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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SACRAMENTO

$191 — SUMMONS ISSUED

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| SUSANNE BALL and VIRGINIA GORDON,<br><br>Plaintiffs,<br><br>v.<br><br>GTE MOBILNET OF CALIFORNIA LIMITED PARTNERSHIP, a limited partnership; GTE MOBILNET OF SANTA BARBARA LIMITED PARTNERSHIP, a limited partnership; GTE MOBILNET, INC., a foreign corporation; BAY AREA CELLULAR TELEPHONE COMPANY, a general partnership; SALINAS CELLULAR TELEPHONE COMPANY a general partnership; CAGAL CELLULAR COMMUNICATIONS CORPORATION, a corporation; NAPA CELLULAR TELEPHONE COMPANY, a general partnership; SACRAMENTO CELLULAR TELEPHONE COMPANY, a general partnership; REDDING CELLULAR PARTNERSHIP, a general partnership; FRESNO CELLULAR TELEPHONE COMPANY, a general partnership; VENTURA CELLULAR TELEPHONE COMPANY, a general partnership; LOS ANGELES CELLULAR TELEPHONE COMPANY, a general partnership; AT&T WIRELESS SERVICES, INC., a foreign corporation; SACRAMENTO VALLEY LIMITED PARTNERSHIP, a limited partnership; FRESNO MSA | CASE NO. 98AS03811<br><br>COMPLAINT FOR RESTITUTION AND INJUNCTIVE RELIEF |

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LIMITED PARTNERSHIP, a limited partnership; LOS ANGELES SMSA LIMITED PARTNERSHIP, a limited partnership; AIRTOUCH CELLULAR, a California corporation; AIRTOUCH COMMUNICATIONS, INC., a California corporation; BAKERSFIELD CELLULAR TELEPHONE COMPANY, a general partnership; BELLSOUTH CELLULAR, a foreign corporation; BELLSOUTH CORPORATION, a foreign corporation, COX COMMUNICATIONS PCS LIMITED PARTNERSHIP, a limited partnership; SPRINT PCS, a corporation; PACIFIC BELL MOBILE SERVICES, a California corporation; and DOES 1 through 50, inclusive,

Defendants.

Plaintiffs allege as follows:

**THE PARTIES**

1. Defendant GTE Mobilnet of California Limited Partnership is a limited partnership, doing business in California, and is controlled by GTE Mobilnet, Inc., with its principal place of business in San Francisco, California.

2. Defendant GTE Mobilnet of Santa Barbara Limited Partnership is a limited partnership, doing business in California, and is controlled by GTE Mobilnet, Inc., with its principal place of business in Santa Barbara, California.

3. Defendant GTE Mobilnet, Inc. is a foreign corporation, doing business in California.

4. Defendant Bay Area Cellular Telephone Company is a general partnership, doing business in California, and is controlled by AT&T Wireless Services, Inc. and Airtouch Cellular and Airtouch Communications, Inc., and its principal place of business is in San Francisco, California.

5. Defendant Salinas Cellular Telephone Company is a general partnership, doing business in California, and is controlled by AT&T Wireless Services, Inc., and its principal place of business is in Salinas, California.

6. Defendant Cagal Cellular Communications Corporation is a corporation, doing business in California, and is controlled by AT&T Wireless Services, Inc.

7. Defendant Napa Cellular Telephone Company is a general partnership, doing business in California, and is controlled by AT&T Wireless Services, Inc., and its principal place of business is in Napa, California.

8. Defendant Stockton Cellular Telephone Company is a general partnership, doing business in California, and is controlled by AT&T Wireless Services, Inc., and its principal place of business is in Stockton, California.

9. Defendant Sacramento Cellular Telephone Company is a general partnership, doing business in California, and is controlled by AT&T Wireless Services, Inc., and its principal place of business is in Sacramento, California.

10. Defendant Redding Cellular Partnership is a general partnership, doing business in California, and is controlled by AT&T Wireless Services, Inc., and its principal place of business is in Redding, California.

11. Defendant Fresno Cellular Telephone Company is a general partnership, doing business in California, and is controlled by AT&T Wireless Services, Inc., and its principal place of business is in Fresno, California.

12. Defendant Ventura Cellular Telephone Company is a

general partnership, doing business in California, and is controlled by AT&T Wireless Services, Inc., and its principal place of business is in Ventura, California.

13. Defendant Santa Barbara Cellular Telephone Company is a general partnership, doing business in California, and is controlled by AT&T Wireless Services, Inc., and its principal place of business is in Santa Barbara, California.

14. Defendant Los Angeles Cellular Telephone Company (hereinafter referred to as "L.A. Cellular") is a general partnership, doing business in California, and is wholly owned by AT&T Wireless Services, Inc. and BellSouth Cellular, and its principal place of business is in Los Angeles, California.

15. Defendant AT&T Wireless Services, Inc. is a foreign corporation, doing business in California.

16. Defendant Sacramento Valley Limited Partnership is a limited partnership, doing business in California, whose general partner is Airtouch Cellular, and its principal place of business is in Sacramento, California.

17. Defendant Fresno MSA Limited Partnership is a limited partnership, doing business in California, whose general partner is Airtouch Cellular, and its principal place of business is in Fresno, California.

18. Defendant Los Angeles SMSA Limited Partnership is a limited partnership, doing business in California, whose general partner is Airtouch Cellular, and its principal place of business is in Irvine, California.

19. Defendant Airtouch Cellular is a California corporation, authorized to do business in California, and doing business in

California, and its principal place of business is in Irvine, California.

20. Defendant Airtouch Communications, Inc. is a California corporation, authorized to do business in California, and doing business in California, and its principal place of business is in San Francisco, California.

21. Defendant Bakersfield Cellular Telephone Company is a general partnership, doing business in California, and controlled by BellSouth Cellular.

22. Defendant BellSouth Cellular is a foreign corporation, doing business in California.

23. Defendant BellSouth Corporation is a foreign corporation, doing business in California.

24. Defendant Cox Communications PCS Limited Partnership is a limited partnership, doing business in California in the personal communications service business, with its principal place of business in San Diego, California.

