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CLERK, U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

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10 UNITED STATES DISTRICT COURT  
11 NORTHERN DISTRICT OF CALIFORNIA  
12 SAN FRANCISCO DIVISION

EDL

CV 13 5296

14 MONA GANDHI, MARISHA  
15 JOHNSTON, and MARSHALL TIETJE,  
16 individually and on behalf of all others  
similarly situated,

Case No. \_\_\_\_\_

**CLASS ACTION COMPLAINT**

**JURY TRIAL DEMANDED**

17 Plaintiffs,

18 v.

19 TRACFONE WIRELESS, INC.

20 Defendant.

21  
22 Plaintiffs, individually and on behalf of all others similarly situated, allege on personal  
23 knowledge, investigation of their counsel, and on information and belief as follows:

24 **NATURE OF THE ACTION**

25 1. This proposed class action alleges that TracFone Wireless, Inc. ("TracFone" or  
26 "Defendant") falsely advertises Net10 cellular phone plans as providing "unlimited" data  
27 service, when in fact the Net10 subscribers in the class have had their supposed "unlimited" data  
28 service terminated or "throttled."

1  
2 2. Defendant founded the Net10 brand in 2004, and since that time has continuously  
3 advertised “unlimited” service plans, thereby becoming one of the largest prepaid phone brands  
4 in the United States.

5 3. Defendant prominently advertises that Net10 wireless plans include “unlimited”  
6 data, but fails to disclose that Defendant terminates or “throttles” (*i.e.* reduces the speed of)  
7 subscribers’ access to data. On information and belief, Defendant terminates or throttles data  
8 access when subscribers near or exceed Defendant’s internally established, but undisclosed, data  
9 usage limits, or when Defendant’s wireless network partners (*e.g.* AT&T) direct Defendant to do  
10 so even where subscribers’ usage is below Defendant’s internal, undisclosed limits in order to  
11 limit the strain on Defendant’s wireless partners’ networks.

12 4. In response to complaints from the members of the proposed Class, Defendant  
13 routinely blames customers for “misusing” Net10 cellular data service, but fails to explain how  
14 customers allegedly misused Net10 cellular data service or the reasons that Defendant has  
15 terminated or throttled customers’ data access.

16 5. After Defendant terminates or throttles data service to Net10’s “unlimited” data  
17 plan customers, Defendant engages in the practice of failing to restore data access or regular data  
18 speeds unless and until subscribers’ current prepaid data plans expire *and* subscribers purchase  
19 new Net10 service plans.

20 6. As a result of Defendant’s material misrepresentations, bad faith, and unfair and  
21 unlawful conduct, Plaintiffs and Class members have suffered damages, including, without  
22 limitation, payment for Net10 “unlimited” data service plans, payment for Net10 branded and  
23 locked smartphones (which cannot be used with other wireless carriers), or payment for Net10  
24 SIM cards.

25 7. On behalf of themselves and the Class, Plaintiffs bring this lawsuit against  
26 Defendant for breach of contract; breach of the covenant of good faith and fair dealing;  
27 unconscionability; unjust enrichment; and violation of California’s Unfair Competition Law and  
28 California’s Consumer Legal Remedies Act.

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**PARTIES**

8. Plaintiff Marisha Johnston is an individual residing in Hollister, California.

9. Plaintiff Mona Gandhi is an individual residing in Hayward, California.

10. Plaintiff Marshall Tietje is an individual residing in Sugarloaf, California.

11. Defendant TracFone Wireless, Inc. is a Delaware corporation and is headquartered in Miami, Florida. TracFone is the fifth largest wireless carrier in the United States, with over 23 million subscribers as of July 2013. TracFone holds multiple agreements with the United States' largest wireless telecommunications companies, including Verizon, AT&T, Sprint, and T-Mobile, to use their networks to provide wireless service.

**JURISDICTION AND VENUE**

12. The Court has subject matter jurisdiction over this matter pursuant to 28 U.S.C. § 1332(d)(2) as the amount in controversy exceeds \$5,000,000 among the proposed nationwide Class, believed to number at least in the tens of thousands, who are entitled to damages in the amount of the purchase price of Net10 "unlimited" service plans, compatible phones, and SIM cards.

13. This Court has personal jurisdiction over Defendant TracFone because Defendant is authorized to do business and regularly conducts business in California, and has marketed, sold, and issued Net10 service plans, phones, and SIM cards in California. Defendant has conducted business in California with certain of the Plaintiffs. Defendant therefore has sufficient minimum contacts with this state to render the exercise of jurisdiction by this Court permissible.

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

**COMMON FACTUAL ALLEGATIONS**

A. **Defendant Falsely Advertises Net10 Wireless Phone Plans as Providing "Unlimited" Data.**

15. Defendant TracFone created the Net10 Wireless brand in 2004, and since then it has become one of the largest prepaid phone brands in the United States.

16. Defendant markets and sells Net10 branded prepaid wireless service plans, phones, and SIM cards. Net10 products and plans can be purchased directly from Net10 or at over 80,000 retail locations across the United States, including Walmart, Target, BestBuy, RadioShack, and leading and independent supermarkets and drugstores.

17. Defendant offer two types of plans: limited plans, which include specified numbers of minutes which can be used for talk or data on basic or feature phones; and 30-day “unlimited” plans, which can be used with smartphones and which Defendant advertises as including “unlimited” data. “Unlimited” plans include a 30-day individual plan for \$50, and a 30-day international plan for \$65. Defendant also offers unlimited “Family Plans,” which are identical to the unlimited individual plan but include a \$10 discount for each additional phone added to the group, up to a maximum of four phones. Customers are promised a \$5 discount if they sign up for the Net10 “Auto-Refill” program. Below is a screenshot of Net10’s offered plans, taken from Net10’s website on September 25, 2013:

The screenshot displays a grid of Net10 prepaid wireless service plans. The plans are organized into three main categories: Family Plans, 30-Day Monthly Plans, and Pay-As-You-Go plans. Each plan card includes the plan name, price, duration, and key features like unlimited talk, text, or data, and whether it includes international calls or an auto-refill option. A disclaimer at the bottom states: "Texting to Another Device is Prohibited. Other Limitations Apply. Refer to terms and conditions service at www.net10.com".

