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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

MARTIN BLAQMOOR, individually and
on behalf of all others similarly situated,

Plaintiff,

v.

TRACFONE WIRELESS, INC.

Defendant.

CV 13 5295

Case No.

CLASS ACTION COMPLAINT

JURY TRIAL DEMANDED

Plaintiff, individually and on behalf of all others similarly situated, alleges on personal knowledge, investigation of his counsel, and on information and belief as follows:

NATURE OF THE ACTION

1. This proposed class action alleges that TracFone Wireless, Inc. ("TracFone" or "Defendant") falsely advertises Simple Mobile cellular phone plans as providing "unlimited" data service, when in fact the Simple Mobile subscribers in the class have had their supposed "unlimited" data service terminated or "throttled."

1 2. Defendant prominently advertises that Simple Mobile wireless plans include
2 “unlimited” data, but fails to disclose that Defendant terminates or “throttles” (*i.e.* reduces the
3 speed of) subscribers’ access to data. On information and belief, Defendant terminates or
4 throttles data access when subscribers near or exceed Defendant’s internally established, but
5 undisclosed, data usage limits, or when Defendant’s wireless network partner, T-Mobile, directs
6 Defendant to do so even where subscribers’ usage is below Defendant’s internal, undisclosed
7 limits in order to limit the strain on T-Mobile’s network.

8 3. In response to complaints from the members of the proposed Class, Defendant
9 routinely blames customers for “misusing” Simple Mobile cellular data service, but fails to
10 disclose how customers allegedly misused Simple Mobile cellular data service or explain the
11 reasons that Defendant has terminated or throttled customers’ data access.

12 4. After Defendant terminates or throttles data service to Simple Mobile’s
13 “unlimited” data plan customers, Defendant engages in the practice of failing to restore data
14 access or regular data speeds unless and until subscribers’ current prepaid data plans expire *and*
15 subscribers purchase new Simple Mobile service plans.

16 5. As a result of Defendant’s material misrepresentations, bad faith, and unfair and
17 unlawful conduct, Plaintiff and Class members have suffered damages, including, without
18 limitation, payment for Simple Mobile “unlimited” data service plans or Simple Mobile SIM
19 cards.

20 6. On behalf of themselves and the Class, Plaintiff brings this lawsuit against
21 Defendant for breach of contract; breach of the covenant of good faith and fair dealing;
22 unconscionability; unjust enrichment; and violation of California’s Unfair Competition Law and
23 California’s Consumer Legal Remedies Act.

24 PARTIES

25 7. Plaintiff Martin Blaqmoor is an individual residing in Oakland, California.

26 8. Defendant TracFone Wireless, Inc., is a Delaware corporation and is
27 headquartered in Miami, Florida. TracFone is the fifth largest wireless carrier in the United
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1 States, with over 23 million subscribers as of July 2013. Simple Mobile, LLC was founded in
 2 November 2009 in Irvine, California. Simple Mobile is a prepaid wireless carrier which
 3 contracts with T-Mobile to provide wireless service on the T-Mobile network. TracFone
 4 purchased Simple Mobile, LLC on May 10, 2012. Based on information and belief, TracFone's
 5 Simple Mobile brand operations were headquartered in California through mid-2013, and Simple
 6 Mobile continues to have operations in California.

7 JURISDICTION AND VENUE

8 9. The Court has subject matter jurisdiction over this matter pursuant to 28 U.S.C.
 9 § 1332(d)(2) as the amount in controversy exceeds \$5,000,000 among the proposed nationwide
 10 Class, believed to number at least in the tens of thousands, who are entitled to damages in the
 11 amount of the purchase price of Simple Mobile "unlimited" service plans and SIM cards.

12 10. This Court has personal jurisdiction over Defendant because Defendant is
 13 authorized to do business and regularly conduct business in California, and Defendant has
 14 marketed, sold, and issued Simple Mobile service plans and SIM cards in California. Defendant
 15 has conducted business in California with the Plaintiff. Defendant therefore has sufficient
 16 minimum contacts with this state to render the exercise of jurisdiction by this Court permissible.

17 11. Venue is proper under 28 U.S.C. §§ 1391(a) and (b) because a substantial part of
 18 the events or omissions giving rise to Plaintiff's claims occurred in this District.

19 COMMON FACTUAL ALLEGATIONS

20 A. Defendant Falsely Advertises Simple Mobile Wireless Phone Plans as 21 Providing "Unlimited" Data.

22 12. Simple Mobile, LLC was founded in November 2009 in Irvine, California.
 23 Simple Mobile sells Simple Mobile branded prepaid SIM cards and wireless service plans.

24 13. Simple Mobile holds an agreement with T-Mobile USA, Inc. to use its network to
 25 provide wireless service.
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1 14. Defendant TracFone acquired Simple Mobile, LLC on May 10, 2012, and
2 converted Simple Mobile into a TracFone Wireless, Inc. brand.¹

3 15. Defendant markets and sells Simple Mobile branded prepaid wireless SIM cards
4 and service plans. Simple Mobile sells SIM cards to customers to enable them to sign up for
5 Simple Mobile's service plans with customers' existing unlocked T-Mobile compatible GSM
6 phones.

7 16. Simple Mobile SIM cards and plans can be purchased directly from Simple
8 Mobile online, or from retailers across the United States, both in-store and online, including
9 Walmart, BestBuy, and leading and independent mobile phone vendors, supermarkets and
10 drugstores.

11 17. Defendant advertises Simple Mobile's most popular plans as providing
12 "unlimited" data access.

13 18. Defendant introduced the first Simple Mobile "unlimited" data plan on June 11,
14 2010, for a price of \$60 per month.² On September 23, 2011, Defendant added a cheaper \$40
15 plan with advertised "unlimited" data access at 3G speeds, and promoted the \$60 unlimited plan
16 as now providing "4G high-speed" data access.³ On August 1, 2012, Defendant lowered the
17 price of the Simple Mobile "high-speed" unlimited data plan to \$50.⁴ On November 2, 2012,
18 Defendant advertised the \$40 unlimited 3G data plan as providing 4G speeds for the first 250
19 MB of data, after which the data speed would reduce to 3G speeds.⁵ On July 3, 2013, Defendant
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21 ¹ According to the Terms and Conditions on Simple Mobile's website, "Simple Mobile is a brand
22 of TracFone Wireless, Inc." See <http://www.simplemobile.com/wps/portal/home/h/about/terms-conditions/>

23 ² Humberto Saabedra, *Simple Mobile Realigns Plans, Adds Unlimited Data*, PHONENEWS.COM,
24 June 11, 2010 (available at <http://www.phonenews.com/simple-mobile-realigns-plans-adds-unlimited-data-11425/>)

25 ³ Todd Haselton, *Simple Mobile Intros All-You-Can-Eat Talk, Text and Web Plans Starting at \$40*, BGR.COM, September 23, 2011 (available at <http://bgr.com/2011/09/23/simple-mobile-intros-all-you-can-eat-talk-text-and-web-plans-starting-at-40/>)

26 ⁴ Evan Rodgers, *Simple Mobile's Prepaid High-Speed Unlimited Plan Drops to \$50, Speeds Rumored to Increase*, THEVERGE.COM, August 1, 2012 (available at
27 <http://www.theverge.com/2012/8/1/3212495/simple-mobile-prepaid-high-speed-unlimited-50>).

28 ⁵ Dennis Bournique, *Simple Mobile's \$40 Plan Now Includes 250MB of High Speed Data*, PREPAIDPHONENEWS.COM, November 2, 2012 (available at
<http://www.prepaidphonenews.com/2012/11/simple-mobiles-40-plan-now-includes-250.html>).

