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8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **FOR THE COUNTY OF SAN DIEGO**

10 UTILITY CONSUMERS' ACTION
NETWORK and JOSE CASTRO, on behalf of
11 themselves and all others similarly situated
and/or the general public,

12 Plaintiffs,

13 v.

14 CINGULAR WIRELESS, LLC, and DOES 1
15 through 50, inclusive,

16 Defendants.

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CASE NO. GIC 838040

CLASS ACTION

**SECOND AMENDED COMPLAINT
FOR:**

**(1) Violation of Business and Professions
Code Sections 17200, et seq.**

**(2) Violation of Consumers Legal
Remedies Act**

(3) Declaratory Relief

Demand For Jury Trial

I/C Judge: Hon. Kevin A. Enright
Dept: 72

Plaintiffs, by and through their attorneys, allege as follows against the above-listed defendants and Does 1 through 50, inclusive (hereinafter referred to collectively as "Cingular" or "defendants"). Except as otherwise noted such allegations are made on information and belief, formed after an inquiry reasonable under the circumstances, which allegations are likely to have evidentiary support after appropriate investigation and discovery.

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1 **SUMMARY OF COMPLAINT**

2 1. The Utility Consumers’ Action Network (“UCAN”) is a public interest advocacy
3 organization that has over 30,000 members in California, several of whom were adversely
4 affected by the transactions alleged in this Complaint and who lost money or property or had their
5 rights infringed upon as a result of the acts and practices here at issue. At all times relevant to this
6 Complaint, plaintiff Jose Castro was a Cingular customer who lost money or property as a result
7 of the acts and practices as detailed below.

8 2. This action is brought for the benefit of persons in California, primarily residents
9 of San Diego County who reside or work in the U.S./Mexican border area, who have made or
10 received local or long distance calls on the Cingular network but have been billed for such calls as
11 if they were international calls originating from Mexico. As detailed below, defendants have
12 engaged in a pattern and practice of uniformly misrepresenting and/or repudiating their
13 obligations under the law.

14 3. Defendants affirmatively misrepresent or do not disclose that if a customer makes
15 or receives a call in an area within a couple miles of the U.S./ Mexican border, these calls may not
16 be picked up by local U.S.-based cell towers maintained by Cingular and thus billed as in-network
17 telephone calls, but rather may be picked up by cell towers located in Mexico. As a result, even
18 though the telephone call is a local phone call or a long distance telephone call subject to no or
19 low per-minute charges, the call is billed as an international telephone call with roaming charges
20 subject to substantially higher rates – as much as \$2.49 per minute. This appears to be a problem
21 unique to Cingular, yet Cingular has not fixed the sources of this problem for all affected persons,
22 provided no notice to its actual or potential customers along the border of this problem or offered
23 automatic refunds to consumers whose telephone calls have been improperly billed at
24 substantially higher amounts. In fact, rather than fix the problem Cingular representatives have
25 routinely told customers either to call in every time they have an improper charge that is not their
26 fault to ask the charge be reversed, or tell its customers to turn off their phones and only use them
27 when necessary.

28 4. Moreover, when customers attempt to cancel their contracts with Cingular because

1 of these problems, not only does Cingular refuse to refund the improperly billed amounts but it
2 also forces some consumers to pay early termination fees in the hundreds of dollars in order to
3 cancel their contract with Cingular. These representatives are not allowing customers out of
4 service agreements when this problem becomes apparent to the customer (which because of the
5 billing cycle does not happen during the original cancellation window or even when these calls are
6 made or received), even though the problem is exclusively within Cingular's control. Thus,
7 customers must either pay a high termination fee, call Cingular and challenge calls on a monthly
8 basis (which may be unsuccessful), or turn off their phones to avoid receiving improperly billed
9 calls – all of which are unacceptable alternatives. Cingular's representatives were also
10 uncooperative in resolving these complaints, threatening consumers (particularly those who were
11 Spanish-speaking) with being reported to collection agencies if they did not pay these improperly
12 imposed amounts.

13 5. Defendants either directly or through their agents misrepresent or fail to disclose
14 this material problem, and if customers call to complain they are not given accurate information
15 about what is causing this problem, that there is an available solution or that they can have such
16 charges reversed. Cingular has also failed to fix the situation that causes this problem. As a
17 result, no reasonable consumer who was targeted by defendants – or even a highly sophisticated
18 consumer – could determine this problem in advance of signing up for Cingular service. The true
19 facts are thus being actively concealed by defendants.

20 6. Defendants have also uniformly misrepresented and repudiated their obligations
21 by stating that the billed amounts are due and owing at the charged rates when in fact neither is
22 the case, since customers in this situation should not have ever been charged international rates or
23 any associated roaming charges in the first place.