Category	Plan Name	Price	Duration	Key Features
NEW FAMILY PLANS	2 PEOPLE	\$90 / \$85	30 Days / Auto-Refill	Unlimited* National Calls, Unlimited* Text, Unlimited* Data, No Activation Fee
	3 PEOPLE	\$130 / \$125	30 Days / Auto-Refill	Unlimited* National Calls, Unlimited* Text, Unlimited* Data, No Activation Fee
	4 PEOPLE	\$170 / \$165	30 Days / Auto-Refill	Unlimited* National Calls, Unlimited* Text, Unlimited* Data, No Activation Fee
	NEW FAMILY PLANS	We believe staying safe and in touch is more and more important as families lead more active and separate lives. We make it as affordable as possible.		
30-DAY MONTHLY PLANS	UNLIMITED* INTERNATIONAL TALK, TEXT, DATA	\$65 / \$60	30 Days / Auto-Refill	International Calls, Auto Refill, Unlimited* Text, picture messaging, Web / email and call to 411
	UNLIMITED* TALK, TEXT, DATA	\$50 / \$45	30 Days / Auto-Refill	No International Calls, Auto Refill / Unlimited* Talk, Text / Picture Messaging, Web / Email and call to 411
	750 MINUTES	\$25	30 Days	International Calls, Auto Refill For Talk, Text / Picture Messaging, Web / Email and calls to 411
	500 MINUTES	\$30	30 Days / Carryover	International Calls, Auto Refill
	200 MINUTES	\$15	30 Days / Carryover	International Calls, Auto Refill
PAY-AS YOU-GO	1500 MINUTES	\$100	180 Days / Carryover	International Calls, No Auto Refill
	900 MINUTES	\$60	90 Days / Carryover	International Calls, No Auto Refill
	600 MINUTES	\$45	60 Days / Carryover	International Calls, No Auto Refill
	300 MINUTES	\$30	60 Days / Carryover	International Calls, No Auto Refill
	200 MINUTES	\$20	30 Days / Carryover	International Calls, No Auto Refill

1 18. Smartphones comprise over 70 percent of the Net10 branded and locked phones  
2 currently offered for sale by Net10. In January 2013, Defendant began selling Net10 branded  
3 iPhones, in addition to its Android smartphone lineup.

4 19. On February 9, 2012, Defendant promoted Net10's "Bring Your Own Phone"  
5 program as a new way for consumers to sign up for Net10's "unlimited" data plans. Through  
6 this program, Defendant sells Net10 SIM cards to enable the "unlimited" plans on unlocked  
7 AT&T or T-Mobile compatible GSM smartphones. On April 4, 2013, Defendant expanded this  
8 program such that unlocked Verizon compatible CDMA smartphones may be used with the  
9 Net10 "unlimited" plans without a Net10 SIM card.

10 20. Defendant continues to aggressively and consistently promote the supposed  
11 "unlimited" data plans in order to capture the burgeoning smartphone market. Defendant's  
12 advertising and packaging of Net10 phones, SIM cards, and data plans prominently feature the  
13 word "unlimited." Below are examples of Defendant's marketing for Net10's "unlimited" plans:  
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1           21. Defendant's widespread marketing for Net10's "unlimited" data plans induced  
2 millions of new smartphone users to subscribe to the plans and buy Net10 phones and SIM  
3 cards.

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

5           23. Upon information and belief, the networks accessed by Net10's data plans  
6 (AT&T, Verizon, Sprint and T-Mobile) have complained to Defendant about the ever-increasing  
7 strain being placed on their respective networks by growing numbers of Net10 "unlimited" data  
8 plan subscribers.

9  
10           **B. Defendant Regularly Terminates or Throttles "Unlimited" Subscribers'  
11 Access to Data.**

12           24. To control network data usage and costs, Defendant implements monthly data  
13 usage limits, which Defendant fails to disclose to Net10's "unlimited" data plan subscribers. A  
14 former TracFone employee stated that the monthly data cap in 2012 was between 2 GB – 3 GB,  
15 having been reduced from a prior 5 GB limit at the behest of Defendant's network carrier  
16 partners.<sup>1</sup> Defendant actively conceals these limits from Net10's "unlimited" data customers.

17           25. Upon information and belief, Defendant had a contract dispute with AT&T  
18 regarding the increased strain and cost to AT&T's network, which led to Net10's adoption of a  
19 policy, in or around March 2013, of imposing a monthly hard cap of 1.5 GB of data for Net10  
20 subscribers using AT&T compatible SIM cards, after which subscribers' data would be  
21 automatically terminated.<sup>2</sup>

22           26. Defendant admitted to the 1.5 GB cap in a hard-to-find blog entry on the Net 10  
23 website.<sup>3</sup> In March 2013, Defendant posted new Terms and Conditions of Service on the Net10  
24 website stating, for the first time, that there was a hard 1.5 GB data usage cap for Net10  
25 customers who purchased "unlimited" data plans for their Net10 AT&T compatible SIM cards.

26 <sup>1</sup> Discussion on XDADEVELOPERS.COM, *Have questions for StraightTalk/Net10/Tracfone?*  
(available at <http://forum.xda-developers.com/showthread.php?t=1641966>).

27 <sup>2</sup> Humberto Saabedra, *Net10 to Cap AT&T SIM Customers to 1.5 GB Starting March 1st*,  
28 PHONENEWS.COM, February 28, 2013 (available at <http://www.phonenews.com/net10-to-cap-att-sim-customers-to-1-5gb-starting-march-1st-22480/>)

<sup>3</sup> <http://www.net10blog.com/2013/02/what-can-you-do-with-16-gb-of-data.html>

1           27. Defendant failed to notify existing AT&T SIM card customers of the 1.5 GB data  
2 usage cap. Moreover, Defendant continues to prominently advertise and sell the plan as  
3 “unlimited.”