1 updated all of its “unlimited” data plans to include advertised 4G speeds up to specified data
2 limits, after which the data speed would purportedly reduce to 3G speeds: (1) the \$40 plan was
3 advertised with an allotment of 500 MB of data at 4G speeds; (2) the \$50 plan was advertised
4 with an allotment of 2.5 GB of data at 4G speeds; and (3) a new \$60 plan was introduced with
5 an allotment of 4 GB of data at 4G speeds.⁶ On August 23, 2013, Defendant again updated the
6 unlimited data plans, increasing the 4G data allotments for the \$40, \$50 and \$60 plans to 1GB, 3
7 GB and 5GB of data, respectively.⁷

8 19. Defendant’s advertising and packaging of Simple Mobile SIM cards and data
9 plans prominently feature the word “unlimited.” Defendant aggressively and consistently
10 promotes the supposed “unlimited” data plans in order to capture the burgeoning smartphone
11 market. Below are examples of Defendant’s marketing for the Simple Mobile “unlimited” plans:
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25 ⁶ Stephanie Lanier, *Simple Mobile Launches New Plans, Increases 4G Data Limits*,
26 ANDROIDGUYS.COM, July 3, 2013 (available at <http://www.androidguys.com/2013/07/03/simple-mobile-launches-new-plans-increases-4g-data-limits/>).

27 ⁷ *Simple Mobile Increasing High-Speed Data Allotment on All Monthly Plans*,
28 PREPAIDMOBILEPHONEREVIEWS.COM, August 23, 2013 (available at
<http://prepaidmobilephonereviews.com/simple-mobile-increasing-high-speed-data-allotment-on-all-monthly-plans/>).

NEW **UNLIMITED EVERYTHING**

SIMPLE Mobile

• Unlimited local, long distance & 411, voicemail, caller ID & call waiting
• Unlimited US & Global text (SMS)

NEW

• Unlimited local, long distance & 411, voicemail, caller ID & call waiting
• Unlimited US & Global text (SMS)
• Unlimited Mobile Web, iFC, Picture Messaging (MMS), Email & Social Networks

UNLIMITED EVERYTHING

• Unlimited local, long distance & 411, voicemail, caller ID & call waiting
• Unlimited US & Global text (SMS)
• Unlimited Mobile Web, iFC, Picture Messaging (MMS), Email & Social Networks

3G **24/7**

WORKS ON ALL DATA CAPABLE & SMART PHONES
For full terms and conditions visit mysimplemobile.com

THE UNLIMITED NATIONWIDE
TALK, INTERNATIONAL TEXT & DATA

SIMPLE Mobile

SIMPLE Mobile

\$40 **UNLIMITED TALK, TEXT WEB 4G/3G**

MORE FOR THE PEOPLE LESS FOR THE MAN.

\$40 **Unlimited Nationwide**
Talk, Worldwide Text & Web

THE SIM

\$40 **UNLIMITED NATIONWIDE TALK, TEXT & WEB 4G**

BEST DEAL

\$60 **UNLIMITED NATIONWIDE TALK, TEXT & HIGH SPEED WEB 4G**

BLACKBERRY® PLANS.

\$50 **UNLIMITED NATIONWIDE BLACKBERRY TALK, TEXT & WEB 3G**

BEST DEAL

\$60 **UNLIMITED NATIONWIDE BLACKBERRY TALK, TEXT & HIGH SPEED WEB 4G**

SIMPLE Mobile

THE GAME JUST CHANGED AGAIN.

SIMPLE'S DONE IT AGAIN. WE THINK 4G SHOULD BE AFFORDABLE TO EVERYONE SO WE'VE LOWERED THE COST OF OUR 4G HIGH SPEED PLAN TO JUST \$50 A MONTH. WHETHER IT'S THE LOW COST \$40 UNLIMITED PLAN WITH AN IMPROVED DATA EXPERIENCE OR THE NEW \$50 UNLIMITED HIGH SPEED PLAN, NOW THERE'S SOMETHING FOR EVERYONE. FOR LESS.

\$40 **UNLIMITED**

Unlimited Nationwide Talk, Worldwide Text & Web

• Browse the web, stream music & video, check email & social networks
• Run a your own smartphone
• \$3/day, 30-day trial, international long distance (first 100 minutes)
• 24/7 Mail, Caller ID, Call Waiting, Forward

\$50 **ALL NEW**

Unlimited Nationwide Talk, Worldwide Text & 4G High Speed Web

• Browse the web, stream music & video, check email & social networks
• Run a your own smartphone Blackberry
• \$5/day, 30-day trial, international long distance (first 100 minutes)
• 24/7 Mail, Caller ID, Call Waiting, Forward

BYOP

SIMPLE Mobile

4G High Speed Data.

UNLIMITED PLANS TALK, TEXT, INTL. TEXT & DATA

\$25 **15 DAYS UNLIMITED TALK AND TEXT**
Blackberry Not Compatible

\$40 **30 DAYS UNLIMITED 4G** **NEW**
GET THE FIRST 1GB AT 4G SPEED*

\$50 **30 DAYS UNLIMITED 4G**
GET THE FIRST 3GB AT 4G SPEED*

\$60 **30 DAYS UNLIMITED 4G** **DATA**
GET THE FIRST 5GB AT 4G SPEED*

4G

BLACKBERRY COMPATIBLE

20. Defendant's widespread marketing for Simple Mobile's "unlimited" data plans induced millions of new smartphone users to subscribe to the plans and buy Simple Mobile SIM cards.

21. Defendant's promise of "unlimited" data is material to consumers.

B. Defendant Regularly Terminates or Throttles "Unlimited" Subscribers' Access to Data.

22. To control network data usage and costs, Defendant implements monthly data usage limits, which Defendant fails to disclose to its Simple Mobile "unlimited" data plan subscribers.

23. Defendant throttles or terminates customers' data access, typically without any notice or warning, when those customers exceed Defendant's undisclosed data usage limits. Defendant actively conceals these limits from its Simple Mobile "unlimited" data customers.

24. Based on information and belief, Defendant adjusts the secret data usage limits to cut costs or to placate Defendant's wireless network partner, T-Mobile. According to customer reports, Simple Mobile's first purportedly "unlimited" monthly data plan, introduced on June 11, 2011, had a 1 GB secret data cap, after which Defendant terminated customers' data access altogether.⁸ Subscribers of Simple Mobile's \$40 unlimited 3G and \$60 unlimited 4G data plans, introduced on September 23, 2011, had their data throttled when they exceeded 2 GB of data usage and/or had their data terminated altogether after using 3 GB of data.⁹

25. Apparently recognizing that its prior "unlimited" advertising was deceptive, on August 23, 2013, Defendant revised the fine print in some of its advertisements to acknowledge, for the first time, that data would be throttled to "2G speeds and lower" after the respective 4G data allotment for each plan was used up, rather than to the previously claimed 3G speeds. The

⁸ *Simple Mobile Unlimited Data Plan is of Course Secretly Limited*, CONSUMERIST.COM, JULY 26, 2010 (available at <http://consumerist.com/2010/07/26/simple-mobile-unlimited-data-plan-is-of-course-secretly-limited/>).

⁹ Dennis Bournique, *Cheaper Plans, Faster Data Coming to Simple Mobile*, PREPAIDPHONENEWS.COM, July 30, 2012 (available at <http://www.prepaidphonenews.com/2012/07/cheaper-plans-faster-data-coming-to.html>); Dennis Bournique, *Simple Mobile Changes Plans, No Longer Claims to Offer Unlimited High Speed Data*, PREPAIDPHONENEWS.COM, July 8, 2013 (available at <http://www.prepaidphonenews.com/2013/07/simple-mobile-changes-plans-no-long.html>).