25. Defendant Sprint PCS is a corporation, doing business in California, and doing business in the personal communications service business, with its principal place of business in San Diego, California.

26. Defendant Pacific Bell Mobile Services is a California corporation, authorized to do business in California, and doing business in the personal communications service business in California, with its principal place of business in San Francisco, California.

27. Defendant Does 1 through 50, inclusive, are sued herein under fictitious names. Their true names and capacities are

unknown to plaintiffs. When their true names and capacities are ascertained, plaintiff will amend this complaint by inserting their true names and capacities herein. Plaintiffs are informed and believe and thereon allege that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that injury to consumers of cellular telephone service or personal communications service as herein alleged were proximately caused by such Defendants.

**GENERAL ALLEGATIONS**

28. The Defendants and each of them are providers or owners of providers of wireless communication services variously known as cellular telephone service (hereinafter referred to as "cellular") and personal communications service (hereinafter referred to as "PCS").

29. In each metropolitan statistical area in California there are two facilities based cellular carriers licensed by the Federal Communications Commission (hereinafter referred to as the "FCC") to provide cellular telephone service. There are two or more PCS service providers in each metropolitan statistical area in California. The cellular service providers and the PCS providers are hereinafter referred to as "carriers"

30. All of the carrier Defendants are authorized carriers of cellular telephone service or personal communications service in the State of California. The non-carrier Defendants named in the Complaint exercise control over the activities of certain of the carrier Defendants.

31. Cellular and PCS systems permit two-way communication between a mobile telephone and radio transceivers which are

integrated into the land based telecommunications system by switching equipment.

32. PCS and cellular carriers offer a variety of pricing plans for service. Some plans have a fixes charge for monthly access. coupled with a charge per minute for air time. other plans provide a package of minutes included in the monthly charge. Usage is charged on a "per minute basis" for any airtime which exceeds the number of minutes in the package. Plans which include a package of minutes are called "bucket plans".

33. For many years, it has been possible for a carrier to bill airtime in fractions of a minute, down to the nearest second. Notwithstanding this ability, all of the Defendant carriers have chosen to charge customers for time they do not use by rounding up usage to the nearest higher minute, or the nearest 30-second interval.

34. In 1993, Congress amended the Federal Communications Act as it related to commercial mobile radio services. One of the purposes of this amendment was to allow competition to establish rates that would be charged for commercial mobile radio services in the United States including California. One of the effects of this amendment was to eliminate the regulation of rates of commercial mobile radio carriers by the various states of the United States, including California. In implementing this intent of Congress, the FCC has elected to forebear the regulation of rates for mobile communications including cellular and PCS rates. The FCC decided on February 3, 1994, that it would not regulate the rates of providers of "commercial radio services." After Section 332 of the Federal Communications Act was amended in 1993,

the FCC commenced a hearing "in the Matter of Implementation of Sections 3(N)II and 332 of the Communications Act, GN Docket No. 93-252." On February 3, 1994, the FCC issues its Second Report and Order. In this Order, the FCC determined that it was the intent of Congress to allow competition to establish prices with respect to "commercial mobile radio services". As a result, the FCC determined it would not regulate the rates of providers of "commercial mobile radio services". At no time has the FCC required any cellular carriers or PCS carriers to file their rates with the FCC or any other federal agency, nor were such carriers required to file any rates with the FCC prior to the enactment of the amendment to Section 332(c)(3)(A).

35. The amendment to Section 332(c)(3)(A) of the Federal Communications Act does not expressly preempt the Business and Professions Code Section 17200 through 17209 (the unfair competition law). There is no conflict between the scheme of hands-off federal regulation and the enforcement of the California unfair competition law. The unfair competition law promotes competition and fair business practices, not regulation. Congress' purpose to foster competition in the provision of commercial mobile radio services is consistent with and promoted by the enforcement of the unfair competition law.

36. Business and Professions Code Section 17200 in relevant part defines unfair competition as "any lawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibit by Chapter 1 (commencing with Section 17500) of Part 3 of the Division 7 of the Business and Professions Code."

37. The unfair and/or unlawful and/or fraudulent business acts or practices alleged in this complaint constitute unfair competition within the meaning of Business and Professions Code Section 17200, et seq. Plaintiffs are entitled to seek relief under the Unfair Competition Law pursuant to Business and Professions Code 17204 on behalf of themselves or on behalf of the general public.

38. Plaintiffs and the public at large have no adequate remedy at law for the injuries currently being suffered or which will result in the future from the continued wrongful conduct including the unfair and/or unlawful business practices of the defendants as set forth in each of the causes of action in this complaint. Unless the Court restrains said defendants, plaintiffs will be forced to institute a multiplicity of suits to obtain restitution and obtain orders to restrain and permanently enjoin these practices.

39. Plaintiffs were ignorant of their causes of action stated in this complaint regarding rounding up, charging for non-conversation time and overcharging for incomplete calls. Plaintiffs only recently discovered within the last year, the existence of their causes of action. Defendants fraudulently concealed that they were incorrectly billing subscribers for airtime when they were aware that subscribers were being billed incorrectly.

40. The Defendants fraudulently concealed the Plaintiffs' cause of action stated in this complaint regarding incorrectly billing for "lag time". Plaintiffs were ignorant of this cause of action and only recently discovered, within the past year, the

existence of this cause of action regarding "lagtime" and overlapping cause. Defendants fraudulently concealed that they were incorrectly billing subscribers for such airtime at a time when they were fully aware that subscribers were being billed incorrectly.

**FIRST CAUSE OF ACTION**

**(Against All Defendants for Restitution and Injunctive Relief for "Rounding Up" as an Unfair Business Practice Under Business and Professions Code Section 17200)**

41. Plaintiffs incorporate herein by reference, as though fully set forth herein, paragraphs 1 through 39, inclusive, of this complaint.