4           28. On or about August 8, 2013, Defendant claimed to have removed the 1.5 GB cap  
5 for AT&T SIM card customers.<sup>4</sup>

6           29. On September 27, 2013, Defendant posted further revised Terms and Conditions  
7 of Service on the Net10 website stating, for the first time, that “unlimited” data plans for all  
8 Net10 phones and SIM cards have a monthly data usage cap of 2.5 GB, after which data will be  
9 throttled to “2G speeds,” regardless of which underlying carrier network (*i.e.*, AT&T, Verizon,  
10 Sprint, or T-Mobile) is utilized to provide service.

11           30. Defendant failed to notify its existing subscribers of the 2.5 GB data usage cap  
12 and corresponding throttling. Moreover, Defendant continues to prominently advertise and sell  
13 the data plans as “unlimited.”

14           31. When customers exceed Defendant’s data usage limits, Defendant typically  
15 throttles or terminates customer data access without any notice or warning, as Defendant did in  
16 the case of all three plaintiffs. In other instances, Defendant first throttles customer data to  
17 virtually unusable speeds before terminating the data access altogether.

18           32. When customers contact Net10 to complain about being cut off, Net10 blames the  
19 customers for engaging in “unauthorized uses” set forth in the Net10 Terms and Conditions. But  
20 these Terms and Conditions are not reasonably disclosed or agreed to by customers, and are also  
21 riddled with vague, confusing, contradictory, and unconscionable provisions. Defendant fails to  
22 disclose its data usage limits to customers or explain the reasons why their data access was  
23 terminated or throttled.

24           33. Customers contacting Defendant about their data access being terminated or  
25 throttled are often transferred to a recorded message on Defendant’s “High Data Usage Hotline”  
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28 <sup>4</sup> Humberto Saabedra, *Net10 Removes AT&T Data Caps And Goes Bank To Unlimited?*,  
PHONENEWS.COM, August 8, 2013 (*available at* <http://www.phonenews.com/net10-removes-att-data-caps-and-goes-back-to-unlimited-23238/>)

1 that recites to customers that their data service may have been suspended or reduced “due to  
2 violation of our Terms and Conditions” and that “our customer care representatives cannot  
3 override this policy to restore” data access. The message then suggests “tips” to reduce data  
4 usage such as syncing emails no more than once an hour, refraining from browsing regular  
5 internet websites (as opposed to “mobile friendly” websites), and downloading a data usage app  
6 to “better understand and manage your monthly data plan.”

7  
8 34. Prior to September 27, 2013, the “High Data Usage Hotline” message did not  
9 state or refer to the existence of a data cap or limit. On or about September 27, 2013, Defendant  
10 updated the High Data Usage Hotline message to state, for the first time, that the “unlimited”  
11 data plans have a 2.5 GB data usage “threshold,” after which data is throttled to “2G speed.”<sup>5</sup>

12 35. Even in the few instances when a customer is fortunate enough to speak to or  
13 “chat” via the internet with a live customer service representative, Defendant refuses to provide a  
14 clear answer as to why any particular customer’s data access was terminated or throttled. In  
15 response to one customer’s question posted on the Net10 Facebook page on July 17, 2013 asking  
16 why his “unlimited data” was cutoff, a Net10 representative responded “Your data will be  
17 suspended if you have exceeded the limit for mobile browsing” without saying what the “limit”  
18 is.

19 36. Defendant’s refusal to explain under what circumstances Defendant will  
20 terminate or throttle Net10 “unlimited” plan customers’ data access makes the practice all the  
21 more unclear and deceptive to consumers. Customers report that Defendant has terminated their  
22 data access after they used as little as 200 megabytes in a month.<sup>6</sup>

23 37. Upon information and belief, Defendant also terminates customers’ data access at  
24 the behest of Defendant’s wireless network partners when a particular cell tower is at or near  
25 data capacity, regardless of whether that customer’s data usage has exceeded Defendant’s data  
26 usage limits. Upon information and belief, Defendant’s network partners such as AT&T are

27 <sup>5</sup> “High Data Usage Hotline” recorded message, reachable at 866.793.0474.

28 <sup>6</sup> See customer complaint posted in user comments to Net10 commercial at  
[http://www.youtube.com/watch?v=H0V4i-mvAH4&lc=VdFqO9rG-9ioOELYabLal\\_ag81GKxUvbZcpQm8gZhYc](http://www.youtube.com/watch?v=H0V4i-mvAH4&lc=VdFqO9rG-9ioOELYabLal_ag81GKxUvbZcpQm8gZhYc) (posted February 2013)



1 concerned that Net10 customers' data usage on their networks may negatively impact their  
2 ability to provide their own direct customers with service, and thus require Defendant to restrict  
3 the data usage of Net10 customers. TracFone Executive Resolution Specialist, Juanita  
4 Woodside, said the following to a customer in response to his FCC and BBB complaints:  
5 "Tracfone... doesn't track your usage, AT&T or T-Mobile does. When on a given cell phone  
6 tower (AT&T or T-Mobile), and you use a lot of data, this affects other subscribers."<sup>7</sup>  
7

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

10 38. When customers contact Defendant to complain about their data access having  
11 been restricted, Defendant typically tells customers that their "unlimited" data access has been  
12 terminated or throttled because they allegedly violated the Net10 "Terms and Conditions" that  
13 Defendant purports to apply to Net10 phones, SIM cards, and service plans. But these terms are  
14 never adequately disclosed to consumers and contradict Defendant's prominent and consistent  
15 advertisements that Net10 plans are "no contract" plans. Defendant advertises in its television  
16 commercials that there is "no catch" to Net10's "unlimited everything" plans. One such  
17 commercial, titled "What's the Catch?" features a child speaking to the camera: "What's the  
18 catch? If I've told you once I've told you a thousand times, with Net10 Wireless there is no  
19 catch!"<sup>8</sup>