1 purported 2G speeds are so slow that they render customers' smartphones virtually unusable for
2 their intended purposes.¹⁰ But, Defendant continues to fail to disclose its data limits or its
3 practice of throttling or terminating customers' data in the Simple Mobile Terms and Conditions
4 of Service. Defendant also continues to fail to disclose to customers, in its advertisements or
5 elsewhere, that it will cut off customers' access to data altogether when undisclosed data limits
6 are exceeded.

7 26. When customers contact Simple Mobile to complain about their data being cut
8 off, Simple Mobile blames the customers for engaging in "unauthorized uses" set forth in the
9 Simple Mobile Terms and Conditions. But these Terms and Conditions are not reasonably
10 disclosed or agreed to by customers, and are also riddled with vague, confusing, contradictory,
11 and unconscionable provisions. Defendant fails to explain its data usage limits to customers or
12 the reasons why their data access was terminated or throttled.

13 27. Customers contacting Defendant about their data access being terminated or
14 throttled are often transferred to a "High Data Usage" recorded message, which recites to
15 customers that their data service may have been suspended "due to misuse of the services under
16 Simple Mobile's Terms and Conditions." The message tells customers that "we may limit,
17 suspend or terminate your service or agreement without notice for any reason." The message
18 does not state or refer to the existence of a data usage limit.

19 28. Even in the few instances when a customer is fortunate enough to speak to or
20 "chat" via the internet with a live customer service representative, Defendant refuses to provide a
21 clear answer as to why any particular customer's data access was terminated or throttled.

22 29. Defendant's refusal to explain under what circumstances Defendant will
23 terminate or throttle customers' data access makes the practice all the more unclear and
24 deceptive to consumers.

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27 ¹⁰ Dennis Bournique, *Simple Mobile Giving All Monthly Plans More Hi-Speed Data*,
28 PREPAIDPHONENEWS.COM, August 23, 2013 (available at
<http://www.prepaidphonenews.com/2013/08/simple-mobile-giving-all-monthly-plans.html>).

30. Upon information and belief, Defendant also terminates customers' data access at the behest of Defendant's wireless network partner, T-Mobile, when a particular cell tower is at or near data capacity, regardless of whether that customer's data usage has exceeded Defendant's secret data usage limits. Upon information and belief, T-Mobile is concerned that Simple Mobile customers' data usage on its network may negatively impact T-Mobile's ability to provide its own direct customers with service, and thus requires Defendant to restrict the data usage of Simple Mobile customers.

C. **Defendant Unfairly and Unlawfully Blames Customers for Purportedly Violating Never-Disclosed and Unconscionable "Terms and Conditions."**

31. When customers contact Defendant to complain about their data access having been restricted, Defendant typically tells customers that their "unlimited" data access has been terminated or throttled because they allegedly violated the Simple Mobile "Terms and Conditions" that Defendant purports to apply to Simple Mobile SIM cards and service plans. But these terms are never adequately disclosed to consumers and contradict Defendant's prominent and consistent advertisements that Simple Mobile plans are "no contract" plans.

32. Defendant does not require consumers who purchase Simple Mobile SIM cards or service plan cards to view the Terms and Conditions before making their purchase.

33. The Terms and Conditions are not referred to and are not available anywhere on websites of major Simple Mobile retailers such as Walmart.com, BestBuy.com, and Amazon.com. On simplemobile.com, the Terms and Conditions are hidden in tiny text in a link at the footer of the website's home page.

34. The Terms and Conditions are not provided with the Simple Mobile service plan cards purchased at any of the retail locations they are sold.

35. Defendant does not mention the Terms and Conditions when a customer purchases or activates a Simple Mobile service plan or SIM card over the telephone.

36. The Terms and Conditions claim that, by purchasing or activating Simple Mobile SIM cards or data plans, customers agree to them, despite that fact that consumers purchase their SIM cards or data plans *prior* to even having an opportunity to view the Terms and Conditions.

1 Moreover, Simple Mobile and its retailers do not allow returns of service plans or SIM cards,
2 such that a consumer who reads and decides to reject the Terms and Conditions is unable to do
3 so.

4 **i. Terms and Conditions Prior to June 10, 2013**

5 37. Defendant, via its customer service agents and the “High Data Usage” recorded
6 message, points to the Terms and Conditions as the reason for terminating or throttling
7 customers’ data. Yet Defendant failed to state specific data usage caps or limits for any of the
8 “unlimited” plans in the Simple Mobile Terms and Conditions dated prior to June 10, 2013.

9 38. Prior to June 10, 2013, Section 16 of the Terms and Conditions discussed Simple
10 Mobile’s discretion to terminate or limit data access “for any reason.” Defendant’s “High Data
11 Usage” recorded message explicitly justified suspension of customer data access by referring to
12 Section 16’s statement that Simple Mobile “MAY LIMIT, SUSPEND OR TERMINATE YOUR
13 SERVICE OR AGREEMENT WITHOUT NOTICE FOR ANY REASON.”

14 39. Section 25 provided that Simple Mobile may “suspend, terminate, or restrict your
15 data session, Plan, or service if you use your Data Plan in a manner that interferes with other
16 customers’ service, our ability to allocate network capacity among customers, or that otherwise
17 may degrade service quality for other customers.” Section 24 stated that “Simple Mobile will
18 not provide refunds or other compensation for unused airtime balances” which may remain upon
19 Simple Mobile’s termination or restriction of customer data. Section 25 also provided that
20 “tethering your device to a personal computer or other hardware, [is] not permitted.”

21 **ii. Terms and Conditions Since June 10, 2013**

22 40. On June 10, 2013, over a year after Defendant acquired Simple Mobile, LLC,
23 Defendant posted entirely new Terms and Conditions on the Simple Mobile website, which
24 remain unchanged to the present day.

25 41. The Terms and Conditions are illusory in that they purport to allow Defendant to
26 change any of the terms at any time without notice to or consent from Simple Mobile customers:
27 “These Terms and Conditions of Service are subject to change at any time without notice. Any
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1 changes to these Terms and Conditions of Service are effective and binding upon you when
2 posted on our websites at www.mySimpleMobile.com.”

3 42. Section 3 ambiguously prohibits “access to the Internet, intranets, or other data
4 networks except as the device’s native applications and capabilities permit.” This poorly written
5 provision could arguably be read to encompass the installation and use of any smartphone
6 application not preinstalled on the phone, but such a reading would be extreme and contrary to
7 consumers’ reasonable expectations. Section 3 also prohibits “tethering” or “Hotspot”
8 applications (connecting one’s phone to a computer via cable or Wi-Fi to share Simple Mobile’s
9 data connection), and forbids “uploading, downloading, or streaming uninterrupted continuous
10 video.”

11 43. Despite Section 3 purporting to prohibit at least some types of video streaming,
12 Defendant publicly promotes and encourages consumers to use their data plans to download and
13 stream videos and music.