24 7. Based upon the legal obligations imposed upon defendants and their experience in
25 the industry and the information made available to them from complaining consumers, defendants
26 either knew, recklessly disregarded, reasonably should have known or were obligated under the
27 law to understand that the improper billing of such calls and the systematic misleading of
28 consumers as to the amounts consumers may be charged or were billed for in such a situation was

1 unlawful, unfair or fraudulent.

2 8. Based upon the proximity of the problem to the U.S./Mexican border, it can be
3 reasonably expected that many of the victims targeted by this business practice are minorities or of
4 limited English-speaking capacity, and thus may be more likely to simply pay, rather than contest,
5 such charges. Cingular representatives also appear to have taken a much more aggressive
6 collection attitude with regard to its Spanish-speaking customers as compared to its English-
7 speaking customers. Hundreds if not thousands of local Californians have been improperly
8 charged for making or receiving international calls and associated roaming charges when in fact
9 the calls were in-network calls without being informed of the true facts, and have been subjected
10 to this practice and improperly charged the international and/or roaming charges at least once, to
11 their injury.

12 9. The issues raised here are a matter of significant public importance, particularly
13 considering the huge per-minute discrepancy between the local or covered rates and the non-
14 disclosed and improperly charged international and/or roaming rates, as well as the fact that this
15 type of practice may increase in the deregulated telecommunications industry. As a result, courts
16 are the primary, if not exclusive, avenue for recourse for consumers to ensure that defendants
17 make all relevant information reasonably and timely available to the targeted consumers and do
18 not improperly and illegally charge consumers for international calls and roaming charges that
19 should not be billed as such.

20 10. In an effort to avoid disclosing to the general public the scope and nature of their
21 illegal business practices, defendants have engaged in a conspiracy and violated their legal
22 obligations to properly disclose such information and correct this problem, resulting in injury to
23 members of the class and/or general public.

24 11. These claims are material for the reasons set forth in detail below. In addition,
25 defendants have concealed material facts, as detailed throughout this Complaint, and the
26 disclosure of such information was necessary in order to make defendants' other representations
27 not misleading for want of disclosure of such omitted facts or because defendants possessed
28 superior knowledge of the true facts.

1 Rather, the focus of this litigation is defendants' uniform method of non-disclosure and
2 misrepresentation of the billing practices that resulted in customers being charged for making or
3 receiving in-network calls that are improperly charged as international calls and/or are improperly
4 being assessed roaming charges, then failing to automatically correct this problem.

5 16. Venue is proper in this County as the acts and transactions upon which this action
6 is based occurred in part in this County. Plaintiffs and members of the Class and general public
7 reside primarily in this County, received representations and communications from defendants in
8 this County, or were injured and/or subjected to the conduct at issue and irreparable harm in this
9 venue as this is where most if not all of the mis-billing took place. Defendants received
10 substantial compensation and profits from the sale of their products and services in this County,
11 caused misrepresentations to be disseminated, entered into agreements and transactions and/or
12 breached agreements in this County. Thus, defendants' liability arose at least in part in this
13 County.

14 **PARTIES**

15 17. (a) Plaintiff UCAN is a consumer advocacy organization with its office located at
16 3100 Fifth Avenue, San Diego, California. Plaintiff asserts the Causes of Action on behalf of
17 itself and through its members affected by the acts and practices in question, several of whom
18 have suffered injury in fact and lost money or property or had their rights infringed upon as a
19 result of such acts and practices, and as a result can properly act and maintain this action on behalf
20 of both the class members and the general public.

21 (b) Plaintiff Jose Castro is a resident of San Diego County, California. Since
22 February 2004, plaintiff has been a customer of Cingular. Mr. Castro, whose primary language is
23 Spanish, originally signed up for Cingular service in San Diego, but explained that he needed
24 service for Perris, California that he could also use when he eventually moved to San Diego.
25 When the Cingular service in Perris was inadequate he tried to timely cancel, expressing his need
26 for complete coverage based on his work as a contractor. He was told by Cingular representatives
27 that service was much better in San Diego and that he should not have coverage problems there.
28 Mr. Castro timely paid his Cingular bills, which averaged about \$150 a month. Beginning in June