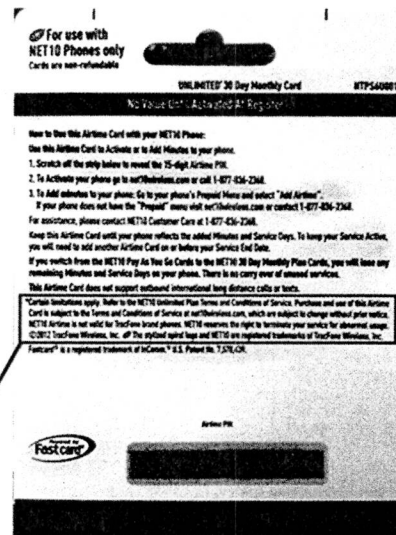
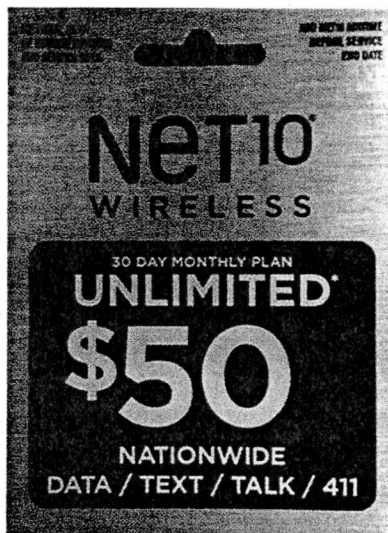
20 39. Defendant does not require consumers who purchase Net10 phones, SIM cards,  
21 or service plan cards to view the Terms and Conditions before making their purchase.

22 40. The Terms and Conditions are not referred to and are not available anywhere on  
23 websites of major Net10 retailers such as Walmart.com, Target.com, RadioShack.com, and  
24 Amazon.com. On net10wireless.com, the Terms and Conditions are hidden in tiny text in a link  
25 at the footer of the website's home page, which a consumer must click to have the Terms and  
26 Conditions open in a small window.  
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28 <sup>7</sup> <http://www.howardforums.com/showthread.php/1765893-A-limit-according-to-Tracfone>

<sup>8</sup> See Net10 commercial at [http://www.youtube.com/watch?v=FaOG9\\_iKhWA](http://www.youtube.com/watch?v=FaOG9_iKhWA)

1                    41.        The Terms and Conditions are not provided with the Net10 service plan cards  
2 purchased at any of the 80,000 retail locations they are sold. The front of the service card, in  
3 very large white text on blue background, features the word “UNLIMITED” next to “Data, Text,  
4 Talk, 411.” Hidden on the back of the card, in tiny text, is a statement that use of the service  
5 card is subject to unspecified “Terms and Conditions of Service at net10wireless.com, which are  
6 subject to change without prior notice.” Below are photographs of the front and back of the  
7 service card:  
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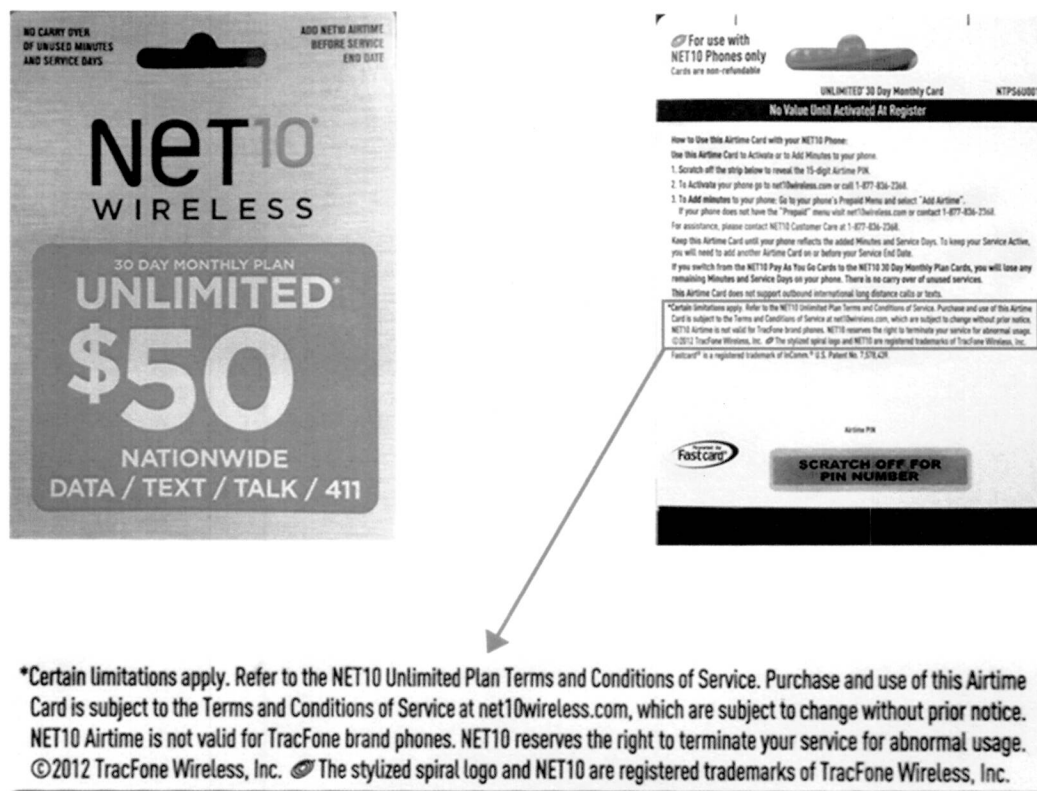


**\*Certain limitations apply. Refer to the NET10 Unlimited Plan Terms and Conditions of Service. Purchase and use of this Airtime Card is subject to the Terms and Conditions of Service at net10wireless.com, which are subject to change without prior notice. NET10 Airtime is not valid for TracFone brand phones. NET10 reserves the right to terminate your service for abnormal usage. ©2012 TracFone Wireless, Inc. The stylized spiral logo and NET10 are registered trademarks of TracFone Wireless, Inc.**

42.        Defendant does not mention the Terms and Conditions when a customer purchases or activates a Net10 service plan, smartphone, or SIM card over the telephone.