14 44. Section 3 also discusses Simple Mobile’s discretion to terminate or throttle data
15 service “in order to protect the Carrier’s network from harm due to any cause including, without
16 limitation, the excessive and/or unauthorized use of Simple Mobile Service” or where Simple
17 Mobile believes a customer “is using the Simple Mobile Unlimited Plan Service in an
18 unauthorized manner or whose usage, in Simple Mobile’s sole opinion, adversely impacts the
19 Carrier’s network or customer service levels.” Despite seemingly putting some limits on its
20 discretion in the above provisions, Section 3 then purports to allow Simple Mobile to terminate
21 data access to anyone, at any time, with no notice, and for any reason or no reason at all:
22 “Simple Mobile may modify or cancel any Service or take corrective action at any time without
23 prior notice and for any reason, including but not limited to your violation of this agreement.”

24 45. Section 2 states that any “unused service at the time of termination will not be
25 refunded,” and Section 6 states that if “any Data Services which you have purchased are
26 modified, interrupted, discontinued or canceled, Simple Mobile will NOT refund any remaining
27 or unused services.”
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46. To this day, the Terms and Conditions confusingly describe, in Section 3, the unlimited plans that were in effect on June 10, 2013, even though Defendant replaced these two plans with three different unlimited plans on July 3, 2013.

D. Defendant Refuses To Restore Subscribers' Data, if Ever, Unless and Until Their Current Data Plans Expire and They Purchase New Data Plans.

47. Once Defendant terminates or throttles a customer's data access, Defendant will not restore that customer's data service until the customer's current data plan expires *and* the customer purchases a new data plan. Even after waiting until their plan has expired and paying for a new data plan, some customers report that Defendant restricts them from future use of 4G high-speed data plans.¹¹

E. Defendant's Practices are Unfair and Likely to Mislead Consumers.

48. Reasonable consumers are likely to be misled by Defendant's promise of "unlimited" data, particularly in combination with Defendant's advertisements that encourage customers to use Simple Mobile data plans in typical ways such as browsing the internet, streaming or downloading music and videos, running apps, and using GPS navigation.

49. Once customers discover the truth about Defendant's "unlimited" plans, customers are outraged by Defendant's lies and bad faith practices. Angry customers have flooded Simple Mobile's Facebook page, turning it into a virtual complaint board. Simple Mobile's official online community forum, c.mysimplemobile.com, is also full of complaints from frustrated customers. Many more customers have posted complaints on websites such as Consumeraffairs.com, Boycottowl.com, Howardforums.com, Pissedconsumer.com, Ripoffreport.com, Yelp.com, Amazon.com, and YouTube.com. The following are examples of typical complaints:

"I was suckered into a new mobile phone plan with a new company called Simple Mobile. They are a T-mobile MVNO (essentially a reseller) claiming to offer UNLIMITED talk, text, and data for \$60/mo. The reality is... Their \$60 plan is NOT unlimited. When you

¹¹ See customer complaint at http://www.amazon.com/review/RXE4C0AJOGKRO/ref=cm_cr_pr_cmt?ie=UTF8&ASIN=B004003HAG&linkCode=&nodeID=&tag=#wasThisHelpful (posted July 10, 2011)

1 hit 1000MB [1 GB] in one month your data service is simply terminated without
2 warning.”¹²

3 “DO NOT be suckered in by the advertised "unlimited data" \$60 plan. If you exceed 2GB
4 of usage, they throttle your data speed to a trickle and then cut you off completely. And
5 when you call customer no-service to complain, they give you a Simple Mobile Corporate
in Irvine, CA to call, which is a voicemail that will never call you back.”¹³

6 “Do not think for a minute that they have an unlimited plan - read all of the reviews. They
7 will turn off your data without warning... They LIE. When I called customer service, they
8 kept saying they were transferring me to a "higher department" that could help me, but it
was a recording saying that I had exceeded their terms and conditions, then hangs up
without the option to speak to anyone.”¹⁴

9 “I signed up for the \$50 plan and they cut me off not even close to 1gb of data. Customer
10 service is a big fat joke. Don't even try to complain, since they don't really care much.
...DO NOT WASTE YOUR MONEY ON THIS SERVICE!”¹⁵

11 “Their customer service is the worst... Simple mobile [sells] you on the unlimited data,
12 talk, and text but they will cut you off of data if you exceed their limit which they don't
13 tell you up front. Pretty much false advertising their service/product. Can't wait for the
class action lawsuit to happen. Sign me up.”¹⁶

14 “Simple mobile is a lie.... there is no unlimited data with them.... they say that your 4g
15 internet is truly unlimited, but they only give you a set amount of data... [T]hey will shut
16 off your internet connection without any warning at all and when you call for any
17 information as to why they will say that you misused your internet, put you on hold and
hang up on you when you ask to speak to a supervisor..... do your self a great favor... go
to anybody except simple mobile.”¹⁷

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21 ¹² <http://consumerist.com/2010/07/26/simple-mobile-unlimited-data-plan-is-of-course-secretly-limited/> (posted July 26, 2010)

22 ¹³ http://www.amazon.com/review/RXE4C0AJOGKRO/ref=cm_cr_pr_cmt?ie=UTF8&ASIN=B004003HAG&linkCode=&nodeID=&tag=#wasThisHelpful (posted July 7, 2011)

23 ¹⁴ http://www.amazon.com/review/R2UD262EFF54UF/ref=cm_cr_pr_perm?ie=UTF8&ASIN=B003JVC12&linkCode=&nodeID=&tag= (posted March 28, 2013)

24 ¹⁵ http://www.amazon.com/review/ROH8Y4QLJFSN9/ref=cm_cr_pr_perm?ie=UTF8&ASIN=B004003HAG&linkCode=&nodeID=&tag= (posted April 28, 2013)

25 ¹⁶ <http://c.mysimplemobile.com/t5/Community-News-Announcements/Service/m-p/4551/highlight/true#M90> (posted April 2, 2013)

26 ¹⁷ <http://www.yelp.com/biz/simple-mobile-irvine#hrid:yeAfTsvGVl3usdgJt5gXSQ> (posted March 19, 2013)

51. Defendant's misrepresentations and omissions regarding Defendant's "unlimited" data plans are material to reasonable consumers.

53. Defendant's misrepresentations and practices injured and caused Plaintiff and Class members to lose money or property in that they purchased Simple Mobile SIM cards and "unlimited" data plans, but Defendant terminated or throttled the promised "unlimited" data rendering Plaintiff's and Class members' smartphones essentially useless for their intended purposes.

Plaintiff Martin Blagmoor

55. In July 2013, Mr. Blaqmoor purchased an unlocked LG P930 smartphone. While walking in downtown Oakland, he saw an advertisement in the window of a Simple Mobile dealer for “Unlimited 4G” data plans. Mr. Blaqmoor entered the store and spoke to a salesperson, who told Mr. Blaqmoor that the \$60 Simple Mobile monthly plan included unlimited 4G data.

56. The next day, on July 19, 2013, Mr. Blaqmoor returned to the store and, relying on Defendant's advertisements and the Simple Mobile dealer's representations, purchased a

1 Simple Mobile SIM card for approximately \$20, along with the \$60 unlimited 30-day service
2 plan. The dealer installed the SIM card in Mr. Blaqmoor's smartphone and activated his service.

3 57. Defendant did not adequately disclose Simple Mobile's Terms and Conditions
4 during these purchases and activation, and Mr. Blaqmoor was at all times unaware of any such
5 terms. Moreover, at the time of Mr. Blaqmoor's purchase on July 19, 2013, continuing to the
6 present day, the Simple Mobile Terms and Conditions failed to disclose the existence of any data
7 usage limits or throttling thresholds regarding the \$60 unlimited 30-day service plan he
8 purchased.

9 58. Mr. Blaqmoor used his smartphone and Simple Mobile data plan to access email,
10 browse websites, and watch streaming video. Mr. Blaqmoor never tethered his phone to a
11 computer to access Simple Mobile's data and he never used his phone as a Wi-Fi hotspot.