1 2004, Mr. Castro unknowingly began to be charged for receiving or making certain in-network
2 calls as if they were international phone calls and roaming charges, at the rate of \$2.49 per minute.
3 This resulted in his bill skyrocketing to over \$700 for one month. It was only upon receipt of his
4 Cingular bill in July 2004 that he learned that certain calls that his family was receiving from
5 friends and relatives in California were suddenly being charged at international and roaming rates,
6 even though he confirmed such persons were not in Mexico at the time such calls were made.
7 When he went to complain about this situation at the Cingular store in Chula Vista, California and
8 dispute such charges, Mr. Castro was informed that Cingular was aware of this situation as many
9 other people had complained of this same problem (indeed, several people were at the store at the
10 same time making the same complaint). Mr. Castro was told by the Cingular representative that
11 as a result he should not pay his bill, as this matter would likely be resolved based on such
12 complaints. Mr. Castro's family attempted to curtail their local phone use, only to receive a bill a
13 month later for \$600, primarily based on charges from the prior billing period that were now being
14 included on his subsequent bill. Mr. Castro complained again to Cingular representatives and
15 disputed such charges. Yet Cingular representatives now claimed that despite knowing of the
16 situation, there was nothing they could do, and claimed Mr. Castro had to pay all charges (now
17 totaling over \$1,300) or have his service terminated – which Cingular did without notice in
18 August 2004. Despite his repeated attempts to resolve this situation, Cingular has refused to
19 admit to its error or credit Mr. Castro's bill -- even though it had given other English-speaking
20 customers credits for the same mis-billing practice. In fact, Cingular representatives threatened to
21 report Mr. Castro to collections and adversely affect his credit unless he paid the disputed
22 amounts, and he paid his usual monthly service fees based on what Cingular told him to pay.
23 These representatives also required Mr. Castro to pay an early termination fee to end his account
24 with Cingular, even though the problems that caused this situation were created solely by
25 Cingular, and Cingular was on notice by that time of this fact. Mr. Castro has yet to receive a
26 return of such disputed amounts plus interest thereon or reimbursement for the time off work that
27 he had to take in order to attempt to resolve this problem. Moreover, despite the fact such
28 amounts were disputed and not properly charged to him, Mr. Castro fears Cingular has followed

1 through with its threats and has adversely affected his credit history and that Cingular has not
2 reported the fact such charges are disputed, despite having the legal obligation to do so.

3 18. Defendant Cingular Wireless, LLC is a Delaware corporation. This entity has a
4 principal place of business in Atlanta, Georgia and in California, and is operating, maintaining
5 offices, and conducting business throughout California. This entity is in turn owned by Cingular
6 Wireless Communications, LLC, which is a Delaware corporation owned 60% by SBC
7 Communications, Inc. and 40% by Bell South, one of the former "Baby Bells." Cingular actively
8 advertises its products and services and, either directly or through various agents, also maintains
9 kiosks at major shopping areas throughout San Diego County. Cingular also maintains an
10 interactive website at www.cingular.com.

11 19. The true names, conduct and capacities of the defendants sued herein under Code
12 of Civil Procedure §474 as Does 1 through 50, inclusive, are presently unknown to plaintiffs who,
13 therefore, sue these defendants by such fictitious names. Plaintiffs will include these Doe
14 defendants' true names and capacities when they are ascertained. Each of the fictitiously named
15 defendants is responsible in some manner, including, *inter alia*, as aiders and abettors or co-
16 conspirators, for the conduct alleged herein and for the injuries suffered by the class and/or the
17 general public.

18 20. At all times mentioned in the Causes of Action alleged herein, each and every
19 defendant was an agent, representative, affiliate, controlling party or employee of each and every
20 other defendant, and in doing the things alleged in the Causes of Action stated herein, each and
21 every defendant was acting within the course and scope of such agency, representation, affiliation,
22 control or employment and was acting with the consent, permission and authorization of the other
23 defendants. During the relevant time period, each of these defendants agreed either in words or
24 conduct to either misrepresent or fail or refuse to notify members of the class and the general
25 public about the scope and nature of the illegal business practices detailed herein, thus engaging in
26 a conspiracy that resulted in injury to members of the class and the general public. All actions of
27 each defendant, as alleged in the Causes of Action stated herein, were ratified and approved by the
28 other defendants or their respective directors, officers and/or managing agents, as appropriate for

1 **NUMEROSITY AND ASCERTAINABILITY OF THE CLASS**

2 25. The proposed Class is so numerous that the individual joinder of all its members in
3 one action is impracticable. While the exact number and the identities of Class members are
4 unknown at this time and can only be ascertained through appropriate investigation and discovery,
5 as defendants conduct business throughout the State of California and in San Diego County and
6 likely have thousands of customers who reside or work in close proximity to the U.S./Mexican
7 border, and maintain records that show where calls are originated, plaintiffs estimate the Class
8 includes hundreds if not thousands of individual members.