42. Since September 1, 1995, each of the defendant carriers has engaged in and continues to engage in the billing practice of "rounding up" the usage of airtime on each wireless telephone call to the next higher full minute for billing purposes which results in the customer, including plaintiffs, being billed for time over and above the actual usage of airtime by the customer. The Defendant carrier's practice of "rounding up" results in customers, including plaintiffs, paying for something they do not receive. Each instance of "rounding up" is, has been and continues to be an unfair act in violation of Business and Professions Code Section 17200. The practice of "rounding up" is an unfair business practice in violation of Business and Professions Code Section 17200, et seq.

**WHEREFORE**, Plaintiffs pray against all Defendants, and each of them, as follows:

(a) For a permanent injunction enjoining said Defendants, and each of them, their agents, servants, and employees, and all

persons acting under, in concert with or for them directly or indirectly, or in any manner, for or in any way engaging in any of the unfair business acts or practices enumerated herein;

(b) For restitution of all amounts overpaid by Plaintiffs and other members of the general public for cellular service and/or PCS as a result of the aforesaid unfair business practice;

(c) For interest from and after the date of service of this Complaint at the legal rate;

(d) For the appointment of a receiver to receive all sums paid by way of restitution;

(e) For payments of Plaintiffs' reasonable attorneys' fees;

(f) For costs of suit herein incurred; and

(g) For such other and further relief as the Court may deem proper.

**SECOND CAUSE OF ACTION**

**(Against All Defendants For Restitution and Injunctive Relief for "Rounding-Up" as an Unlawful Business Practice Under Business & Professions Code Section 17200)**

43. Plaintiffs incorporate herein by reference, as through fully set forth herein, paragraphs 1 through 39, inclusive, of this complaint.

44. Since September 1, 1995 each of the Defendant carriers has engaged in and continues to engage in the billing practice of "rounding up" the usage of airtime on each wireless telephone call to the next higher full minute for billing purposes which results in the customer, including plaintiffs, being billed for time over and above the actual usage of airtime by the customer. The Defendant carrier's practice of "rounding up" results in customers, including plaintiffs. paying for something they do not

receive.

45. Each instance of each of the Defendant carrier's "rounding up" a customer's airtime usage bill together with the collection of monies therefor is, has been and continues to be an intentional and unlawful taking of property belonging to another with an intention to permanently deprive the billed customer in each such instance of the customer's money in the full amount of the billed airtime charges that were unlawfully rounded up.

46. In each such instance, while the Defendant carriers have, on occasion, disclosed in their contracts the fact that they round up to the next highest minute, that disclosure is totally inadequate and deceptive, as a means of procuring subscriber consent, inasmuch as the Defendant carriers have and at all relevant times herein mentioned, continued to have the ability to charge airtime to the nearest second but have failed to disclose that fact to the subscribers.

47. This conduct is the concealment of a material fact to any subscriber making a free decision to subscribe to a wireless telephone service, the contract for which includes rounding up airtime to the next highest minute, and any such consent, without disclosure of that fact, is vitiated by its concealment. The defendant carriers have also concealed and continue to conceal from plaintiffs and other subscribers the amount of the charges for airtime directly attributable to the business practice of rounding up. Each such instance of rounding up constitutes a violation of California Penal Code Section 484. Each instance of "rounding up" has been and continues to be an unlawful act in violation of Business and Professions Code Section 17200, et seq.

The pattern of "rounding up" is an unlawful practice in violation of Business and Professions Code Section 17200, et seq.

**WHEREFORE**, Plaintiffs pray against all Defendants, and each of them, as follows:

(a) For a permanent injunction enjoining said Defendants, and each of them, their agents, servants, and employees, and all persons acting under, in concert with or for them directly or indirectly, or in any manner, for or in any way engaging in any of the unlawful business acts or practices enumerated herein;

(b) For restitution of all amounts overpaid by Plaintiffs and other members of the general public for cellular service and/or PCS as a result of the aforesaid unlawful business practices;

(c) For interest from and after the date of service of this Complaint at the legal rate;

(d) For the appointment of a receiver to receive all sums paid by way of restitution;

(e) For payments of Plaintiffs' reasonable attorneys' fees;

(f) For costs of suit herein incurred; and

(g) For such other and further relief as the Court may deem proper.

## THIRD CAUSE OF ACTION

**(Against the "Airtouch" Defendants and L.A. Cellular for Restitution and Injunctive Relief for Billing in the LASMSA and Against all "Airtouch" Defendants in all "Airtouch Markets" Billing "Nonconversation Airtime" Measured from "Send" to "End" as an Unfair Business Practice Under Business and Professions Code Section 17200)**

48. Plaintiffs incorporate herein by reference, as though fully set forth herein, paragraphs 1 through 39, inclusive, of this complaint.

49. The Airtouch Defendants are Sacramento Valley Limited Partnership, Fresno MSA Limited Partnership, Los Angeles SMSA Limited Partnership, Airtouch Cellular, and Airtouch Communications. For the Airtouch Defendants in all "Airtouch" markets and L.A. Cellular in the L.A. market ("LASMSA"), chargeable time for calls originated by a mobile telephone begins when a connection is established with the carrier's facilities and ends when the mobile telephone disconnects. In other words, time is measured from when the customer presses the "send" button until they press the "end" button on their mobile telephone. this practice of measuring usage from "send" to "end" results in usage as measured by the these Defendant cellular carriers being increased by more than 18 seconds on the average call for non-conversation airtime before any rounding up takes place. It is, for example, quite possible for a customer to be charged for 3 minutes of airtime on a call where actual conversation time was 1 minute 45 seconds. Each of these Defendant carriers would measure the conversation time at 1 minute 45 seconds and measure an addition 18 second on an average call for non-conversation time, bringing the usage as measured to 2 minutes and 3 seconds. As such, a customer would then be charged for 3 minutes of airtime as a result of the combination of being charged with the non-conversation time, causing the call to pass the next minutes', 2 minutes in this example, threshold, thereby triggering, with the rounding-up practice, a rounding up to the next minutes, to wit, 3 minutes. Indeed, with average calls measuring just over 2 minutes in length such occurrences are common.