12 59. Mr. Blaqmoor experienced 4G data speeds (approximately 2,000 Kbps) for only
13 eight days. On July 27, 2013, Simple Mobile throttled Mr. Blaqmoor's data speed without
14 warning. Mr. Blaqmoor thereafter tested his data download speed and found that it had been
15 reduced by 86% to 273 Kbps, only slightly faster than average 2G speeds.

16 60. Mr. Blaqmoor called Simple Mobile's customer service to ask why his data had
17 been throttled. The customer service representative told Mr. Blaqmoor that his data speed was
18 throttled because he had used too much data. Mr. Blaqmoor told the representative that he did
19 not understand because he had signed up for the "unlimited" 4G data plan. Mr. Blaqmoor asked
20 the representative how much data was actually included with the plan, and at what speed, but the
21 representative refused to answer, and told him that his data speed would be restored when he
22 paid for another month of service.

23 61. Ten days later, on August 6, 2013, Mr. Blaqmoor's data access was terminated
24 altogether, such that use of the internet or email was impossible.

25 62. Mr. Blaqmoor called Simple Mobile customer service on August 19, 2013 to pay
26 for another month of service and restore his data access. Simple Mobile then restored Mr.
27
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1 Blaqmoor's data access. However, within a week, his data speed was again throttled to slow
2 speeds.

3 63. Mr. Blaqmoor let his Simple Mobile monthly service plan expire on September
4 19, 2013.

5 64. Mr. Blaqmoor reasonably relied upon Defendant's material misrepresentations
6 and omissions, which, in conjunction with Defendant's acts and practices alleged herein caused
7 Mr. Blaqmoor to suffer harm, injury in fact, and lost money or property. Had Mr. Blaqmoor
8 known that Simple Mobile's purportedly "unlimited" plan was in fact limited in the manner that
9 it is, he would not have paid for the Simple Mobile data plan.

10 CLASS ACTION ALLEGATIONS

11 65. Plaintiff brings this class-action lawsuit on behalf of himself and the proposed
12 Class members under Rule 23(b)(3) of the Federal Rules of Civil Procedure.

13 66. Plaintiff seeks certification of the following Class:

14 All persons in the United States who purchased an "unlimited" Simple Mobile wireless
15 service plan and whose data access was terminated or throttled prior to the expiration of
16 the service plan.

17 Specifically excluded from the Class is the Defendant and any entities in which Defendant has a
18 controlling interest, Defendant's agents and employees, the judge to whom this action is assigned,
19 members of the judge's staff, and the judge's immediate family.

20 67. In the alternative, Plaintiff seeks certification of the following Class:

21 All persons in the United States who purchased an "unlimited" Simple Mobile wireless
22 service plan on or after June 13, 2013, and whose data access was terminated or throttled
prior to the expiration of the service plan.

23 Specifically excluded from the Class is the Defendant and any entities in which Defendant has a
24 controlling interest, Defendant's agents and employees, the judge to whom this action is assigned,
25 members of the judge's staff, and the judge's immediate family.

26 68. **Numerosity.** Plaintiff does not know the exact number of Class members but
27 believes that the Class comprises tens of thousands, if not hundreds of thousands, of consumers
28

1 throughout California. As such, Class members are so numerous that joinder of all members is
2 impracticable.

3 69. ***Commonality and predominance.*** Well-defined, nearly identical legal or factual
4 questions affect all Class members. These questions predominate over questions that might
5 affect individual Class members. These common questions include, but are not limited to, the
6 following:

- 7 a. Whether Defendant offered to Plaintiff and Class members “unlimited”
8 data plans;
- 9 b. Whether Plaintiff and Class members accepted Defendant’s offer for
10 “unlimited” data plans;
- 11 c. Whether the Simple Mobile Terms and Conditions were adequately
12 disclosed to and were consented to by Plaintiff and Class members;
- 13 d. Whether the Simple Mobile Terms and Conditions contain illusory terms;
- 14 e. Whether the Simple Mobile Terms and Conditions contain unconscionable
15 terms;
- 16 f. Whether Defendant breached Defendant’s contracts with Plaintiff and
17 Class members by terminating and/or throttling their data access prior to the expiration of their
18 data plans;
- 19 g. Whether Defendant acted in bad faith or abused Defendant’s discretion in
20 terminating or throttling Plaintiff’s and Class members’ data access prior to the expiration of their
21 data plans;
- 22 h. Whether Defendant’s practice of terminating or throttling Plaintiff’s and
23 Class members’ data access went against Plaintiff’s and Class members’ objectively reasonable
24 expectations;
- 25 i. Whether Defendant’s promise of “unlimited” data was likely to mislead
26 objectively reasonable consumers;
- 27
28

1 j. Whether Defendant engaged in deceptive and unfair business and trade
2 practices under California law;

3 k. Whether Plaintiff and Class members are entitled to restitution and other
4 equitable relief;

5 l. Whether Plaintiff and Class members are entitled to damages; and

6 m. Whether Defendant should be enjoined from engaging in this type of
7 conduct.

8 70. **Typicality.** Plaintiff's claims are typical of Class members' claims. Plaintiff and
9 the Class members all sustained injury as a direct result of Defendant's practice of terminating or
10 throttling data access prior to the expiration of their "unlimited" data plans.

11 71. **Adequacy.** Plaintiff will fairly and adequately protect Class members' interests.
12 Plaintiff has no interests antagonistic to Class members' interests, and Plaintiff has retained
13 counsel that has considerable experience and success in prosecuting complex class-action and
14 consumer-protection cases.

15 72. **Superiority.** A class action is the superior method for fairly and efficiently
16 adjudicating this controversy for the following reasons without limitation:

17 a. Class members' claims are relatively small compared to the burden and
18 expense required to litigate their claims individually, so it would be impracticable for Class
19 members to seek individual redress for Defendant's illegal and deceptive conduct;

20 b. Even if Class members could afford individual litigation, the court system
21 could not. Individual litigation creates the potential for inconsistent or contradictory judgments
22 and increases the delay and expense to all parties and to the court system. By contrast, a class
23 action presents far fewer management difficulties and provides the benefits of single adjudication,
24 economy of scale, and comprehensive supervision by a single court; and

25 c. Plaintiff anticipates no unusual difficulties in managing this class action.
26
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INAPPLICABLE OR UNENFORCEABLE ARBITRATION CLAUSE

73. The Simple Mobile Terms and Conditions purport to require that certain disputes be individually arbitrated. The arbitration clause in both the pre- and post-June 10, 2013, Terms and Conditions is unenforceable because it is never adequately disclosed or agreed to by consumers, and Defendant does not require consumers who purchase Simple Mobile SIM cards or service plans to view the arbitration clause before making their non-refundable purchase. The arbitration clause is substantively unconscionable and/or is against public policy. The arbitration clause is procedurally unconscionable because, among other reasons, it is presented to consumers, if at all, on a take-it-or-leave-it basis and is not conspicuous. The clause is not applicable to Plaintiff's claims for public injunctive relief, because such claims are not arbitrable.

74. To the extent that Defendant asserts that Plaintiff's and Class members' claims are subject to an arbitration agreement or a class action waiver, Plaintiff and the Class seek declaratory relief in the form of a finding that such a purported arbitration agreement is void and unenforceable.