9 **EXISTENCE AND PREDOMINANCE OF**
10 **COMMON QUESTIONS OF LAW AND FACT**

11 26. Common questions of law and fact arising out of the claims here at issue exist as to
12 all members of the Class and predominate over any individual issues. These common legal and
13 factual questions include, but are not limited to, the following:

14 a. Whether defendants' uniform course of conduct was unconscionable, constitutes
15 acts of unfair competition or violates California law;

16 b. Whether the uniform communications between Class members and defendants
17 included misleading and inaccurate statements about the propriety of the international or roaming
18 charges imposed on Class members by Cingular, which calls should have been billed as local or
19 long distance telephone calls;

20 c. Whether defendants intentionally, recklessly, negligently or otherwise
21 misrepresented to Class members the facts as detailed below, or omitted to disclose material facts
22 necessary in order to make defendants' other statements not misleading for want of disclosure of
23 such omitted facts;

24 d. Whether defendants knew, recklessly disregarded or reasonably should have
25 known about the material misstatements and omissions in their uniform statements regarding the
26 facts as set forth below;

27 e. When defendants learned of these misrepresentations and omissions and of the
28 facts that gave rise to this situation;

1 f. Whether defendants continued to collect the monies here at issue despite their
2 knowledge of or reckless or negligent disregard for the true facts;

3 g. Whether defendants improperly imposed certain charges for international or
4 roaming charges or early termination fees that were not to be imposed upon Class members
5 because the charges should have been for local or long distance phone calls;

6 h. The amount of revenues and profits defendants received and/or the amount of
7 monies or other obligations imposed on or lost by Class members as a result of such wrongdoing;

8 i. Whether Class members were mistreated or threatened with irreparable harm or are
9 otherwise entitled to injunctive and other equitable relief and, if so, what is the nature of such
10 relief; and

11 j. Whether Class members are entitled to payment of equitable monetary relief and
12 actual, incidental, consequential, exemplary and/or statutory damages plus interest thereon, as
13 applicable, and if so, what is the nature of such relief.

14 **TYPICALITY OF CLAIMS**

15 27. Plaintiffs' claims are typical of the claims of members of the Class. Plaintiffs
16 (either directly or through its members) as well as the members of the Class have been charged the
17 disputed amounts at issue and/or have not received reimbursement of such charges plus interest
18 thereon as well as an agreement to stop charging such amounts and fixing the problem. All Class
19 members had their legal rights infringed upon, sustained injuries, losses and damages as described
20 herein and/or are facing irreparable harm arising out of defendants' common course of conduct.
21 The right of each member of the Class to payment of any actual, incidental, consequential,
22 exemplary and/or statutory damages or equitable monetary relief resulting therefrom, as
23 applicable, equally arise from and are attributable to defendants' wrongful conduct in violation of
24 state law as alleged herein.

25 **ADEQUATE REPRESENTATION**

26 28. Plaintiffs will fairly and adequately protect the interests of the members of the
27 Class in that they have no irreconcilable conflicts with or interests materially antagonistic to those
28 of the other Class members.

1 29. Plaintiffs have retained attorneys experienced in the prosecution of class actions,
2 specifically including telecommunications class and representative actions.

3 **SUPERIORITY AND SUBSTANTIAL BENEFITS OF CLASS LITIGATION**

4 30. To the extent it is an element for establishing class certification for certain causes
5 of action, a class action is superior to other available methods for the fair and efficient group-wide
6 adjudication of this controversy and possesses substantial benefits. Individual joinder of all
7 members of the Class is impracticable, and no other group method of adjudication of all claims
8 asserted herein is more efficient and manageable while at the same time providing all the remedies
9 available to ensure the full purpose of this state's laws are effectuated. Furthermore, as the
10 damages suffered by each individual member of the Class may be relatively small and the relief
11 sought discrete, the expense and burden of individual litigation in order to obtain such relief
12 would make it difficult or impossible for individual members of the Class to redress the wrongs
13 done to them on an individual case-by-case basis, and the cost to the court system of adjudicating
14 such litigation on an individual basis would be substantial. The Class members, because of the
15 amounts at stake, would have little interest in individually controlling the prosecution of separate
16 actions; to counsel's knowledge there has not been any substantial litigation concerning this
17 controversy commenced against the parties; and it is not anticipated that there will be any
18 difficulties in the management of this litigation due to the focus of the wrongdoing on defendants'
19 conduct and the level of their knowledge of the true facts. Individualized litigation would also
20 present the potential for varying, inconsistent, or contradictory judgments and would magnify the
21 delay and expense to all parties and to the court system resulting from multiple trials of the same
22 factual issues. The conduct of this action as a class action presents fewer management
23 difficulties, conserves the resources of the parties and the court system, and protects the rights of
24 each Class member as compared to other methods for the group-wide adjudication of this
25 controversy. Thus, both the Class and the court system achieve substantial benefits by the
26 prosecution of this action on a class-wide basis by avoiding the burden of multiple litigation
27 involving identical claims, as well as by aiding legitimate business enterprises in curtailing
28 illegitimate competition and ensuring a therapeutic and deterrent effect on those companies such

1 as defendants that indulge in fraudulent practices.