43.        Inside the packaging of Net10 phones and SIM cards, Defendant hides the Terms and Conditions in a shrink-wrapped “Services Guide” booklet. The cover of the booklet directs customers to “Activate Your SIM Card First” (in the case of SIM cards), or to “Use the Activation Card First” (in the case of phones). The cover of the booklet does not mention the

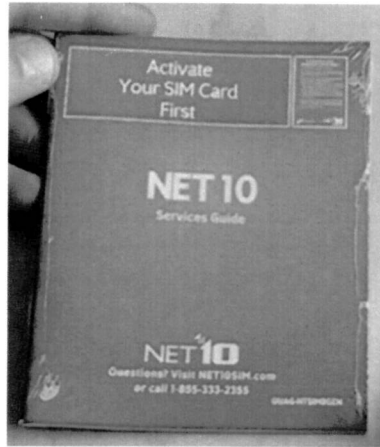
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26 customers to “Activate Your SIM Card First” (in the case of SIM cards), or to “Use the  
27 Activation Card First” (in the case of phones). The cover of the booklet does not mention the  
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1 existence of the Terms and Conditions, which are buried in the middle of the booklet in tiny text.  
2 Below is a photo of the Services Guide booklet:



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10 44. In March of 2013, Defendant began selling a new SIM card package containing  
11 both AT&T and T-Mobile compatible SIM cards, which included a notice in the fine print on the  
12 back of the package that “The Net10 30-day Unlimited Plan Card that you add to your phone  
13 will indicate unlimited data, however if you choose the AT&T compatible SIM you will be  
14 limited to 1.5 GB of data.” Defendant also included a slip of paper inside of the package  
15 mentioning the 1.5 GB data usage limit for AT&T compatible SIM cards. But, Defendant  
16 continued to sell AT&T compatible SIM cards and Net10 branded phones with old packaging,  
17 which made no mention of the 1.5 GB limit. When Defendant updated the Net10 Terms and  
18 Conditions on September 27, 2013 to state the 2.5 GB data usage cap for all Net10 branded  
19 phones and SIM cards, Defendant failed to update any of its product packaging (*e.g.*, for the  
20 phones, SIM cards, or data plan cards) to disclose the purported change.

21 45. The Terms and Conditions claim that, by purchasing or activating Net10 phones,  
22 SIM cards, or data plans, customers agree to them, despite that fact that consumers purchase and  
23 activate their phones, SIM cards, or data plans *prior* to even having an opportunity to view the  
24 Terms and Conditions. Moreover, Net10 and its retailers do not allow returns of service cards or  
25 SIM cards, such that a consumer who reads and decides to reject the Terms and Conditions is  
26 unable to do so.  
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1 underlying carrier network (*i.e.*, AT&T, Verizon, Sprint, or T-Mobile) is utilized to provide  
2 service.

3 51. Section 20 of the Terms and Conditions ambiguously prohibits “access to the  
4 Internet, intranets, or other data networks except as the device’s native applications and  
5 capabilities permit.” This poorly written provision could arguably be read to encompass the  
6 installation and use of any smartphone application not preinstalled on the phone, but such a  
7 reading would be extreme and contrary to consumers’ reasonable expectations. Section 20 also  
8 prohibits “tethering”; *i.e.* connecting one’s phone to a computer to share Net10’s data  
9 connection.

10 52. Up until approximately March 12, 2013, Section 20 provided that Net10 service  
11 plans may only be used for “Internet browsing through the Net10 Mobile Web Portal” and  
12 “Authorized Content Downloads from the Net10 Mobile Web Store.” Section 20 explicitly  
13 prohibited “uploading, downloading or streaming of audio or video programming or games.”  
14 But, contradictorily and confusingly, the same section later provided that “downloading legally  
15 acquired songs” is an example of a permitted use.

16 53. On or about March 12, 2013, Defendant modified Section 20, which now  
17 provides that Net10 data plans may only be used for “Internet browsing and ordinary content  
18 downloads.” Section 20 no longer provides that “uploading, downloading, or streaming of audio  
19 or video programming or games” are prohibited uses, but instead forbids “uploading,  
20 downloading, or streaming uninterrupted continuous video.”

21 54. Despite Section 20 purporting to prohibit at least some types of video and music  
22 uploading, downloading, or streaming, Defendant publicly promotes and encourages consumers  
23 to use their smartphones and data plans to download and stream music and videos. Defendant  
24 preloads streaming video apps, such as YouTube, on Net10 branded smartphones. In a post on  
25 Net10’s blog dated June 3, 2013, Net10 promoted a new Samsung phone as being able to “[d]o  
26 two things at once: watch a video as you email or text.”<sup>10</sup>

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28 <sup>10</sup> *The Samsung Galaxy S III Has Arrived*, NET10 WIRELESS BLOG, June 13, 2013 (*available at*  
<http://www.net10blog.com>).

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55. Meanwhile, Net10 representatives continue to tell customers that their data access was terminated for reasons Net10 has publicly claimed to not be prohibited uses. As recently as July 13, 2013, a Net10 representative posted on Net10's Facebook page, in response to a customer asking why his data access was terminated, that "unlimited data" is not for audio or video streaming: "Our unlimited plan offers unlimited talk, text and mobile web. All streaming (such as videos, Netflix, YouTube, music, Pandora, online games, large downloads, video chat) has to be done on Wi-Fi and not on NET10's data."