50. This practice by the Defendant carriers, engaged in from

about September 1, 1995 through the present and continuing, of charging customers for non-conversation time has resulted in subscribers, including plaintiffs, being charged and continuing to be charged for airtime usage they have not and are not receiving. Each such instance of charging for non-conversation time has been and continues to be an unfair business act in violation of Business and Professions Code Section 17200, et seq. The practice of charging for non-conversation time is an unfair business practice in violation of Business and Professions Code Section 17200.

51. All of the defendants represented to their respective subscribers that they were being properly charged for said subscribers' use of airtime by presenting said subscribers a monthly bill describing airtime usage and the amount of money being charged for said airtime usage. The defendants concealed from their subscribers the fact that they were being overcharged for airtime as set forth hereinabove. Plaintiffs had no knowledge of said overcharge for airtime by defendants except within the last year.

52. Plaintiffs had no knowledge of the acts or practices of said defendants in overcharging for airtime except within the last year, since it would have been virtually impossible for the plaintiffs to have discovered the fact of "overcharging" by the defendants by simply reviewing their telephone bills.

**WHEREFORE**, Plaintiffs pray against all Defendants, and each of them, as follows:

(a) For a permanent injunction enjoining said Defendants, and each of them, their agents, servants, and employees, and all

persons acting under, in concert with or for them directly or indirectly, or in any manner, for or in any way engaging in any of the unfair business acts or practices enumerated herein;

(b) For restitution of all amounts overpaid by Plaintiffs and other members of the general public for cellular service and/or PCS as a result of the aforesaid unfair business act or practice;

(c) For interest from and after the date of service of this Complaint at the legal rate;

(d) For the appointment of a receiver to receive all sums paid by way of restitution;

(e) For payments of Plaintiffs' reasonable attorneys' fees;

(f) For costs of suit herein incurred; and

(g) For such other and further relief as the Court may deem proper.

**FOURTH CAUSE OF ACTION**

**(Against "Airtouch Defendants" and L.A. Cellular for Restitution and Injunctive Relief for Billing in the LASMSA and Against all "Airtouch Defendants in All "Airtouch Markets" Billing "Nonconversation Airtime" Measured from "Send" to "End" as an Unlawful Business Practice in Violation of Business & Professions Code Section 17200)**

53. Plaintiffs incorporate herein by reference, as though fully set forth herein, paragraphs 1 through 39, inclusive, of this complaint.

54. The "Airtouch Defendants" are Sacramento Valley Limited Partnership, Fresno MSA Limited Partnership, Los Angeles SMSA Limited Partnership, Airtouch Cellular, and Airtouch Communications. For the Airtouch Defendants in all "Airtouch" markets and L.A. Cellular in the L.A. market ("LASMSA"),

chargeable time for calls originated by a mobile telephone begins when a connection is established with the carrier's facilities and ends when the mobile telephone disconnects. In other words, time is measured from when the customer presses the 'send" button until they press the "end" button on their mobile telephone. this practice of measuring usage from "send" to "end" results in usage as measured by these Defendant cellular carriers being increased by more than 18 seconds on the average call for non-conversation airtime before any rounding up takes place. It is, for example, quite possible for a customer to be charged for 3 minutes f airtime on a call where actual conversation time was 1 minute 45 seconds. Each of these Defendant carriers would measure the conversation time at 1 minute 45 seconds and measure an additional 18 seconds on an average call for non-conversation time at 1 minutes 45 seconds and measure an additional 18 seconds on an average call for non-conversation time, bringing the usage as measured to 2 minutes and 3 seconds. As such, a customer would then be charged for 3 minutes or airtime as a result of the combination of being charged with the non-conversation time, bringing the usage bringing the usage as measured to 2 minutes and 3 seconds. As such, a customer would then be charged for 3 minutes of airtime as a result of the combination of being charged with the non-conversation time, causing the call to pass the next minutes', 2 minutes in this example, threshold, thereby triggering, with the rounding-up practice, a rounding up to the next minutes, to wit, 3 minutes. Indeed, with average calls measuring just over 2 minutes in length such occurrences are common.

55. This practice by the Defendant carriers, engaged in from on or about September 1, 1995 through the present and continuing, of charging customers for non-conversation time has resulted in subscribers, including plaintiffs, being charged and continuing to be charged for airtime usage they have not and are not receiving. The Defendant carrier's practice of charging for "nonconversation airtime" has resulted in customers, including plaintiffs, paying for something they did not and do not receive. Each instance of each of the Defendant carrier's billing of such "nonconversation airtime" as part of the customer's airtime usage bill together with collection thereof has been and continues to be an intentional and unlawful taking of property belonging to another without their consent with an intention to permanently deprive the billed customer, in violation of California Penal Code Section 484, of the customer's money in the amount of the airtime billed charges that were "nonconversation airtime".

56. In each such instance, the Defendant carriers have failed to and continue to fail to disclose to the subscribers, including the plaintiffs, in any manner reasonably calculated to give actual notice to the customer, of the practice and the additional amount of the charges directly attributable solely to such nonconversation airtime. Each such instance of charging for non-conversation airtime has been and is and continues to be an unlawful act in violation of Business and Professions Code Section 17200, et seq. the practice of charging for non-conversation airtime is an unlawful practice in violation of Business and Professions Code Section 17200, et seq.

57. All of the defendants represented to their respective

subscribers that they were being properly charged for said subscribers' use of airtime by presenting said subscribers a monthly bill describing airtime usage and the amount of money being charged for said airtime usage. The defendants concealed from their subscribers the fact that they were being overcharged for airtime as set forth hereinabove. Plaintiffs had no knowledge of said overcharge for airtime by defendants except within the last year.

58. Plaintiffs had no knowledge of the acts or practices of said defendants in overcharging for airtime except within the last year, since it would have been virtually impossible for the plaintiffs to have discovered the fact of "overcharging" by the defendants by simply reviewing their telephone bills.

