venue is proper under Cal. Civil Code § 1780(d) because a substantial portion of
5 the transactions at issue occurred in this county. The declarations of Plaintiffs establishing that
6 this Court has proper venue for this action are attached as **Exhibit A**.

7 126. Defendant deceived consumers in that it falsely and misleadingly represented that
8 its service plans offered "unlimited" data and also failed to disclose or adequately disclose and
9 actively concealed its practice of regularly throttling "unlimited" plan customers' data.

10 127. Defendant's false and misleading representations, active concealment, and failures
11 to disclose violated the CLRA in the following manner:

12 a. Defendant misrepresented that its service plans, phones, and other products
13 had characteristics, benefits, or uses that they did not have (Cal. Civ. Code § 1770(a)(5));

14 b. Defendant misrepresented that its service plans, phones, and other products
15 were of a particular standard, quality, and/or grade when they were of another (Cal. Civ. Code
16 § 1770(a)(7));

17 c. Defendant advertised its service plans, phones, and other products with an
18 intent not to sell them as advertised (Cal. Civ. Code § 1770(a)(9));

19 d. Defendant misrepresented that its service plans, phones, and other products
20 conferred or involved rights, remedies, or obligations that they did not have (Cal. Civ. Code
21 § 1770(a)(14));

22 e. Defendant misrepresented that its service plans, phones, and other products
23 were supplied in accordance with previous representations when they were not (Cal. Civ. Code
24 § 1770(a)(16));

25 f. Defendant inserted unconscionable provisions in its consumer agreements,
26 including an arbitration clause with a class action waiver provision and other unenforceable
27 provisions, in violation of §1770(a)(19).
28

1 128. Defendant's false and misleading representations and nondisclosures regarding its
2 "unlimited" data plans and its practice of regularly throttling "unlimited" plan customers' data
3 were material to Plaintiffs and Class members in that a reasonable person would have considered
4 them important in making purchase decisions. Defendant had a duty to disclose the truth,
5 including because of its affirmative false and misleading statements and because of its unique and
6 superior knowledge of the truth.

7 129. Plaintiffs and Class members reasonably relied upon Defendant's material false
8 and misleading representations and nondisclosures, and would not have purchased, or would have
9 paid less money for, Defendant's service plans, phones and other products had they known the
10 truth. Plaintiffs and the Class paid for products and services which were not delivered as
11 represented.

12 130. As a direct and proximate result of Defendant's material false and misleading
13 representations and nondisclosures, Plaintiffs and the Class have been irreparably harmed.
14 Defendant's violations of the CLRA are ongoing.

15 131. On behalf of themselves and the Class, Plaintiffs seek injunctive relief in the form
16 of an order enjoining Defendant from making such material false and misleading representations
17 and failing to disclose or adequately disclose or actively concealing its practice of throttling
18 "unlimited" plan customers' data, and requiring AT&T to cease throttling Plaintiffs and the Class
19 members. Plaintiffs also seek attorneys' fees and costs.

20 132. Plaintiffs individually seek public injunctive relief, under the CLRA, to stop, and
21 protect the general public in California from, Defendants' false and misleading advertising.

22 133. In accordance with Cal. Civ. Code § 1782(a), on July 23, 2015, counsel for
23 Plaintiffs served Defendant with notice of their CLRA violations by certified mail, return receipt
24 requested. A true and correct copy of the CLRA demand notice is attached as **Exhibit B**. The
25 CLRA demand letter was delivered to Defendant's registered agent for service of process on July
26 28, 2015, as evidenced by **Exhibit C**.

27 134. Defendant has refused or failed to timely respond the CLRA demand notice of
28 Plaintiffs.

135. Defendant has failed to provide appropriate relief for its CLRA violations within 30 days of receipt of Plaintiffs' demand notice. Accordingly, pursuant to Cal. Civ. Code §§ 1780 and 1782(b), Plaintiffs are entitled to recover, for themselves and the Class, actual damages, punitive damages, attorneys' fees and costs, and any other relief the Court deems proper.

FOURTH CAUSE OF ACTION

(Negligent Misrepresentation)

136. Plaintiffs incorporate by reference all allegations set forth in this Second Amended Complaint as though fully set forth herein.

137. During the relevant time period of this lawsuit, Defendant made express statements that the wireless data plans purchased by Plaintiffs and members of the Class were "unlimited." These statements were false and misleading.