75. **The arbitration clause prior to June 10, 2013.** The pre-June 10, 2013, arbitration clause (Section 2 of the Terms and Conditions) is substantively unconscionable because, among other reasons, it prohibits punitive damages in all circumstances; it requires consumers to notify Defendant of any dispute regarding charges to the consumer's account within 60 days or else the consumer loses the right to pursue a claim in arbitration; and it shortens the statute of limitation for all claims to two years from the date the claim arises.

76. **The arbitration clause since June 10, 2013.** The June 10, 2013 arbitration clause (Section 15 of the Terms and Conditions) is substantively unconscionable because, among other reasons, it lacks mutuality in that it purports to require consumers to arbitrate all claims while explicitly permitting Defendant to bring state or federal lawsuits for certain types of claims important to Defendant; it prohibits any damages arising out of the use of or inability to use Simple Mobile data services, and prohibits punitive damages in all circumstances, while

1 specifying \$5,000 liquidated damages payable to Defendant by consumers regarding certain
 2 types of claims important to Defendant; it requires consumers to bear their own attorneys' fees
 3 and costs, even where, as here, the law allows for the prevailing party to be awarded such fees
 4 and costs; it requires arbitrations to occur in Miami, Florida regardless of the consumer's state of
 5 residence; and it provides that consumers must pay a minimum claim filing fee of \$200 per AAA
 6 rules effective March 1, 2013. In addition, Section 15 is not enforceable as to any of Plaintiff's
 7 and Class members' claims because it is illusory, in that Defendant reserves the right to modify
 8 or change it at any time without notice to or consent from consumers.

9 **CHOICE OF LAW**

10 77. California law applies to Plaintiff's and Class members' claims because (1) a
 11 substantial part of the alleged misleading and deceptive conduct emanated from California and
 12 (2) a substantial part of the bad faith, unfair, and unlawful conduct occurred in California.

13 78. In the alternative, the laws of the states in which each Plaintiff and each Class
 14 member resides apply.

15 **COUNT I** 16 **Breach of Contract**

17 79. Plaintiff realleges and incorporates by reference every allegation set forth in the
 18 preceding paragraphs as though alleged in this Count.

19 80. Defendant offered to Plaintiff and Class members "unlimited" data plans for use
 20 with Simple Mobile SIM cards.

21 81. In exchange for Defendant's promise of "unlimited" data plans, Plaintiff and
 22 Class members paid for 30-day service plans and SIM cards.

23 82. Plaintiff and Class members gave consideration that was fair and reasonable, and
 24 have performed all conditions, covenants, and promises required to be performed.

25 83. Defendant breached its promise of providing "unlimited" data by terminating or
 26 throttling Plaintiff's and Class members' data access prior to the expiration of their data plans.

27 84. The Simple Mobile Terms and Conditions do not form a contract and are not a
 28 part of the above-described bargain for lack of mutual assent. Defendant does not (a) adequately

1 disclose the existence of such terms to Plaintiff or Class members prior to or at the time of the
2 purchase and activation of their Simple Mobile data plans; (b) require Plaintiff or Class members
3 to acknowledge or assent to the Terms and Conditions; or (c) provide an opportunity for Plaintiff
4 or Class members to reject the terms in the event that they discover the terms subsequent to the
5 purchase and activation of their data plans. Defendant also does not provide any new
6 consideration in exchange for any subsequent agreement to the Terms and Conditions.

7 85. The Simple Mobile Terms and Conditions do not form a contract and are not a
8 part of the above-described bargain because the terms described therein are illusory.
9 Specifically, the Terms and Conditions provide that Simple Mobile may change or modify the
10 terms at any time, in its sole discretion, and without notice to or consent from Plaintiff or Class
11 members, rendering all of the terms therein illusory.

12 86. In the alternative, assuming that the Simple Mobile Terms and Conditions do
13 form part of the basis of the bargain, Sections 2, 16, 20, 24, and 25 of the pre-June 10, 2013,
14 Terms and Conditions, and Sections 2, 6, 7, 9, and 15 of the June 10, 2013, Terms and
15 Conditions, are unconscionable and, therefore, unenforceable.

16 87. In the alternative, assuming that the Simple Mobile Terms and Conditions do
17 form part of the basis of the bargain, Section 3 of the June 10, 2013, Terms and Conditions is so
18 contradictory, vague, and ambiguous as to render it meaningless and unenforceable.

19 88. Defendant directly benefitted from, and is being unjustly enriched by,
20 Defendant's breach of its promise to provide "unlimited" data.

21 89. As a result of Defendant's breach of its promise to provide "unlimited" data,
22 Plaintiff and Class members have been harmed and have suffered damages in an amount to be
23 determined by this Court, including interest on all liquidated sums.

24 **COUNT II**

25 **Breach of the Covenant of Good Faith and Fair Dealing**

26 90. Plaintiff realleges and incorporates by reference every allegation set forth in the
27 preceding paragraphs as though alleged in this Count.
28

1 91. Plaintiff and Class members bring this claim in the alternative to their Breach of
2 Contract claim.

3 92. A covenant of good faith and fair dealing is implied in every contract.

4 93. Where a contract vests one party with discretion, but provides no standards for
5 exercising that discretion, the duty of good faith and fair dealing applies and the party exercising
6 the discretion must do so in a commercially reasonable manner or in a manner that satisfies the
7 objectively reasonable expectations of the other party.

8 94. Based on Defendant's promises and representations, it was objectively reasonable
9 for Plaintiff and Class members to expect that Defendant would deliver "unlimited" data access
10 in connection with their data plans. There exists no objectively reasonable reason to expect that
11 Defendant would have secret data usage limits and terminate or throttle Plaintiff's and Class
12 members' data access at any time, without warning, and for any or no reason, regardless of the
13 manner in which the data was used.

14 95. Defendant abused any discretion Defendant had under the Simple Mobile Terms
15 and Conditions or otherwise by regularly terminating or throttling Plaintiff's and Class
16 members' promised "unlimited" data access, often without notice, without regard to the manner
17 in which the data was used, and without explanation to Plaintiff and Class members.

18 96. Plaintiff and Class members performed all required duties and all conditions
19 required for Defendant's performance.

20 97. As a result of Defendant's breach of the implied covenant of good faith and fair
21 dealing, Plaintiff and the Class sustained damages in an amount to be determined by this Court,
22 including interest on all liquidated sums.

23
24 **COUNT III**
 Unjust Enrichment

25 98. Plaintiff realleges and incorporates by reference every allegation set forth in the
26 preceding paragraphs as though alleged in this Count.

27 99. Plaintiff and Class members bring this claim in the alternative to their Breach of
28 Contract and Breach of the Covenant of Good Faith and Fair Dealing claims.

100. Defendant knowingly retained a benefit at the expense of Class members, in the form of substantial revenues and payments from Plaintiff and Class members for Simple Mobile “unlimited” data plans and SIM cards, from Defendant’s conduct in misrepresenting that Defendant’s data plans were “unlimited,” and regularly terminating or throttling “unlimited” customers’ data access.

101. Plaintiff’s and Class members’ detriment and Defendant’s enrichment are traceable to, and resulted directly and proximately from, the conduct challenged in this Complaint.

102. It would be inequitable for Defendant to retain the benefits Defendant received and continues to receive from Plaintiff and Class members without payment to Plaintiff and Class members.

103. Plaintiff and the Class have no adequate remedy at law.

104. Plaintiff seeks disgorgement of and/or a constructive trust on all of the inequitable payments and profits Defendant retained from Plaintiff and Class members.

COUNT IV

Violations of California’s Unfair Competition Law California Business & Professions Code § 17200 et seq.,

105. Plaintiff realleges and incorporates by reference every allegation set forth in the preceding paragraphs as though alleged in this Count.