**WHEREFORE**, Plaintiffs pray against all Defendants, and each of them, as follows:

(a) For a permanent injunction enjoining said Defendants, and each of them, their agents, servants, and employees, and all persons acting under, in concert with or for them directly or indirectly, or in any manner, for or in any way engaging in any of the unlawful business acts or practices enumerated herein;

(b) For restitution of all amounts overpaid by Plaintiffs and other members of the general public for cellular service and/or PCS as a result of the aforesaid unlawful business act or practice;

(c) For interest from and after the date of service of this Complaint at the legal rate;

(d) For the appointment of a receiver to receive all sums paid by way of restitution;

(e) For payments of Plaintiffs' reasonable attorneys' fees;

(f) For costs of suit herein incurred; and

(g) For such other and further relief as the Court may deem proper.

**FIFTH CAUSE OF ACTION**

**(Against all "Airtouch Defendants" Except in the LASMSA for Restitution and Injunctive Relief for Discriminatory Billing in how "Incomplete" Calls are Treated for Billing the Time the Call Remains Unanswered as an Unfair Business Practice Under Business and Professions Code Section 17200)**

59. Plaintiffs incorporate herein by reference, as though fully set forth herein, paragraphs 1 through 39, inclusive, of this complaint.

60. For the Airtouch Defendants, chargeable time for calls originated by a subscriber's mobile telephone begins when a connection is established with the carrier's facilities and ends when the mobile telephone disconnects. In other words, time is measured from when the customer presses the "send" button until they press the "end" button on their mobile telephone. The Airtouch Defendants' practice of charging from "send" to "end" for outgoing calls results in customers being charged for airtime which includes the time the telephone rings on a call that is answered. However, except for their Los Angeles market, if the telephone call is not answered, it is "incomplete", and the Airtouch defendants do not charge for the airtime during the time the telephone rings and is unanswered. This results in discrimination, between callers who make a successful connection and are charged for that telephone ringing airtime and callers who are unsuccessful in making a connection and are not charged for the time the telephone rings.

61. These Airtouch Defendants have engaged in this particular discriminatory billing practice since on or about January 1, 1987 through the present and continue to do so. Airtouch subscribers have been discriminated against and continue to be discriminated against in this manner by Airtouch's said practice. The practice of the Airtouch Defendant carriers in discrimination in the charging of subscribers for nonconversation time is an unfair business practice in violation of Business and Professions code Section 17200, et seq.

62. All of the defendants represented to their respective subscribers that they were being properly charged for said subscribers' use of airtime by presenting said subscribers a monthly bill describing airtime usage and the amount of money being charged for said airtime usage. The defendants concealed from their subscribers the fact that they were being overcharged for airtime as set forth hereinabove. Plaintiffs had no knowledge of said overcharge for airtime by defendants except within the last year.

63. Plaintiffs had no knowledge of the acts or practices of said defendants in overcharging for airtime except within the last year, since it would have been virtually impossible for the plaintiffs to have discovered the fact of "overcharging" by the defendants by simply reviewing their telephone bills.

**WHEREFORE**, Plaintiffs pray against all Defendants, and each of them, as follows:

(a) For a permanent injunction enjoining said Defendants, and each of them, their agents, servants, and employees, and all persons acting under, in concert with or for them directly or

indirectly, or in any manner, for or in any way engaging in any of the unfair business acts or practices enumerated herein;

(b) For restitution of all amounts overpaid by Plaintiffs and other members of the general public for cellular service and/or PCS, as a result of the aforesaid unfair business act or practice;

(c) For interest from and after the date of service of this Complaint at the legal rate;

(d) For the appointment of a receiver to receive all sums paid by way of restitution;

(e) For payments of Plaintiffs' reasonable attorneys' fees;

(f) For costs of suit herein incurred; and

(g) For such other and further relief as the Court may deem proper.

## SIXTH CAUSE OF ACTION

**(Against all "Airtouch Defendants" Except in the LASMSA for Restitution and Injunctive Relief for Discriminatory Billing in how "Incomplete Calls are Treated for Billing the Time the Call Remains Unanswered as an Unlawful Business Practice Under Business and Professions Code Section 17200)**

64. Plaintiffs incorporate herein by reference, as though fully set forth herein, paragraphs 1 through 39, inclusive, of this complaint.

65. For the Airtouch Defendants, chargeable time for calls originated by a subscriber's mobile telephone begins when a connection is established with the carrier's facilities and ends when the mobile telephone disconnects. In other words, time is measured from when the customer presses the "send" button until they press the "end" button on their mobile telephone. The Airtouch Defendants' practice of charging from "send" to "end" for

outgoing calls results in customers being charged for airtime which includes the time the telephone rings on a call that is answered. However, except for their Los Angeles market, if the telephone call is not answered, it is "incomplete", and the Airtouch defendants do not charge for the airtime during the time the telephone rings and is unanswered. This results in discrimination, by all the Defendant Airtouch carriers, except those in the L.A. market, between callers who make a successful connection and are charged for that telephone ringing airtime and callers who are unsuccessful in making a connection and are not charged for the time the telephone rings.

66. These Airtouch defendants have engaged in this particular discriminatory billing practice since on or about January, 1987 through the present and continue to do so. Airtouch subscribers have been discriminated against and continue to be discriminated against in this manner by Airtouch's said practice. The practice of the said Airtouch Defendant carriers in discriminating in the charging of subscribers for nonconversation time is a violation of California Public Utilities code Section 453, which prohibits such discrimination in the billing of public utility services. therefore, the practice of said "Airtouch" Defendant carriers in the discrimination in how such time is charged is, has been and continues to be an unlawful business practice in violation of Business and Professions Code Section 17200, et seq.

67. All of the defendants represented to their respective subscribers that they were being properly charged for said subscribers' use of airtime by presenting said subscribers a

monthly bill describing airtime usage and the amount of money being charged for said airtime usage. The defendants concealed from their subscribers the fact that they were being overcharged for airtime as set forth hereinabove. Plaintiffs had no knowledge of said overcharge for airtime by defendants except within the last year.

68. Plaintiffs had no knowledge of the acts or practices of said defendants in overcharging for airtime except within the last year, since it would have been virtually impossible for the plaintiffs to have discovered the fact of "overcharging" by the defendants by simply reviewing their telephone bills.