138. Defendant used false and misleading statements to induce customers to purchase "unlimited" data plans, phones, and other products.

139. Plaintiffs and members of the Class justifiably relied upon Defendant's false and misleading statements and omissions in deciding whether to purchase Defendant's wireless data plans, phones and other products during the relevant time period of this lawsuit.

140. As a direct and proximate result of the above described practices, Plaintiffs and members of the Class sustained damages. Plaintiffs, on behalf of themselves and the Class, seek damages in an amount to be proven at trial.

FIFTH CAUSE OF ACTION

(Misrepresentation)

141. Plaintiffs incorporate by reference all allegations set forth in this Second Amended Complaint as though fully set forth herein.

142. During the relevant time period of this lawsuit, Defendant made express statements that the wireless data plans purchased by Plaintiffs and members of the Class were "unlimited."

143. Defendant knew that it represented that the wireless data plans purchased by Plaintiffs and members of the Class were “unlimited,” and that this was false and misleading.

144. As such, Defendant used false and misleading statements to induce customers to purchase “unlimited” data plans, phones, and other products.

145. Plaintiffs and members of the Class justifiably relied upon Defendant’s false and misleading statements in deciding whether to purchase wireless data service, phones and other products from Defendant. As a direct and proximate result of the above described practices, Plaintiffs and members of the Class sustained damages. Plaintiffs, on behalf of themselves and the Class, seek damages in an amount to be proven at trial.

146. Defendant’s wrongful acts alleged herein were done maliciously, oppressively and with the intent to mislead and defraud. Accordingly, Plaintiffs and the Class are entitled to punitive and exemplary damages.

SIXTH CAUSE OF ACTION

(Fraudulent Concealment)

147. Plaintiffs incorporate by reference all allegations set forth in this Second Amended Complaint as though fully set forth herein.

148. Defendant intentionally misrepresented or concealed the following material facts from Plaintiffs and the Class:

a. Failing to disclose or adequately disclose that its “unlimited” wireless data plans were not “unlimited”;

b. Failing to disclose or adequately disclose that “unlimited” plan customers were regularly subjected to throttling;

c. Misrepresenting that its wireless data plans were “unlimited.”

149. Plaintiffs and the Class relied on these representations and omissions in purchasing Defendant’s “unlimited” data plans, phones and other products.

150. Defendant performed the wrongful acts, concealed the information, and made the affirmative representations during the relevant time period of this lawsuit with the intent of gaining its own financial advantage to the disadvantage of Plaintiffs and the Class.

151. As a result of Defendant's wrongful conduct, Plaintiffs and the Class have suffered, and continue to suffer, economic losses and non-economic losses. Plaintiffs, on behalf of themselves and the Class, seek damages in an amount to be proven at trial.

152. Defendant's wrongful acts alleged herein were done maliciously, oppressively and with the intent to mislead and defraud. Accordingly, Plaintiffs and the Class are entitled to punitive and exemplary damages.

SEVENTH CAUSE OF ACTION

(Breach of Express Warranty/Breach of Contract)

153. Plaintiffs incorporate by reference all allegations set forth in this Second Amended Complaint as though fully set forth herein.

154. Plaintiffs, and each member of the Class, formed a contract with Defendant at the time they purchased an "unlimited" data plan from Defendant. The terms of that contract include the express promises and affirmations of fact made by Defendant through its marketing materials and statements, described above, that the data plans provided "unlimited" data service each month, which representations constitute express warranties and became part of the basis of the bargain and an essential component of the agreements between Defendant and Plaintiffs and the Class. Defendant made these promises and affirmations for, *inter alia*, the purpose of inducing Plaintiffs and the Class to purchase wireless service from Defendant and to be willing to pay more than they otherwise would for the service.

155. Specifically, Defendant's marketing materials and statements expressly stated that the data plans Plaintiffs and the Class members purchased provided "unlimited" data service each month, and in doing so Defendant warrantied that Plaintiffs and the Class would not be subject to throttling or other negative consequences for exceeding some data cap or limit (or "threshold").

156. Defendant has already conceded in this case that at least through 2010, if not later, “unlimited” data was understood to mean no limit on the amount of data that users could consume for a fixed price. (Dkt. 169 at 2). Nor did the written contract terms at any time purport to impose data caps or “thresholds” on “unlimited” plans.