106. Section 17200 of the California Business & Professions Code (“UCL”) prohibits any “unlawful,” “unfair,” or “fraudulent” business practice.

107. Defendant violated the “unlawful” prong of the UCL by making material misrepresentations that Simple Mobile data plans offer “unlimited” data, when in fact Defendant regularly terminates or throttles customers’ data access, in violation of California’s Consumer Legal Remedies Act, Cal. Civ. Code § 1750 et seq.

108. Defendant’s practice of regularly terminating or throttling customers’ “unlimited” data access, often without notice, violated the “unfair” prong of the UCL because it was immoral, unethical, oppressive, unscrupulous, unconscionable, and/or substantially injurious to

1 Plaintiff and Class members. Defendant's practice was also contrary to legislatively declared
2 and public policy and the harm it caused to consumers outweighed its utility, if any.

3 109. Defendant violated the "fraudulent" prong of the UCL by making material
4 misrepresentations that Simple Mobile data plans were "unlimited" when they were not, and by
5 failing to disclose and actively concealing material information regarding Defendant's practice
6 of regularly terminating or throttling customers' data access. These material misrepresentations
7 and nondisclosures were likely to mislead consumers.

8 110. Plaintiff relied on Defendant's material misrepresentations and nondisclosures,
9 and would not have purchased, or would have paid less money for, Simple Mobile service plans
10 or SIM cards had he known the truth.

11 111. As a direct and proximate result of Defendant's unfair, unlawful, and fraudulent
12 conduct, Plaintiff lost money or property.

13 112. Defendant's conduct caused substantial injury to Plaintiff and Class members.
14 Accordingly, Plaintiff seeks an order enjoining Defendant from committing such unlawful,
15 unfair, and fraudulent business practices, and seek the full amount of money that Plaintiff and
16 Class members paid for their Simple Mobile service plans and SIM cards and/or restitutionary
17 disgorgement of profits. Plaintiff also seeks attorneys' fees and costs under Cal. Code Civ. Proc.
18 § 1021.5.

19
20 **COUNT V**
21 **Violations of California's Consumer Legal Remedies Act**
22 **California Civil Code §1750 et seq.**

23 113. Plaintiff realleges and incorporates by reference every allegation set forth in the
24 preceding paragraphs as though alleged in this Count.

25 114. Defendant is a "person," as defined by Cal. Civ. Code § 1761(c).

26 115. Plaintiff and the Class members are "consumers," as defined by Cal. Civ. Code
27 §1761(d).

28 116. The service plans and SIM cards that Defendant marketed and sold constitute
"goods" and "services," as defined by Cal. Civ. Code §1761(a) and (b).

1 117. Plaintiff's and Class members' purchases of Simple Mobile service plans and
2 SIM cards constitute "transactions," as defined by Cal. Civ. Code § 1761(e).

3 118. Plaintiff and Class members purchased Simple Mobile service plans and SIM
4 cards for personal, family, and household purposes as meant by Cal. Civ. Code § 1761(d).

5 119. Venue is proper under Cal. Civil Code § 1780(d) because a substantial portion of
6 the transactions at issue occurred in this county. Plaintiff's declaration establishing that this
7 Court has proper venue for this action is attached as Exhibit A.

8 120. Defendant deceived consumers in that Defendant misrepresented that Simple
9 Mobile service plans offered "unlimited" data and also failed to disclose or actively concealed
10 that Defendant would regularly terminate or throttle customers' data access.

11 121. Defendant's misrepresentations, active concealment, and failures to disclose
12 violated the CLRA in the following manner:

13 a. Defendant misrepresented that Defendant's Simple Mobile service plans
14 and SIM cards had characteristics, benefits, or uses that they did not have (Cal. Civ. Code
15 § 1770(a)(5));

16 b. Defendant misrepresented that Defendant's Simple Mobile service plans
17 and SIM cards were of a particular standard, quality, and/or grade when they were of another
18 (Cal. Civ. Code § 1770(a)(7));

19 c. Defendant advertised Simple Mobile service plans and SIM cards with an
20 intent not to sell them as advertised (Cal. Civ. Code § 1770(a)(9));

21 d. Defendant misrepresented that Simple Mobile service plans and SIM cards
22 conferred or involved rights, remedies, or obligations that they did not have (Cal. Civ. Code
23 § 1770(a)(14));

24 e. Defendant misrepresented that Simple Mobile service plans and SIM cards
25 were supplied in accordance with previous representations when they were not (Cal. Civ. Code §
26 1770(a)(16));

1 122. Defendant inserted unconscionable provisions in the Simple Mobile Terms and
2 Conditions: Sections 2, 16, 20, 24, and 25 of the pre-June 10, 2013, Terms and Conditions, and
3 Sections 2, 6, 7, 9, and 15 of the June 10, 2013, Terms and Conditions (Cal. Civ. Code §
4 1770(a)(19)).

5 123. Defendant's misrepresentations and nondisclosures regarding Simple Mobile
6 "unlimited" data plans and Defendant's practice of regularly terminating or throttling customers'
7 data access were material to Plaintiff and Class members because a reasonable person would
8 have considered them important in deciding whether or not to purchase the Simple Mobile
9 service plans and SIM cards, and because Defendant had a duty to disclose the truth.

10 124. Plaintiff and Class members relied upon Defendant's material misrepresentations
11 and nondisclosures, and had Plaintiff and Class members known the truth, they would have acted
12 differently.

13 125. As a direct and proximate result of Defendant's material misrepresentations and
14 nondisclosures, Plaintiff and the Class have been irreparably harmed.

15 126. On behalf of the Class, Plaintiff seeks injunctive relief in the form of an order
16 enjoining Defendant from making such material misrepresentations and failing to disclose or
17 actively concealing Defendant's practice of terminating or throttling data access. Plaintiff also
18 seeks attorneys' fees and costs.

19 127. In accordance with Cal. Civ. Code § 1782(a), on November 13, 2013, Plaintiff's
20 counsel served Defendant with notice of Defendant's CLRA violations by certified mail, return
21 receipt requested. A true and correct copy of that notice is attached as Exhibit B.

22 128. If Defendant fails to provide appropriate relief for Defendant's CLRA violations
23 within 30 days of Plaintiff's November 13, 2013, notification letter, Plaintiff will amend this
24 complaint to seek compensatory and exemplary damages as permitted by Cal. Civ. Code §§
25 1780 and 1782(b).
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COUNT VI
Unconscionability

129. Plaintiff realleges and incorporates by reference every allegation set forth in the preceding paragraphs as though alleged in this Count.

130. Defendant's practice of offering Simple Mobile "unlimited" data plans while simultaneously purporting to retain the right to arbitrarily and unilaterally terminate or throttle data access at any time and for any reason, with or without warning, is unfair and unconscionable.

131. Plaintiff and Class members have no meaningful choice with respect to the Simple Mobile Terms and Conditions or Defendant's unilateral and arbitrary practice of terminating and throttling data access. The Terms and Conditions were not adequately disclosed, if at all, to Plaintiff and Class members before or during their purchases and activations of Simple Mobile service plans and SIM cards, and are in any event offered on a take-it-or-leave-it basis. Defendant did not offer Plaintiff or Class members an opportunity to reject the Simple Mobile terms, and Simple Mobile data plans and SIM cards are non-refundable.

132. Defendant's purported discretion to terminate or throttle data access is unreasonably favorable to Defendant and unduly harsh with respect to Plaintiff and the Class, and is therefore substantively unconscionable.