**WHEREFORE**, Plaintiffs pray against all Defendants, and each of them, as follows:

(a) For a permanent injunction enjoining said Defendants, and each of them, their agents, servants, and employees, and all persons acting under, in concert with or for them directly or indirectly, or in any manner, for or in any way engaging in any of the unlawful or unfair business acts or practices enumerated herein;

(b) For restitution of all amounts overpaid by Plaintiffs and other members of the general public for cellular service and/or PCS as a result of the aforesaid unlawful business act or practice;

(c) For interest from and after the date of service of this Complaint at the legal rate;

(d) For the appointment of a receiver to receive all sums paid by way of restitution;

(e) For payments of Plaintiffs' reasonable attorneys' fees;

(f) For costs of suit herein incurred; and

(g) For such other and further relief as the Court may deem proper.

**SEVENTH CAUSE OF ACTION**

**(Against "Airtouch Defendants" and L.A. Cellular for Restitution and Injunctive Relief for Overcharging Customers in the LASMSA for "Incomplete Calls" as an Unlawful Business Practice Under Business and Professions Code Section 17200)**

69. Plaintiffs incorporate herein by reference, as though fully set forth herein, paragraphs 1 through 39, inclusive, of this complaint.

70. In or about January, 1987, the "Airtouch" Defendants in the LASMSA and L.A. Cellular filed tariffs with the California Public Utilities commission for the LASMSA to charge one-half of the normal usage rate for "incomplete calls", that is, calls that are unanswered or receive a busy signal for all subscribers including those on "bucket plans", which tariffs were in effect until on or about August 19, 1995. In violation of their respective tariffs filed with the Public Utilities Commission (hereinafter the "PUC"), the Airtouch Defendants and L.A. Cellular both incorrectly charged for incomplete calls to their subscribers on "bucket plans". the tariffs filed by the Airtouch Defendants and L.a. Cellular with the PUC set forth the charges that the carriers charged until on or about August 31, 1995. Subscribers to airtime plans that included in their monthly charge a package of minutes ("bucket plans"), including Plaintiff Gordon, were charged a full minute for "incomplete calls" contrary to the tariffs filed with the PUC and effective until on or about August 31, 1995 which required such subscribers to be charged only for

one-half of one minute for such "incomplete calls". These Airtouch Defendants and L.A. Cellular violated Public Utilities Code Section 2886(b), which permits cellular carriers to charge only up to 50% of their normal charges for incomplete calls by charging subscribers, including Plaintiff Gordon, a whole minute for all incomplete calls.

71. Furthermore, in each such instance, the Defendant carriers have failed to and continue to fail to disclose to the subscribers, in any manner reasonably calculated to give actual notice to the subscriber, of the practice and the additional amount of the charges directly attributable to the overcharging for any incomplete calls. Each such instance of charging one whole minute for any incomplete call was and continues to be an unlawful act in violation of Business and Professions Code Section 17200. The pattern of charging subscribers one whole minute for any incomplete call was and continues to be an unlawful business practice in violation of Business and Professions Code Section 17200.

72. All of the defendants represented to their respective subscribers that they were being properly charged for said subscribers' use of airtime by presenting said subscribers a monthly bill describing airtime usage and the amount of money being charged for said airtime usage. The defendants concealed from their subscribers the fact that they were being overcharged for airtime as set forth hereinabove. Plaintiffs had no knowledge of said overcharge for airtime by defendants except within the last year.

73. Plaintiffs had no knowledge of the acts or practices of

1 said defendants in overcharging for airtime except within the last
2 year, since it would have been virtually impossible for the
3 plaintiffs to have discovered the fact of "overcharging" by the
4 defendants by simply reviewing their telephone bills.
5 **WHEREFORE**, Plaintiffs pray against all Defendants, and each
6 of them, as follows:
7 (a) For a permanent injunction enjoining said Defendants,
8 and each of them, their agents, servants, and employees, and all
9 persons acting under, in concert with or for them directly or
10 indirectly, or in any manner, for or in any way engaging in any of
11 the unlawful business acts or practices enumerated herein;
12 (b) For restitution of all amounts overpaid by Plaintiffs
13 and other members of the general public for cellular service
14 and/or PCS, as a result of the aforesaid unlawful business act or
15 practice;
16 (c) For interest from and after the date of service of this
17 Complaint at the legal rate;
18 (d) For the appointment of a receiver to receive all sums
19 paid by way of restitution;
20 (e) For payments of Plaintiffs' reasonable attorneys' fees;
21 (f) For costs of suit herein incurred; and
22 (g) For such other and further relief as the Court may deem
23 proper.
24
25 **EIGHTH CAUSE OF ACTION**
26 **(Against all Defendants for Restitution and Injunctive Relief for Charging for "Lag Time" as an Unlawful Business Practice**
27 **Under Business and Professions Code Section 17200)**
28 74. Plaintiffs incorporate herein by reference, as though
fully set forth herein, paragraphs 1 through 39, inclusive, of

this complaint.

75. Subscribers for cellular and PCS, including Plaintiffs, are charged for "lag time" on calls so that a call which terminates less than 1 full minute continues to be charged into the next minute due to software/hardware issues at the carrier's facilities. Callers are unable to identify this practice and/or system problem unless they make an addition call immediately after disconnecting the first call and subsequently receive a bill for overlapping calls. Defendants and each of them were aware that software and hardware issues result in customers being charged for "lag time". Notwithstanding this fact, the Defendants have and continue to conceal these issues from their customers, including Plaintiffs, and have continued the practice of charging them for "lag time". Defendants have engaged in this practice from on or about January of 1987. Each instance of each of the Defendant carrier's billing of such "lagtime" as part of a customer's airtime usage bill together with collection thereof has been and continues to be an intentional and unlawful taking of property belonging to the subscribers with an intention to permanently deprive the billed customer of said property, in violation of California Penal Code Section 484. This practice of knowingly overcharging customers is an unlawful business practice. Each instance of overcharging for "lag time" is an unlawful act in violation of Business and Professions Code Section 17200, et seq. The practice of knowingly overcharging customers for "lag time" is an unlawful business practice in violation of Business and Professions Code Section 17200, et seq. Each such act has resulted and continues to result in subscribers, including

plaintiffs, being overcharged for service.