157. All conditions precedent to Defendant’s liability under this contract have been performed by Plaintiffs and the Class.

158. Defendant breached the terms of its contracts, including the express warranties, with Plaintiffs and the Class. As a matter of Defendant’s company policy and practice, Plaintiffs and the Class members were each “subject to throttling when they exceeded Defendant’s imposed monthly data caps and limits (or “thresholds”).

159. To the extent, if any, that Defendant purported to retain discretion to impose restrictions on the data service of Plaintiffs and the Class, Defendant exercised that discretion in bad faith, unreasonably, and in manner that defied the reasonable expectations of the parties, through its implementation of data caps and limits (or “thresholds”) and throttling as a matter of company policy and practice, as alleged herein. Such conduct breached the covenant of good faith and fair dealing implied in every contract pursuant to California law.

160. As a result of Defendant’s breaches of its contract and warranties, Plaintiffs and the Class have been damaged in an amount to be proven at trial.

EIGHTH CAUSE OF ACTION

(Unjust Enrichment)

161. Plaintiffs incorporate by reference all allegations set forth in this Second Amended Complaint as though fully set forth herein.

162. This claim is pled in the alternative to Plaintiff’s breach of express warranty/contract claim. *See Astiana v. Hain Celestial Grp., Inc.*, 783 F.3d 753, 762 (9th Cir. 2015).

163. Plaintiffs and the Class have conferred a benefit upon Defendant by purchasing Defendant's service plans, phones, and other products, which did not perform as promised and/or did not have the attributes and benefits promised by Defendant.

164. By their deceptive, misleading, and unlawful conduct alleged herein, Defendant has unjustly received and retained benefits at the expense of Plaintiffs and the Class, including funds that Plaintiffs and the Class paid to Defendant for service plans, phones and other products.

165. Under principles of equity and good conscience, Defendant should not be permitted to retain money belonging to Plaintiffs and the Class that it unjustly received as result of its deceptive, misleading and unlawful conduct alleged herein without providing compensation to Plaintiffs and the Class.

166. Plaintiffs and the Class have suffered financial loss as a direct result of Defendant's conduct.

167. Plaintiffs and Class members are entitled to restitution of, disgorgement of, and/or the imposition of a constructive trust upon all profits, benefits and other compensation obtained by Defendant as a result of Defendant's deceptive, misleading and unlawful conduct, and for such other relief that this Court deems proper.

PRAYER FOR RELIEF

WHEREFORE, as a result of the foregoing, Plaintiffs pray for relief as follows:

1. In order to prevent injury to the general public, Plaintiffs individually request that the Court enter a public injunction, under the UCL, FAL, and CLRA, enjoining Defendant from engaging in the false and misleading advertising alleged herein.

2. On behalf of themselves and the Class, Plaintiffs request that the Court order relief and enter judgment against Defendant as follows:

a. Declaring this action to be a proper class action, certifying the proposed Class, appointing Plaintiffs as class representatives, and appointing Plaintiffs' counsel as class counsel;

b. An order that Defendant is permanently enjoined from its improper conduct and practices as alleged;

c. A judgment awarding Plaintiffs and the Class members restitution, including, without limitation, restitutionary disgorgement of all profits and unjust enrichment that Defendant obtained as a result of its unlawful, unfair, and fraudulent business practices and conduct;

d. A judgment awarding Plaintiffs and the Class members damages;

e. A judgment awarding Plaintiffs and the Class members punitive and exemplary damages for Defendant's knowing, willful, and intentional conduct;

f. Pre-judgment and post-judgment interest;

g. Attorneys' fees, expenses, and the costs of this action; and

3. All other and further relief as this Court deems necessary, just, and proper.

JURY DEMAND

Plaintiffs demand a trial by jury on all issues so triable.