133. Defendant's enforcement of such unconscionable terms have harmed Plaintiff and Class members and have caused them to suffer damages in an amount to be determined by this Court, including interest on all liquidated sums.

PRAYER FOR RELIEF

1. On behalf of themselves and the Class, Plaintiff requests that the Court order relief and enter judgment against Defendant as follows:

2. An order certifying Plaintiff's proposed Class and appointing Plaintiff and his counsel to represent the Class;

3. An order that Defendant is permanently enjoined from Defendant's improper conduct and practices as alleged;

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

5. A judgment awarding Plaintiff and Class members actual damages;

6. A judgment awarding Plaintiff and Class members exemplary damages for Defendant's knowing, willful, and intentional conduct;

7. Pre-judgment and post-judgment interest;

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

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

JURY DEMAND

Plaintiff demands a trial by jury on all issues so triable.

Dated: November 14, 2013

Respectfully submitted,

LIEFF CABRASER HEIMANN & BERNSTEIN, LLP

By: 

Michael W. Sobol

Michael W. Sobol

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Nicole D. Reynolds

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Attorneys for Plaintiff

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t 415.956.1000
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November 14, 2013

VIA CERTIFIED MAIL RETURN RECEIPT REQUESTED

Frederick J. Pollak, President and CEO
Richard B. Salzman, EVP-General Counsel
TracFone Wireless, Inc.
9700 NW 112 Ave.
Miami, FL 33178

Registered Agent for Service of Process
Corporate Creations Network, Inc.
131-A Stoney Circle, Suite 500
Santa Rosa, CA 95401

Re: Notice of Violation of California Consumer Legal Remedies Act

Dear Mr. Pollak and Mr. Salzman:

We represent Martin Blaqmoor, who purchased a Simple Mobile SIM card and “unlimited” wireless phone plan. We send this letter under the California Consumers Legal Remedies Act, California Civil Code Section 1750 *et seq.* (“CLRA”), to notify TracFone Wireless, Inc. (“TracFone”) that its practice of advertising Simple Mobile plans as providing “unlimited” data, while also regularly terminating or throttling subscribers’ data when consumers exceed undisclosed data usage limits or arbitrarily at the direction of network carrier partners, violates the CLRA. We demand that TracFone rectify its violations within 30 days of receipt of this letter.

TracFone misrepresents to consumers that its Simple Mobile wireless phone plans offer “unlimited” 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 playing video games. In reality, TracFone regularly throttles subscribers’ data to slow speeds or cuts off access to data altogether without notice. TracFone refuses to disclose its data usage caps or explain under what circumstances it might throttle or terminate data access, making the practice all the more unclear and deceptive to consumers.

Moreover, TracFone purports to rely on the Simple Mobile Terms and Conditions of Service when terminating or throttling subscribers’ data, but these terms are never given to or seen by customers and are riddled with vague, contradictory, unconscionable, and illusory terms.

Exh A

November 14, 2013

Page 2

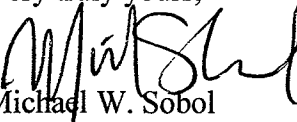
Relying on TracFone's promise of "unlimited" data, on July 19, 2013, Martin Blaqmoor purchased a Simple Mobile SIM card for approximately \$20 from a local Simple Mobile dealer for use with his unlocked LG Android phone. Mr. Blaqmoor also purchased a \$60 "Unlimited 4G" data plan. Eight days later, on July 27, 2013, Simple Mobile throttled Mr. Blaqmoor's data speed without warning. Ten days later, on August 6, 2013, Simple Mobile terminated Mr. Blaqmoor's data access altogether.

TracFone's material misrepresentations, active concealment, and failures to disclose violated the CLRA in the following manner:

1. TracFone misrepresented that its Simple Mobile SIM cards and data plans had characteristics, benefits, or uses that they did not have (Cal. Civ. Code § 1770(a)(5));
2. TracFone misrepresented that its Simple Mobile SIM cards and data plans were of a particular standard, quality, and/or grade when they were of another (Cal. Civ. Code § 1770(a)(7));
3. TracFone advertised its Simple Mobile SIM cards and data plans with an intent not to sell them as advertised (Cal. Civ. Code § 1770(a)(9));
4. TracFone misrepresented that its Simple Mobile SIM cards and data plans conferred or involved rights, remedies, or obligations that they did not have (Cal. Civ. Code § 1770(a)(14));
5. TracFone misrepresented that its Simple Mobile SIM cards and data plans were supplied in accordance with previous representations when they were not (Cal. Civ. Code § 1770(a)(16));
6. TracFone inserted unconscionable provisions in the Simple Mobile Terms and Conditions (Cal. Civ. Code § 1770(a)(19)).

We demand that within thirty (30) days of receiving this letter, TracFone agrees to (1) refrain from engaging in the deceptive practices described above at any time in the future; and (2) return all money Simple Mobile "unlimited" subscribers whose data was terminated or throttled paid for Simple Mobile SIM cards and/or "unlimited" plans. If TracFone refuses to provide the demanded relief within thirty (30) days, we will seek compensatory and punitive damages, restitution, and any other appropriate equitable relief.

Very truly yours,


Michael W. Sobol

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2 Nicole D. Reynolds (State Bar No. 246255)
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15 *Attorneys for Plaintiff*

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

19 MARTIN BLAQMOOR, individually and
20 on behalf of all others similarly situated,

21 Plaintiffs,

22 v.

23 TRACFONE WIRELESS, INC.

24 Defendant.

Case No. _____

DECLARATION OF MARTIN
BLAQMOOR

25
26
27 Exh B
28

1 I, Martin Blaqmoor, 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 September 16, 2013, in Oakland California.

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15 Martin Blaqmoor
16 Martin Blaqmoor
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JS 44 (Rev. 12/12) cand rev (1/15/13)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

MARTIN BLAQMOOR, individually and on behalf of all others similarly situated.

(b) County of Residence of First Listed Plaintiff Alameda
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

Michael W. Sobol 415-956-1000
Lief Cabraser Heimann & Bernstein, LLP
275 Battery St., 29th Floor, San Francisco, CA 94111

DEFENDANTS

TRACFONE WIRELESS, INC.

County of Residence of First Listed Defendant _____

(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

① 13-5295 KAW

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☐ 2 U.S. Government Defendant
- ☐ 3 Federal Question (U.S. Government Not a Party)
- ☒ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | PTF | DEF | | PTF | DEF |
|---|---------------------------------------|----------------------------|---|----------------------------|---------------------------------------|
| Citizen of This State | <input checked="" type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input checked="" type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input checked="" type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	PERSONAL INJURY <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	PRISONER PETITIONS Habeas Corpus: <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty Other: <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement			

V. ORIGIN (Place an "X" in One Box Only)

- ☒ 1 Original Proceeding
- ☐ 2 Removed from State Court
- ☐ 3 Remanded from Appellate Court
- ☐ 4 Reinstated or Reopened
- ☐ 5 Transferred from Another District (specify)
- ☐ 6 Multidistrict Litigation

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
California Business & Professions Code § 17200 et seq.; Cal. Civ. Code § 1750 et seq.

Brief description of cause:

Defendants falsely advertise Simple Mobile cellular phone plans as providing "unlimited" data service.

VII. REQUESTED IN COMPLAINT:

☒ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND: ☒ Yes ☐ No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE

11/14/2013

SIGNATURE OF ATTORNEY OF RECORD

IX. DIVISIONAL ASSIGNMENT (Civil L.R. 3-2)

(Place an "X" in One Box Only)

☒ SAN FRANCISCO/OAKLAND ☐ SAN JOSE ☐ EUREKA