2 31. Notice of the pendency of and any resolution of this action can be provided to the
3 Class members by publication and/or individual mailed notice, and such costs are properly
4 imposed on defendants or can be accomplished by including notice in the monthly bills mailed to
5 the Class members by defendants, as appropriate under California law.

6 32. This action is also properly certified to proceed on a class-wide basis because:

7 a. The prosecution of separate actions by the individual members of the Class
8 would create a risk of inconsistent or varying adjudications with respect to individual Class
9 members, thus establishing incompatible standards of conduct for defendants;

10 b. Because of the nature of the relief sought, the prosecution of separate
11 actions by individual Class members would create a risk of adjudication with respect to them that
12 would, as a practical matter, be dispositive of the interests of the other Class members not parties
13 to such adjudications or would substantially impair or impede the ability of such Class members
14 to protect their interests; and

15 c. Defendants have acted or refused to act in respects generally applicable to
16 the Class, thereby making appropriate injunctive relief with regard to the members of the Class as
17 a whole in terms of the equitable relief sought.

18 **FACTUAL ALLEGATIONS**

19 33. Defendants hold themselves out as possessing superior knowledge regarding their
20 products and services, particularly in the telecommunications markets they serve. Defendants
21 provide their products and services for use throughout California and generate millions of dollars
22 each year by providing such products and services.

23 34. A number of Cingular customers live in, work in or visit an area within close
24 proximity to the U.S./Mexican border.

25 35. In a situation apparently unique to Cingular, if a customer makes or receives a call
26 close to the border (typically within 5 miles), even if the call was a local phone call or a long
27 distance phone call, the call may be routed through a cell tower located in Mexico. As a result,
28 customers who make or receive calls in this area and who use Cingular service in this area may

1 be improperly billed for many calls, even though Cingular maintains records that should establish
2 where such calls were originated.

3 36. These customers are making or receiving calls that are local or made from within
4 the United States and thus are covered by calling plans and should be billed at substantially lower
5 rates, if at all. Moreover, customers have no control over which tower picks up which call, thus
6 making it impossible to predict in advance if they will be improperly charged such international
7 or roaming charges, particularly where the call is an incoming phone call showing a local or long
8 distance number.

9 37. Cingular did and does not inform consumers in advance of this potential even
10 though it has or should have information in its possession establishing this fact. Nor did or do
11 Cingular's agents who service this area disclose this fact.

12 38. As a result, it is virtually impossible using any reasonable method to determine
13 the true facts until after receiving a bill charging consumers these substantially higher amounts,
14 which at a minimum takes place after the original termination window has passed and appears to
15 have taken place months after many customers signed up for service.

16 39. These international and/or roaming charges are materially higher than the plan
17 rates defendants disclose and should properly be charging for these local and/or long distance
18 calls. Thus, this improper billing practice is material to Cingular customers and the general
19 public who may sign up for Cingular service.

20 40. Nowhere is there a reasonably accessible disclosure made by defendants of this
21 potential and how this potential can be avoided. These misrepresentations and omissions are
22 material, as the amounts at issue can be substantial on a per-call and monthly basis, and in any
23 event few persons would likely sign up for service provided by a company that either misstates or
24 omits from disclosure material facts or sets up an infrastructure that results in such mis-billing.

25 41. These improperly charged amounts are routinely imposed on customers with a
26 demand to pay such amounts. Customers are then forced to justify why these charges should not
27 be imposed, when in fact the burden should be the other way around based on this flaw in the
28 Cingular system and Cingular's apparent awareness of the situation. To add to the confusion,

1 Cingular representatives either told customers not to pay such bills or required customers
2 subjected to this practice to call Cingular on a monthly basis to contest such charges, even though
3 Cingular either is or should have been aware of this situation. By billing and attempting to
4 collect or threatening collection efforts over these improper amounts, defendants are attempting
5 to hold members of the class and the general public accountable for obligations defendants are
6 not permitted to impose and are disputed, and at the same time are attempting to avoid complying
7 with their own legal obligations to disclose this mis-billing and its potential in a reasonable
8 manner considering the markets targeted by defendants and to correct such billings automatically.
9 These representations and omissions of material fact were likely to be misleading, resulting in
10 injury to members of the Class and the general public.