76. All of the defendants represented to their respective subscribers that they were being properly charged for said subscribers' use of airtime by presenting said subscribers a monthly bill describing airtime usage and the amount of money being charged for said airtime usage. The defendants concealed from their subscribers the fact that they were being overcharged for airtime as set forth hereinabove. Plaintiffs had no knowledge of said overcharge for airtime by defendants except within the last year.

77. Plaintiffs had no knowledge of the acts or practices of said defendants in overcharging for airtime except within the last year, since it would have been virtually impossible for the plaintiffs to have discovered the fact of "overcharging" by the defendants by simply reviewing their telephone bills.

**WHEREFORE**, Plaintiffs pray against all Defendants, and each of them, as follows:

(a) For a permanent injunction enjoining said Defendants, and each of them, their agents, servants, and employees, and all persons acting under, in concert with or for them directly or indirectly, or in any manner, for or in any way engaging in any of the unlawful business acts or practices enumerated herein;

(b) For restitution of all amounts overpaid by Plaintiffs and other members of the general public for cellular service and/or PCS, as a result of the aforesaid unlawful business act or practice;

(c) For interest from and after the date of service of this Complaint at the legal rate;

(d) For the appointment of a receiver to receive all sums paid by way of restitution;

(e) For payments of Plaintiffs' reasonable attorneys' fees;

(f) For costs of suit herein incurred; and

(g) For such other and further relief as the Court may deem proper.

**NINTH CAUSE OF ACTION**

**(Against all Defendants for Restitution and Injunctive Relief for Charging for "Lag Time" as an Unfair Business Practice Under Business and Professions Code Section 17200)**

78. Plaintiffs incorporate herein by reference, as though fully set forth herein, paragraphs 1 through 39, inclusive, of this complaint.

79. Subscribers for cellular and PCS, including Plaintiffs, are charged for "lag time" on calls so that a call which terminates after less than 1 full minute continues to be charged into the next minute due to software/hardware issues at the carrier's facilities. Defendants and each of them were aware that said software and hardware issues result in customers being overcharged for "lag time". Notwithstanding this fact, the Defendants have concealed and continue to conceal these billing issues from their customers and have continued the practice of overcharging them for "lag time".

80. Defendants have engaged in this practice from on or about January of 1987. This practice of knowingly overcharging customers is an unfair business practice. Each instance of overcharging for lag time is an unfair act in violation of Business and Professions Code Section 17200, et seq. The practice of knowingly overcharging customers for lag time is an unfair

business practice in violation of Business and Professions Code Section 17200, at seq. Each such act has resulted in and continues to result in subscribers, including Plaintiffs, being overcharged for service.

81. All of the defendants represented to their respective subscribers that they were being properly charged for said subscribers' use of airtime by presenting said subscribers a monthly bill describing airtime usage and the amount of money being charged for said airtime usage. The defendants concealed from their subscribers the fact that they were being overcharged for airtime as set forth hereinabove. Plaintiffs had no knowledge of said overcharge for airtime by defendants except within the last year.

82. Plaintiffs had no knowledge of the acts or practices of said defendants in overcharging for airtime except within the last year, since it would have been virtually impossible for the plaintiffs to have discovered the fact of "overcharging" by the defendants by simply reviewing their telephone bills.

WHEREFORE, Plaintiffs pray against all Defendants, and each of them, as follows:

(a) For a permanent injunction enjoining said Defendants, and each of them, their agents, servants, and employees, and all persons acting under, in concert with or for them directly or indirectly, or in any manner, for or in any way engaging in any of the unfair business acts or practices enumerated herein;

(b) For restitution of all amounts overpaid by Plaintiffs and other members of the general public for cellular service and/or PCS, as a result of the aforesaid unfair business act or

practice;

(c) For interest from and after the date of service of this Complaint at the legal rate;

(d) For the appointment of a receiver to receive all sums paid by way of restitution;

(e) For payments of Plaintiffs' reasonable attorneys' fees;

(f) For costs of suit herein incurred; and

(g) For such other and further relief as the Court may deem proper.

DATED: July 27, 1998

FRANKLIN & FRANKLIN

By: _____
J. DAVID FRANKLIN
Attorneys for Plaintiffs

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IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR LEE COUNTY, FLORIDA

CIVIL ACTION

RECEIVED
JUL 15 1998
Laura J. Coleman

CYNTHIA L. COY, On Her Behalf
And On Behalf Of All Others
Similarly Situated,

Plaintiff,

vs.

GTE WIRELESS INCORPORATED,

Defendants.

Case No.:
98-4987CA
L6

FILED LEE CO. FLORIDA
CLERK OF COURTS
98 JUL -1 PM 4:46
BY D.C.

## PLAINTIFF'S CLASS ACTION PETITION AND DEMAND FOR JURY TRIAL

Plaintiff, CYNTHIA L. COY, on and behalf of herself and all others similarly situated, for their Class Action Petition states as follows:

## NATURE OF ACTION

1. In order to induce cellular customers to use its cellular service, Defendant, GTE WIRELESS INCORPORATED, uses deceptive, fraudulent and/or misleading contracts. These practices are designed to conceal the billing practices of imposing "roaming" fees and charging for incoming calls when the "send" button is not used. These billing practices result in millions of dollars of overcharges by GTE WIRELESS INCORPORATED.

2. This class action is brought on behalf of all cellular subscribers of GTE WIRELESS INCOPORATED cellular services throughout the United States.

3. Plaintiff seeks, on behalf of herself and all others similarly situated, injunctive and monetary relief, including: (a) an order enjoining defendant from engaging in the deceptive practices complained of herein; (b) restitution; and (c) compensatory damages in the amount of the difference between the amounts charged by GTE WIRELESS INCORPORATED for cellular service and the amount Plaintiff and class members would have been charged for actual usage; and (d) rescission or reformation. The deceptive practices and contract breaches complained of herein are of a universal nature and equally affect all members of the plaintiff class.