Dated: August 3, 2020

Respectfully submitted,

LIEFF CABRASER HEIMANN & BERNSTEIN, LLP

By: /s/ Roger N. Heller

Roger N. Heller

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EXHIBIT A

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3 Nicole D. Sugnet (State Bar No. 246255)
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5 John A. Yanchunis (*pro hac vice application to be submitted*)
6 Rachel Soffin (*pro hac vice application to be submitted*)
7 MORGAN & MORGAN
8 COMPLEX LITIGATION GROUP
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Tampa, FL 33602
9 Telephone: (813) 223-5505

10 Jean Sutton Martin (*pro hac vice application to be submitted*)
11 LAW OFFICE OF JEAN SUTTON MARTIN PLLC
2018 Eastwood Road, Suite 225
12 Wilmington, North Carolina 28403
Telephone: (910) 292-6676

13 Attorneys for Plaintiffs

14
15 UNITED STATES DISTRICT COURT
16 NORTHERN DISTRICT OF CALIFORNIA
17 SAN FRANCISCO DIVISION

18
19 Marcus A. Roberts, Kenneth A. Chewey
20 and Ashley M. Chewey, individually and
on behalf of themselves and all others
21 similarly situated,

Plaintiffs,

22 v.

23 AT&T MOBILTY LLC,

24 Defendant.
25
26
27
28

Case No. _____

CLASS ACTION COMPLAINT

DECLARATION ASHLEY CHEWEY

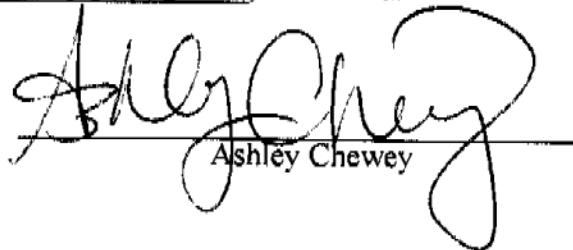
1 I, Ashley Chewey, hereby declare and state as follows:

2 1. I am over the age of 18, and a Plaintiff in this action. The facts contained in this
3 declaration are based on my personal knowledge, and if called upon to do so, I could and would
4 testify competently hereto.

5 2. The complaint in this action, filed concurrently with this declaration, is filed in the
6 proper place for trial under California Civil Code § 1780(d), because this is a county in which the
7 Defendant does business and where a substantial portion of the transactions occurred.
8

9 I declare under penalty of perjury under the laws of the United States and the State of
10 California that the foregoing is true and correct.
11

12 Executed on July 22, 2015, in ROSEVILLE, California.
13

14 
15 Ashley Chewey
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18
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21
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25
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1 Michael W. Sobol (State Bar No. 194857)
2 Roger N. Heller (State Bar No. 215348)
3 Nicole D. Sugnet (State Bar No. 246255)
4 LIEFF CABRASER HEIMANN
5 & BERNSTEIN LLP
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9 John A. Yanchunis (*pro hac vice application to be submitted*)
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15 Telephone: (813) 223-5505

16 Jean Sutton Martin (*pro hac vice application to be submitted*)
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18 2018 Eastwood Road, Suite 225
19 Wilmington, North Carolina 28403
20 Telephone: (910) 292-6676

21 Attorneys for Plaintiffs

22 UNITED STATES DISTRICT COURT
23 NORTHERN DISTRICT OF CALIFORNIA
24 SAN FRANCISCO DIVISION

25 Marcus A. Roberts, Kenneth A. Chewey
26 and Ashley M. Chewey, individually and
27 on behalf of themselves and all others
28 similarly situated,

Plaintiffs,

v.

AT&T MOBILTY LLC,

Defendant.

Case No. _____

CLASS ACTION COMPLAINT

DECLARATION KENNETH CHEWEY

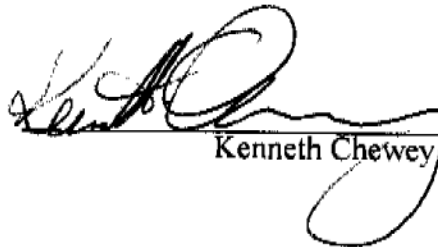
1 I, Kenneth Chewey, hereby declare and state as follows:

2 1. I am over the age of 18, and a Plaintiff in this action. The facts contained in this
3 declaration are based on my personal knowledge, and if called upon to do so, I could and would
4 testify competently hereto.

5 2. The complaint in this action, filed concurrently with this declaration, is filed in the
6 proper place for trial under California Civil Code § 1780(d), because this is a county in which the
7 Defendant does business and where a substantial portion of the transactions occurred.
8

9 I declare under penalty of perjury under the laws of the United States and the State of
10 California that the foregoing is true and correct.
11

12 Executed on July 22, 2015, in ROSEVILLE, California.
13

14 
15 Kenneth Chewey
16
17
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27
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13 Attorneys for Plaintiffs

14
15 UNITED STATES DISTRICT COURT
16 NORTHERN DISTRICT OF CALIFORNIA
17 SAN FRANCISCO DIVISION

18
19 Marcus A. Roberts, Kenneth A. Chewey
20 and Ashley M. Chewey, individually and
on behalf of themselves and all others
similarly situated,

21 Plaintiffs,

22 v.