11 42. Defendants assert they are permitted to act in this manner. Any agreements
12 defendants would claim permitted such conduct (or defendants' claimed interpretation thereof)
13 are either inapplicable in light of the other statements made by defendants or are unenforceable.
14 Thus, either there is no valid agreement to impose such amounts or the terms of the agreement
15 are misleading and unconscionable because there would have been unequal economic bargaining
16 power, terms imposed on a take it or leave it basis, and a material and adverse change in an
17 important term of the customers' understanding with no or inadequate notice thereof and to the
18 surprise of members of the Class and general public and with no opportunity to change the terms,
19 all to the detriment of and prejudice to the rights of such persons but with significant benefit to
20 defendants. In addition, a construction permitting such charges would result in an absurdity.
21 Since any construction resulting in an absurd or an unconscionable and illegal result should be
22 avoided, any ambiguities must be construed against defendants who drafted such language and in
23 favor of members of the Class and general public affected by such practices.

24 43. Defendants appear to be aware of this inaccuracy, as its Cingular stores in the
25 border area received numerous complaints from customers and their representatives apparently
26 answered inquiries about such charges by referring to uniform answers. Customers were told to
27 simply turn off their phones to avoid receiving improperly billed calls. Cingular representatives
28 also told customers affected by this practice that they needed to call back monthly to challenge

1 such charges, even though this problem was exclusively caused by Cingular's own operations
2 and, as shown by Mr. Castro's situation, places the customer at the whim of the Cingular
3 representative who may or may not accept such a challenge. Cingular also refuses to let affected
4 customers cancel service due to this problem without being charged an early termination fee.

5 44. As a result of the foregoing, defendants or their representatives are failing and
6 refusing to abide by their own terms, are making uniformly misleading representations and
7 omitting material facts about such billing charges, are making uniform misleading
8 representations in billing statements and customer contacts that such monies were properly
9 charged and are due and owing, are failing to protect consumers from paying such amounts in
10 response to such uniform misrepresentations, and are failing to fix Cingular's system to stop such
11 a situation from taking place and to automatically correct such bills, records and credit reports
12 once it was determined such amounts were disputed and not properly charged, as well as by
13 defendants' failure to warn consumers of the true facts in advance and the concealment of such
14 material facts and/or their consistent and uniform repudiation of their express agreements and
15 representations.

16 45. Defendants have also misrepresented that the amounts here at issue were properly
17 charged and enforceable, and failed in their statements to disclose material facts, *i.e.*, that
18 imposing such charges would in fact be illegal under California law as being contrary to prior
19 promises and representations regarding when international and roaming charges would be
20 imposed. Thus, defendants have improperly held its customers accountable for obligations that
21 were not permissibly billed or collectable or were disputed and/or required the additional payment
22 of monies that were not properly charged, such as early termination fees.

23 46. Based on the amounts and issues in question, these representations were both
24 material and misleading, but customers were still required to continue to make and made such
25 payments, all to their injury. Such conduct adversely impacted or will impact hundreds or
26 thousands of members of the Class and the general public located in this County and state.

27 47. Due to the scope and extent of defendants' consistent deception, and the form of
28 defendants' promotional materials, website, billing statements or other form communications,

1 such misstatements and material omissions were uniformly made to all affected persons.

2 48. The persons that are the targeted consumers for this practice are particularly
3 vulnerable to such deceptive and fraudulent practices. Many of the affected persons likely use
4 English as a second language if at all or come from minority backgrounds, or may not be
5 conversant in the legalese contained in defendants’ prolix “disclosure documents” that do not
6 even disclose this as a possibility. Most persons possess limited knowledge of such a potential for
7 misleading statements and the inner workings of the telecommunications industry or have the
8 wherewithal to challenge such charges. Thus, such persons could not have reasonably been
9 expected to determine whether any limitations to such promises and representations truly existed
10 or what were the actual facts. Moreover, Cingular appears to have taken a different position with
11 those customers who were Spanish-speaking and those who were not in terms of attempting to
12 resolve this situation, giving credits to some English-speaking customers but challenging similar
13 claims of Spanish-speaking customers.

14 49. Defendants have publicly represented that they possess special expertise in the
15 offering of such products and services and presumably would not place profits over their duties to
16 and the needs of their customers. Without having been informed of the misrepresentations and
17 omissions detailed herein, members of the Class and the general public reasonably believed these
18 representations and statements or acted without knowledge of defendants’ concealment of the true
19 facts, and were injured thereby.