## THE PARTIES

4. Plaintiff, CYNTHIA L. COY, is a citizen of Lee County, Florida, and is a GTE WIRELESS INCORPORATED subscriber for cellular services.

5. GTE WIRELESS INCORPORATED provides cellular communication goods and services to subscribers in the state of Florida and has agents and representatives conducting business on a substantial and regular basis in several states, including the State of Florida.

6. GTE WIRELESS INCORPORATED is a corporation licensed to do business in the State of Florida and was doing business in Lee County, Florida.

7. Plaintiff at all times relevant herein was a subscriber of GTE WIRELESS INCORPORATED for cellular services and was damaged by the deceptive, misleading and fraudulent practices alleged herein.

## CLASS ACTION ALLEGATIONS

8. Plaintiff brings this action as a class action against GTE WIRELESS INCORPORATED, under the Florida Rules of Civil Procedure, individually and on behalf of a class consisting of all persons and entities located throughout the United States who have been billed for incoming calls when the "send" button was not used and have paid "roaming" fees to GTE WIRELESS INCORPORATED.

9. Plaintiff is a member of the class and she will fairly and adequately assert and protect the interests of the class. The interest of the Plaintiff is coincident with, and not antagonistic to, those of other members of the class.

10. The members of the class are so numerous that joinder of all members is impracticable. Plaintiff believes that there are thousands of members of the class whose identities can easily be ascertained by the records and files of GTE WIRELESS INCORPORATED. Plaintiff does not anticipate any difficulties in the management of the action as a class action.

11. Common questions of law and fact predominate over any questions affecting only individual members of the class. Common questions include, inter alia, the following:

a. Whether GTE WIRELESS INCORPORATED charges for calls received by the cellular phones of the Plaintiff and the members of the class when the "send" button is not used and imposes "roaming" fees;

b. Whether contractual documents and other materials used by GTE WIRELESS INCORPORATED misrepresented or omitted material facts;

c. Whether GTE WIRELESS INCORPORATED acted willfully, recklessly, or with gross negligence in imposing "roaming" fees and charging for incoming calls when the "send" button is not used as alleged herein;

d. Whether GTE WIRELESS INCORPORATED violated various Federal consumer fraud acts; and

e. The nature and extent of damages and other remedies to which the conduct of GTE WIRELESS INCORPORATED entitles Plaintiff and Class members.

12. GTE WIRELESS INCORPORATED has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive and declaratory relief with respect to the class as a whole.

13. This is an action for damages that exceeds Fifteen Thousand and 00/100 ($15,000.00) Dollars.

14. A class action is superior to other available methods for the fair and efficient prosecution of this action. The certification of a class would allow litigation of claims that, in view of the expense of the litigation, may be insufficient in amount to support individual actions.

15. Accordingly, Plaintiff brings this action on behalf of himself and all members of the sub-classes defined as follows:

a. All persons and entities located in the United States who have been charged for incoming calls when the "send" button was not used; and

b. All persons and entities located in the United States who have been charged "roaming" fees.

The above sub-class is collectively referred hereinafter to as "class members."

## COMMON FACTUAL ALLEGATIONS

16. Cellular phone service employs a technology of mobile radio communication-based portable cellular phones and a computer-coordinated network of radio transceivers located in cell sites throughout a given coverage area. Each cell site contains a radio transmitter, which serves a portion of the total coverage area. When a subscriber places a call from his or her cellular phone, the system locates the cellular phone, establishes a connection through the nearest cell site to the telephone network and transfers that connection to other cell sites as the cellular phone moves through the area served by the system.

17. GTE WIRELESS INCORPORATED provides cellular service in many markets throughout the United States.

18. Paragraph 28 of the Customer Service Agreement (hereinafter referred to as the "Agreement") which GTE WIRELESS INCORPORATED entered into with Plaintiff states that it is the "Entire Agreement".

19. Under the Agreement, the Service Billing is defined in Section 7 as follows:

> 7. Unless otherwise specified, cellular telephone calls are billed in one minute increments, and fractions of minutes are rounded up to the next full minute. If Customer has selected a rate

plan with "Included Minutes," those Included Minutes will either be applied to the home coverage airtime used in the earliest part of each monthly billing cycle, or applied within a specific rate period, at Carrier's discretion. Any unused "Included Minutes" remaining at the end of any monthly Billing Period will neither be carried forward nor credited against the next month's Billing Period. Calls are billed from the time Customer presses the "Send" key on the cellular telephone, whether Customer is placing the call in the Customer" home coverage area or roaming. Customer will not be charged for unanswered calls, unless Customer places a cellular telephone call to a number that rings unanswered or signals busy for sixty (60) seconds, regardless of whether a connection is made. Customer may be charged for busy or unanswered calls when roaming on another carrier's network.

20. Under the Agreement, Defendant GTE WIRELESS INCORPORATED is not allowed to charge the Plaintiff or the class members for time in connection with calls received by the subscriber's cellular phone when the "send" button is not pushed.

21. Under the Agreement, Defendant GTE WIRELESS INCORPORATED is not allowed to charge the Plaintiff or the class members "roaming" fees.

22. As a result of this deceptive, fraudulent and misleading practice, GTE WIRELESS INCORPORATED has received millions of dollars in unlawful overcharges paid by Plaintiff and Class members.

## COUNT I

### (Breach of Contract)

For her first cause of action against GTE WIRELESS INCORPORATED, Plaintiff states:

23. Plaintiff realleges each allegation contained in paragraphs 1-22 above as if fully set forth herein.

24. Defendant has contracted with Plaintiff and Class members for cellular services.

25. Paragraph 28 of the Agreement states:

> 28. **Entire Agreement:** The terms and conditions set forth in this agreement represent the entire agreement between the parties with respect to service, and this agreement supersedes any prior or contemporaneous representations of sales representatives or other personnel of carrier whether oral or written. No change to the terms or conditions of this agreement has been authorized, and