56. Section 20 also discusses Net10's discretion to terminate or throttle data access. Section 20 purports to allow Net10 to terminate or throttle data service "in order to protect the Carrier's network from harm due to any cause including, without limitation, the excessive and/or improper use of Net10 service" or where Net10 believes a customer "is using the Net10 30 Day Unlimited Plan Service in an unauthorized manner or whose usage, in Net10's sole opinion, adversely impacts the Carrier's network or customer service levels." Despite seemingly putting some limits on its discretion in the above provisions, Section 20 then purports to allow Net10 to terminate data access to anyone, at any time, with no notice, and for any reason or no reason at all: "Net10 may modify or cancel any Service or take corrective action at any time without prior notice and for any reason, including but not limited to your violation of this agreement." Up until approximately March 11, 2013, Section 20 also provided as follows: "Notwithstanding the foregoing, Net10 reserves the right to deny Service, deactivate or cancel existing Service, terminate data connections and/or reduce data throughput speeds, to anyone for any reason at any time, in Net10's sole discretion."

57. Section 2 states that any "unused service at the time of termination will not be refunded."

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

58. 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. Defendant explained on the High Data Usage Hotline

1 recorded message that “customer care representatives cannot override this policy to restore your  
2 service to its original data speed. Adding a plan prior to your service end date also will not  
3 restore your original data speed.” Even after waiting until their plan has expired and paying for  
4 a new data plan, many customers find that their data access remains restricted in the new data  
5 plan period.<sup>11</sup>

6 **E. Defendant’s Practices are Unfair and Likely to Mislead Consumers.**

7 59. Reasonable consumers are likely to be misled by Defendant’s promise of  
8 “unlimited” data, particularly in combination with Defendant’s advertisements that encourage  
9 customers to use Net10 smartphones and data plans in typical ways such as browsing the  
10 internet, streaming or downloading music and videos, running apps, and using GPS navigation.

11 60. Once customers discover the truth about Defendant’s “unlimited” plans,  
12 customers are outraged by Defendant’s lies and bad faith practices. Angry customers have  
13 flooded Net10’s Facebook page, turning it into a virtual complaint board. Net10’s official online  
14 forum, net10forum.com, is also full of complaints from frustrated customers whose data access  
15 has been terminated or throttled. Many more customers have posted complaints on consumer  
16 websites such as Consumeraffairs.com, Boycottowl.com, Howardforums.com,  
17 Pissedconsumer.com, and Ripoffreport.com, or in the comments to Net10 video advertisements  
18 posted on YouTube. The following are examples of typical complaints:

19  
20 “BIG SCAM! They said I was supposed to have unlimited Internet and I have been  
21 without it for at least a week. They even took my money out of my account three days ago  
22 and still have not connected my Internet! Every time I call customer service they transfer  
me to a recording then I get disconnected. I will surely be canceling my service with these  
scam artist!”<sup>12</sup>

23  
24 “On the 7th of jan, I was told ... the only way I could get my data back was to buy a new  
25 card! I spent \$50.00 had the card put on my account on the 7th. 2 days later, that being  
today guess what? my data is off again! in the 2 days I used 195mbs of data. I’ve never  
heard of unlimited data being less then 200 mbs.”<sup>13</sup>

26  
27 <sup>11</sup> E.g., see customer complaints at <https://www.facebook.com/NET10Wireless> (posted June 6,  
2013) and <https://www.net10forum.com/viewtopic.php?f=5774&t=201181&start=10#p467601>  
(posted June 4, 2013)

28 <sup>12</sup> <https://www.facebook.com/NET10Wireless> (posted June 6, 2013)

<sup>13</sup> Comment by Gary Tittle to Net10 commercial at <http://www.youtube.com/watch?v=H0V4i->

1  
2 “I called in yesterday and they said my data was suspended because of extreme usage?  
3 They said I went over 1.5 GB , that is not extreme. I only purchased net10 because it said  
4 unlimited Data + Text + Calling on the package at Walmart.”<sup>14</sup>

5 “I have filed a complaint with the FCC and the Better Business Bureau against Net 10 for  
6 false advertising, and lying about services. I went over the "unlimited" data usage policy 1  
7 time, my data was turned off, and I was rudely connected to a pre-recorded message  
8 telling me that since I went over my data could not be restored until my next billing  
9 period. I read through the info on the "unlimited" plan, and then paid my next month's bill  
10 for my smartphone. I have contacted customer service 3 times about the fact that my data  
11 is still not turned on, and they simply say the data should have been restored within 24  
12 hours of paying my new bill. This is horrible on so many levels I do not know where to  
13 begin. That, my friends, is the data policy.”<sup>15</sup>

14 “I reactivated my phone on May 17th and had data immediately! The next day, my data is  
15 gone! I was told by a Net10 representative that my data had been suspended due to high  
16 data usage. How on earth do I lose data in less than 24 hours? ...I have been dealing with  
17 Net10 since February of this year, and I have had issues every month! I'm purchasing a  
18 \$50 plan each month and my data runs out after about a week... This isn't fair! They can't  
19 help me when I call, and they always transfer me to an automated recording.”<sup>16</sup>

20 “My son's internet capabilities were just shut off for overusage. NOWHERE can I find a  
21 limit. \$50 card says nothing about a data limit. Now my Son does not have internet to  
22 research his homework. This is BALONEY! LET us know when we are approaching  
23 limits so we can conserve if we have to. My son is 14 yrs. old and just learning about  
24 SMART phones and he is also getting a lesson in SHADY business practices.”<sup>17</sup>

25 61. Defendant has benefited, and continues to benefit, from falsely advertising that  
26 Net10 data plans are “unlimited,” terminating or throttling customers’ data access to cut costs or  
27 to keep Defendant’s wireless network carrier partners happy, and relying on confusing,  
28 contradictory, and unconscionable Terms and Conditions that Defendant ensures customers will  
never see or read to justify Defendant’s unfair and misleading practices.

62. Defendant’s misrepresentations and omissions regarding Defendant’s “unlimited”  
data plans are material to reasonable consumers.