23 AT&T MOBILITY LLC,

24 Defendant.
25
26
27
28

Case No. _____

CLASS ACTION COMPLAINT

DECLARATION MARCUS ROBERTS

1 I, Marcus Roberts, hereby declare and state as follows:

2 1. I am over the age of 18, and a Plaintiff in this action. The facts contained in this
3 declaration are based on my personal knowledge, and if called upon to do so, I could and would
4 testify competently hereto.

5 2. The complaint in this action, filed concurrently with this declaration, is filed in the
6 proper place for trial under California Civil Code § 1780(d), because this is a county in which the
7 Defendant does business and where a substantial portion of the transactions occurred.
8

9 I declare under penalty of perjury under the laws of the United States and the State of
10 California that the foregoing is true and correct.
11

12 Executed on July 23, 2015, in SO. SAN FRANCISCO, California.
13

14 
15 _____
16 Marcus Roberts
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EXHIBIT B



Lieff Cabraser Heimann & Bernstein, LLP
275 Battery Street, 29th Floor
San Francisco, CA 94111-3339
t 415.956.1000
f 415.956.1008

July 23, 2015

VIA CERTIFIED MAIL RETURN RECEIPT REQUESTED

Glenn Lurie, President and CEO
AT&T Mobility, LLC
1025 Lenox Park Blvd. NE
Atlanta, GA 30319

Registered Agent for Service of Process
CT Corporation System
818 West Seventh Street, Suite 930
Los Angeles, CA 90017

Re: Notice of Violation of California Consumer Legal Remedies Act

Dear Mr. Lurie:

We represent Marcus Roberts, Kenneth Chewey, and Ashley Chewey, who purchased AT&T Mobility, LLC ("AT&T") "unlimited" wireless phone plans. All three have purportedly been "grandfathered" into their unlimited plans and accordingly expect to be able to access and use unlimited data on their phones. We send this letter under the California Consumers Legal Remedies Act, California Civil Code Section 1750 *et seq.* ("CLRA") to notify AT&T that its practice of regularly throttling its unlimited plan subscribers' data, often without notice, when their data usage exceeds certain undisclosed limits, violates the CLRA. We demand that AT&T rectify its violations within 30 days of receipt of this letter.

AT&T misrepresents to its "unlimited" service plan subscribers that the "unlimited" plan offers "unlimited" web and data access and that consumers may use the data access to operate their smartphones as virtual PCs by browsing the internet, streaming music and videos, or using GPS navigation. In reality, AT&T regularly throttles "unlimited" plan subscribers' data speeds once they have used 3GB or 5GB of data, often without notice. AT&T fails to truthfully and adequately disclose its throttling practice. AT&T, for example, does not inform its subscribers as to the drastically reduced speeds at which they will be throttled and how that will impact their data usage, or that their data will be throttled once they have exceeded the data usage limits regardless of whether AT&T's network is congested at the time.

Relying on AT&T's promise of "unlimited" data, in 2008, Marcus Roberts purchased an iPhone 3G with an AT&T "unlimited" data plan. Each time Mr. Roberts subsequently upgraded to a newer version of the iPhone, AT&T offered to grandfather him into his "unlimited" plan,

July 23, 2015

Page 2

which he accepted. In 2012, Mr. Roberts began noticing that, by the middle of the month, his internet connection was drastically slower and his ability to download was severely hampered. On or about July 6, 2015, AT&T sent Mr. Roberts a text stating that he had used 75% of a supposed 5GB allotment of data usage, and that he may experience reduced speeds once he exceeded that allotment. This was the first notice regarding AT&T's throttling practice that Mr. Roberts received from AT&T, and even it failed to disclose the true nature of AT&T's practice by deceptively suggesting that his speeds "may" be slowed when in fact AT&T ***always*** throttles "unlimited" subscribers' data once they exceed the secret data usage caps.