20 50. Defendants’ failure to abide by their legal obligations, their making of the false
21 and misleading representations either directly or through their representatives and their failing to
22 disclose material facts as set forth above, are ongoing and continue to this date. The persons
23 affected by this practice have not received a cancellation of outstanding or disputed charges or
24 return of the improperly paid or retained monies plus interest thereon or had their credit reports
25 corrected and are currently owed such amounts and appropriate disclosure or correction to reflect
26 the true facts.

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1 **FIRST CAUSE OF ACTION**

2 **Commission of Unlawful, Unfair and Fraudulent Business Acts and Practices**

3 51. Plaintiffs hereby incorporate by reference all allegations contained in ¶¶1- 50
4 hereof and further allege as follows against all defendants.

5 52. Defendants' acts and practices as detailed above constitute acts of unfair
6 competition. Defendants have engaged in unlawful, unfair or fraudulent business acts and/or
7 practices within the meaning of California Business & Professions Code §17200.

8 53. Defendants have engaged in an "unlawful" business act and/or practice by charging
9 or billing local or long distance calls at international calling rates and/or roaming charges and by
10 not disclosing or fixing the problem that results in such charges, automatically crediting the
11 disputed amounts, referring these disputed amounts to collections, and treating its customers
12 improperly and differently apparently based on their race or ethnicity, as detailed above. These
13 business acts and practices violated numerous provisions of law, including, *inter alia*, California
14 Civil Code §51 *et seq.*, §1565 *et seq.*, §1670.5, §1709, the Consumers Legal Remedies Act,
15 California Civil Code §§1750, *et seq.*, §1785.5 *et seq.*, and Business and Professions Code
16 §§17500 *et seq.* Plaintiffs reserve the right to identify additional violations of law as further
17 investigation warrants.

18 54. Through the above-described conduct, defendants have engaged in an "unfair"
19 business act or practice in that the justification for not disclosing such material information and
20 imposing such charges based on the business acts and practices described above considering its
21 awareness of the material facts and then failing to correct the situation or the resulting mis-billing
22 is outweighed by the gravity of the resulting harm, particularly considering the available
23 alternatives, and/or offends public policy, is immoral, unscrupulous, unethical and offensive, or
24 causes substantial injury to consumers and competitors.

25 55. By engaging in the above-described conduct, defendants have engaged in a
26 "fraudulent" business act or practice in that the business acts and practices described above had a
27 tendency and likelihood to deceive reasonable consumers who either were or may be targeted or
28 affected by defendants' practices.

1 practices engaged in by defendants and alleged herein were intended to, and did, result in the
2 continued sale of the telecommunications services here at issue to a significant number of
3 members of the Class primarily for personal, family or household purposes. In engaging in the
4 conduct described above, defendants violated and continue to violate the CLRA's statutory
5 scheme in at least the following respects:

- 6 a. In violation of Cal. Civ. Code §1770(a)(5), defendants' acts and practices
7 constitute misrepresentations that the services in question have qualities,
8 characteristics, uses or benefits that they do not have;
- 9 b. In violation of Cal. Civ. Code §1770(a)(9), defendants advertised the
10 services at issue with the intent not to sell them as advertised or
11 represented;
- 12 c. In violation of Cal. Civ. Code §1770(a)(14), defendants have
13 misrepresented that a transaction confers or involves legal rights,
14 obligations, or remedies of members of the Class concerning the products
15 and services at issue which it does not have or involve or which are
16 prohibited by law;
- 17 d. In violation of Cal. Civ. Code §1770(a)(16), defendants represented that the
18 products and services were supplied or billed in accordance with previous
19 representations when they were not; and
- 20 e. In violation of Cal. Civ. Code §1770(a)(19), to the extent they claim they
21 had a contractual right to impose such charges, defendants attempted to insert
22 an unconscionable provision in an agreement.

23 61. Members of the Class who are entitled to relief under the CLRA have had their
24 legal rights infringed upon and suffered irreparable harm, entitling them to both injunctive relief
25 and restitution as a result of defendants' conduct described above.

26 62. In compliance with the provisions of California Civil Code §1782, plaintiffs have
27 by virtue of the service of this Complaint given written notice to defendants of the intention to
28 amend this claim to seek damages under the provisions of the CLRA unless defendants promptly

1 solve this problem and offer an appropriate correction, replacement or refund plus interest and
2 other appropriate relief to all Class members entitled to relief under the CLRA within 30 days of
3 service.