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mvAH4&lc=VdFqO9rG-9ioOELYabLal\_ag81GKxUvbZcpQm8gZhYc (posted February 2013)

<sup>14</sup> <http://net10forum.com/viewtopic.php?f=5782&t=131113> (posted March 28, 2013)

<sup>15</sup> <https://www.net10forum.com/viewtopic.php?f=5774&t=201181&start=10#p467601> (posted June 4, 2013)

<sup>16</sup> [http://www.consumeraffairs.com/cell\\_phones/net\\_10.html?page=2](http://www.consumeraffairs.com/cell_phones/net_10.html?page=2) (posted May 22, 2013)

<sup>17</sup> <https://www.net10forum.com/viewtopic.php?f=5774&t=201181&start=10> (posted June 5, 2013)



1           63. Defendant’s continuing practice of terminating and/or throttling customers’ data  
2 access pursuant to secret data usage caps, or for any other reason, is unfair and is done in bad  
3 faith, and defies the reasonable expectations of reasonable customers.

4           64. Defendant’s implementation of a 1.5 GB hard data cap for its AT&T customers,  
5 and later a 2.5 GB data cap for all customers, without giving the customers notice of these caps  
6 and after having promised them “unlimited data” at the time they purchased their data plans,  
7 SIM cards and/or Net10 smartphones, was unfair and was done in bad faith, and defied the  
8 reasonable expectations of reasonable customers.

9           65. Defendant’s misrepresentations and practices injured and caused Plaintiffs and  
10 Class members to lose money or property in that they purchased expensive smartphones,  
11 Net10 SIM cards, and Net10 “unlimited” data plans, but Defendant terminated or throttled the  
12 promised “unlimited” data rendering Plaintiffs’ and Class members’ smartphones essentially  
13 useless for their intended purposes.

14                           **PLAINTIFFS’ FACTUAL ALLEGATIONS**

15                                   **Plaintiff Marisha Johnston**

16           66. Prior to March 25, 2013, Plaintiff Marisha Johnston had a voice and data plan  
17 with Verizon Wireless.

18           67. Defendant’s marketing and advertisements for “unlimited data” displayed in Ms.  
19 Johnston’s local Kmart store induced Ms. Johnston to switch to Net10. Relying on Defendant’s  
20 promises, on or about March 25, 2013, Ms. Johnston purchased a Net10 T-Mobile compatible  
21 SIM card from Kmart for \$15 for use with an unlocked T-Mobile branded LG Android  
22 smartphone she received from a friend.

23           68. Ms. Johnston inserted the SIM card into the smartphone and called Net10  
24 customer service to transfer her phone number and activate her Net10 service. While on the call  
25 with a customer service representative, Ms. Johnston purchased Net10’s “unlimited” 30-day  
26 service plan for \$50, and also signed up for Net10’s “auto refill” program to automatically renew  
27 and pay for her “unlimited” data service each month.  
28

1           69.     In June 2013, Ms. Johnston received an AT&T compatible Apple iPhone 3GS  
2 from her friend. Ms. Johnston called Net10 customer service to switch her plan to the new  
3 phone. Ms. Johnston asked if the AT&T iPhone was fully compatible with the Net10 service  
4 and whether she would still receive “unlimited” data with the phone. The representative  
5 confirmed that with a new AT&T compatible SIM card, Ms. Johnston would receive unlimited  
6 data on the iPhone.

7           70.     After receiving the new SIM card and installing it in her iPhone, Ms. Johnston  
8 called Net10 customer service to transfer her phone number to the new SIM card and activate the  
9 iPhone.

10          71.     Defendant did not adequately disclose Net10’s Terms and Conditions or Net10’s  
11 1.5 GB data cap on AT&T SIM cards during these purchases and activation, and Ms. Johnston  
12 was at all times unaware of any such terms.

13          72.     Ms. Johnston used her smartphone and Net10 data plan to access email, navigate  
14 via Google Maps, browse websites, and occasionally watch streaming video. While at home,  
15 Ms. Johnston accessed the internet on her phone via Wi-Fi. Ms. Johnston never tethered her  
16 phone to a computer to access Net10’s data and she never used her phone as a Wi-Fi hotspot.

17          73.     In mid June, approximately two weeks after Ms. Johnston switched to the AT&T  
18 compatible SIM card, Net10 terminated Ms. Johnston’s data access without warning. Ms.  
19 Johnston called Net10’s customer service, and the representative transferred her to the “high data  
20 usage hotline” recorded message, which stated she had violated unspecified “Terms and  
21 Conditions.” Ms. Johnston immediately called back and asked a customer service representative  
22 what terms she had violated. The representative transferred Ms. Johnston to someone in another  
23 department, who told Ms. Johnston that there was a 1.5 GB data cap on Net10 SIM cards. Ms.  
24 Johnston asked why are the Net10 plans being marketed as “unlimited,” and told the  
25 representative that no one had previously told her there was any such limit. The representative  
26 then told Ms. Johnston that he would transfer her to someone who could help her, but he instead  
27 transferred her again to the “High Data Usage Hotline” recorded message. Ms. Johnston called  
28

1 back two more times, and each time she was immediately transferred to the same recorded  
2 message.

3 74. Ms. Johnston's data access was restored only on June 23, 2013, when she was  
4 automatically charged for a new month of service. However, within two weeks of her data  
5 access being restored, Net10 again terminated her data access.

6 75. Ms. Johnston transferred her service to T-Mobile in August 2013.

7 76. Ms. Johnston reasonably relied upon Defendant's material misrepresentations and  
8 omissions, which, in conjunction with Defendant's acts and practices alleged herein caused Ms.  
9 Johnston to suffer harm, injury in fact, and lost money or property. Had Ms. Johnston known  
10 that Net10's purportedly "unlimited" plan was in fact limited in the manner that it is, she would  
11 not have paid for the Net10 data plan.