Similarly, Kenneth and Ashley Chewey purchased an iPhone 3G with an AT&T family share plan purportedly providing "unlimited" data in late 2009. In 2011, the Cheweys began notice that around the middle of the month, their internet connection was significantly slower and they were unable to use their iPhone for certain purposes. After noticing the issue, Mr. Chewey called AT&T. A customer service representative falsely told him that the problem was attributable to being in a high congestion area. Subsequent to this conversation, the Cheweys have noticed that their data has been severely slowed on other occasions, sometimes to the point where they are unable to use the internet at all. On or about July 7, 2015, AT&T sent Mr. Chewey two messages stating that he was reaching a data usage limit. This was the first indication from AT&T that the Cheweys' "unlimited" plan had any data restrictions.

AT&T's material misrepresentations, active concealment, and failures to disclose violated the CLRA in the following manner:

1. AT&T misrepresented that its phones and "unlimited" data plans had characteristics, benefits, or uses that they did not have (Cal. Civ. Code § 1770(a)(5));
2. AT&T misrepresented its that its phones and "unlimited" data plans were of a particular standard, quality, and/or grade when they were of another (Cal. Civ. Code § 1770(a)(7));
3. AT&T advertised that its phones and "unlimited" data plans with an intent not to sell them as advertised (Cal. Civ. Code § 1770(a)(9));
4. AT&T misrepresented that that its phones and "unlimited" data plans conferred or involved rights, remedies, or obligations that they did not have (Cal. Civ. Code § 1770(a)(14));
5. AT&T misrepresented that that its phones and "unlimited" data plans were supplied in accordance with previous representations when they were not (Cal. Civ. Code § 1770(a)(16));

July 23, 2015

Page 3

6. AT&T inserted unconscionable provisions in its Wireless Customer Agreement and other agreements, including an arbitration clause with a class action ban (Cal. Civ. Code § 1770(a)(19)).

We demand that within thirty (30) days of receiving this letter, AT&T agree to (1) refrain from engaging in the deceptive practices described above at any time in the future; and (2) return all money that AT&T “unlimited” subscribers paid for “unlimited” plans. If AT&T refuse to provide the demanded relief within thirty (30) days, we will seek compensatory and punitive damages, restitution, and any other appropriate equitable relief.

We sincerely hope to confer with you to resolve these violations without the need for litigation. I invite you to contact me to discuss this demand at any time. I can be reached at (415) 956-1000 ext. 2230 or nsugnet@lchb.com. I look forward to hearing from you.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Nicole Sugnet", written in dark ink.

Nicole D. Sugnet

EXHIBIT C

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

COMPLETE THIS SECTION ON DELIVERY

A. Signature

X

B. Received by (Printed Name)

Date of Delivery

very address different from item 1?
 , enter delivery address below:

☐ Yes
☐ No

1. **Registered Agent for Service of Process**
CT Corporation System
818 West Seventh Street, Suite 930
Los Angeles, CA 90017

9590 9401 0033 5071 9293 87

2. **Art** 7015 0640 0006 1268 7241

PS Form 3811, April 2015 PSN 7530-02-000-9053

Domestic Return Receipt

Domestic Return Receipt

3. Service Type

- | | | | |
|--|--|--|---|
| <input type="checkbox"/> Adult Signature | <input type="checkbox"/> Restricted Delivery | <input type="checkbox"/> Priority Mail Express® | <input type="checkbox"/> Registered Mail™ |
| <input type="checkbox"/> Certified Mail® | <input type="checkbox"/> Certified Mail Restricted Delivery | <input type="checkbox"/> Registered Mail Restricted Delivery | <input type="checkbox"/> Signature Confirmation™ |
| <input type="checkbox"/> Collect on Delivery | <input type="checkbox"/> Collect on Delivery Restricted Delivery | <input type="checkbox"/> Return Receipt for Merchandise | <input type="checkbox"/> Signature Confirmation Restricted Delivery |

UNITED STATES POSTAL SERVICE



First-Class Mail
Postage & Fees Paid
USPS
Permit No. G-10

• Sender: Please print your name, address, and ZIP+4® in this box •

LIEFF, CABRASER, HEIMANN & BERNSTEIN LLP
EMBARCADERO CENTER WEST
275 BATTERY STREET, 29TH FLOOR
SAN FRANCISCO, CA 94111-3339

USPS TRACKING #



9590 9401 0033 5071 9293 87

JR