4 63. Plaintiffs seek and are entitled to, pursuant to California Civil Code §1780(a)(2),
5 an order enjoining the above-described wrongful acts and practices of defendants, providing
6 restitution to all members of the Class who are so entitled, ordering the payment of costs and
7 attorneys' fees, and such other relief as deemed appropriate and proper by the Court under
8 California Civil Code §1780. In addition, as defendants failed to offer an appropriate response
9 consistent with the requirements of Civil Code §1782(c) within 30 days from the service of this
10 amended Complaint and adequately respond to plaintiffs' demand to correct or otherwise rectify
11 the wrongful conduct described above on behalf of all consumer Class members, plaintiffs also
12 seek, for all Class members entitled to relief under the CLRA, all actual and exemplary damages
13 permitted for violation of the CLRA, including statutory damages of \$1,000 per consumer and/or
14 up to \$5,000 per consumer who qualifies as a "senior citizen" under the CLRA.

15 THIRD CAUSE OF ACTION

16 **Declaratory Relief**

17 64. Plaintiffs hereby incorporate by reference all allegations contained in ¶¶1-63
18 hereof, and further allege as follows against all defendants.

19 65. There currently exists between the parties an actual controversy regarding the
20 respective rights and liabilities of the parties regarding, *inter alia*, the obligation of members of
21 the Class and general public to pay or be reimbursed for the charges and amounts in question
22 and/or the need to disclose the true facts and automatically cancel or rebate all amounts that were
23 improperly charged, as alleged in detail above.

24 66. The persons affected by this practice or who may be subjected thereto may be
25 without adequate remedy at law and may be subjected to irreparable harm, rendering declaratory
26 relief appropriate in that:

- 27 a. Damages may not adequately compensate such persons for the injuries
28 suffered, nor may other claims permit such relief;

- 1 b. The relief sought herein in terms of ceasing such practices, fixing the
2 problem, correcting such statements and internal records or credit reports
3 and/or declaring there is no obligation to pay such monies may not be fully
4 accomplished by awarding damages; and
- 5 c. If the conduct complained of is not enjoined, harm will result to the Class
6 and the general public because defendants’ wrongful conduct is continuing
7 and on-going, persons may not be aware of such a potential until after their
8 opportunity to cancel service has come and gone, claims remain
9 unresolved, persons are entitled to the direct monies taken from them and
10 may not be aware of their right to a refund, defendants may be adversely
11 affecting members’ credit histories or seeking collection of monies not
12 properly owed or disputed, and the obligation for many Cingular customers
13 to continue to pay such sums is still allegedly outstanding.

14 67. Defendants have been unjustly enriched as a result of such actions, and should be
15 ordered to return all monies by which they have been unjustly enriched, plus any interest made on
16 such amounts, to the persons rightfully entitled to such monies.

17 68. Accordingly, plaintiffs request the Court issue an order granting the following
18 declaratory relief:

- 19 a. That a judicial determination and declaration be made of the rights of the
20 Class and/or the general public, and the corresponding responsibilities of
21 defendants;
- 22 b. That defendants be ordered to cease and desist from misrepresenting to the
23 Class and/or the general public that these international and/or roaming
24 charges are properly imposed, that the amounts in dispute are due and
25 owing, or that such persons may be held responsible for any such
26 obligations, or from failing to disclose material facts to the contrary;
- 27 c. That defendants cancel or cause to be cancelled any further obligations to
28 pay such sums that are not properly claimed as being due and owing and fix

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the problem that causes this situation;

- d. That defendants be mandated to institute, at their own cost, a campaign to advise all affected persons that the charges here at issue are not properly imposed and that a full and timely refund, rebate and/or cancellation of any such obligations plus interest thereon will be made available at no cost to all persons to whom such amounts are owed and to correct any adverse credit reports made by defendants arising out of this situation; and
- e. That defendants pay over all monies by which they have been unjustly enriched to all persons with a vested interest therein, as well as pay appropriate attorneys' fees and costs.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment against defendants, and each of them jointly and severally, as follows:

- (1) For the declaratory, equitable and injunctive relief requested in the above Causes of Action as appropriate for the particular Causes of Action;
- (2) For all monetary relief as appropriate for the particular Causes of Action;
- (3) For pre- and post-judgment interest;
- (4) For attorneys' fees pursuant to, *inter alia*, the CLRA, the common fund and private Attorney General doctrines and/or C.C.P. §1021.5 as may be appropriate, and for costs of suit incurred herein; and
- (5) For such other and further relief as this Court may deem just and proper.

DEMAND FOR JURY TRIAL

Plaintiffs demand a trial by jury on all claims so triable and an advisory jury for a factual determination on all equitable claims.

DATED: January ____, 2005 ROSNER, LAW & MANSFIELD

By: _____
ALAN M. MANSFIELD
Attorneys for Plaintiffs

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