12 **Plaintiff Mona Gandhi**

13 77. Prior to January 2013, Plaintiff Mona Gandhi had a voice and data plan with H2O  
14 Wireless which she used with her unlocked Samsung Galaxy Note 2 smartphone.

15 78. Defendant's marketing and advertisements for "unlimited data" induced Ms.  
16 Gandhi to switch to Net10. On or about January 4, 2013, Ms. Gandhi visited a wireless phone  
17 dealer in San Francisco who sold Net10 plans. The dealer confirmed to Ms. Gandhi that the  
18 Net10 plan included unlimited data, as stated in Net10 advertisements. Relying on Defendant's  
19 promises, Ms. Gandhi purchased a Net10 T-Mobile compatible SIM card from the dealer, along  
20 with a \$50 "unlimited" data plan, paying a total of approximately \$70. The dealer installed the  
21 SIM card in Ms. Gandhi's smartphone, transferred her phone number to Net10, and activated her  
22 service.

23 79. Ms. Gandhi found T-Mobile coverage in the Hayward area to be inadequate, and  
24 purchased a Net10 AT&T SIM card from the same wireless dealer in February 2013 for  
25 approximately \$20. The dealer installed the new SIM card in Ms. Gandhi's smartphone and  
26 transferred Ms. Gandhi's service to the new AT&T SIM card.  
27  
28

1  
2 80. Ms. Gandhi renewed her monthly service by calling Net10 customer service and  
3 purchasing an additional month each time her service plan expired.

4 81. In June 2013, Ms. Gandhi purchased an unlocked iPhone 5 on Craigslist. Ms.  
5 Gandhi transferred the AT&T SIM card from her Samsung Galaxy Note 2 to the iPhone 5.

6 82. Defendant did not adequately disclose Net10's Terms and Conditions during  
7 these purchases and activation, and Ms. Gandhi was at all times unaware of any such terms.  
8 Moreover, when Defendant imposed a 1.5 GB hard data cap on AT&T SIM card "unlimited"  
9 plan customers in March 2013, Defendant failed to inform or notify Ms. Gandhi of this  
10 purportedly new policy or of the corresponding revision to the Terms and Conditions.

11 83. Ms. Gandhi used her smartphone and Net10 data plan to access email, browse  
12 websites, and occasionally navigate via Google Maps. Ms. Gandhi never streamed music or  
13 video. Ms. Gandhi never tethered her phone to a computer to access Net10's data and she never  
14 used her phone as a WiFi hotspot.

15 84. Only July 2, 2013, Ms. Gandhi renewed her monthly service via telephone and  
16 signed up for Net10's "auto refill" program to automatically renew her service each month.

17 85. Approximately one week later, Net10 terminated Ms. Gandhi's data access  
18 without warning. Ms. Gandhi called Net10's customer service, and the representative  
19 transferred her to the "High Data Usage Hotline" recorded message. Ms. Gandhi immediately  
20 called back and asked why her data service had been terminated. The representative told her that  
21 her plan was no longer unlimited, and that her data access would not be restored until she  
22 purchased another "unlimited" plan. Ms. Gandhi asked to speak to a supervisor.

23 86. The supervisor repeated what the first representative had told her, and informed  
24 her that there was now a 1.5 GB data limit on the "unlimited" plan. Ms. Gandhi told the  
25 supervisor this did not make sense because she signed up for an "unlimited" data plan and she  
26 was never notified that there was a limit. Ms. Gandhi also told the supervisor she did not  
27 understand how she could have used 1.5 GB in just a few days given her light usage of data  
28 which was limited to checking email and surfing websites. The representative had no response

1 and was unable to tell Ms. Gandhi how much data she had used before Net10 terminated her data  
2 access. Ms. Gandhi meanwhile had no data access on her phone for the next 3 weeks of July.

3 87. Ms. Gandhi transferred her service to Red Pocket Mobile in September 2013.

4 88. Ms. Gandhi reasonably relied upon Defendant's material misrepresentations  
5 and omissions, which, in conjunction with Defendant's acts and practices alleged herein  
6 caused Ms. Gandhi to suffer harm, injury in fact, and lost money or property. Had Ms. Gandhi  
7 known that Net10's purportedly "unlimited" plan was in fact limited in the manner that it is,  
8 she would not have paid for the Net10 data plan.

9 **Plaintiff Marshall Tietje**

10 89. Prior to 2007, Plaintiff Marshall Tietje subscribed to various pay-as-you-go  
11 cellular plans. Defendant's marketing and advertisements for "unlimited" calls, text and data  
12 induced Mr. Tietje to switch to Net10 in or about 2007. Mr. Tietje purchased a Net10 branded  
13 Nokia feature phone for use with Net10's "unlimited" plan.

14 90. Each month, Mr. Tietje would renew his service by purchasing a Net10 30-day  
15 service plan card at a retail store.

16 91. On or about July 3, 2013 Mr. Tietje purchased a Net10 branded LG Optimus  
17 Dynamic CDMA smartphone for approximately \$69 from a local Kmart retail store, along with a  
18 \$50 Net10 30-day unlimited data plan. Mr. Tietje activated the smartphone and service by  
19 calling Net10 customer service.

20 92. Defendant did not adequately disclose Net10's Terms and Conditions during  
21 these purchases and activations, and Mr. Tietje was at all times unaware of any such terms.

22 93. Mr. Tietje used his smartphone and Net10 data plan to access email, browse  
23 websites, navigate via Google Maps, and occasionally stream radio. Mr. Tietje never tethered  
24 his phone to a computer to access Net10's data and he never used his phone as a WiFi hotspot.

25 94. Only July 26, 2013, after only 3 weeks of use of his new smartphone, Net10  
26 terminated Mr. Tietje's data access without warning. Mr. Tietje called Net10's customer service,  
27 and the representative told him that his service had been suspended because he had exceeded the  
28

1 “data limit” and that his data access would not be restored until he paid for the next month of  
2 service. Mr. Tietje asked to speak to a supervisor, and the representative said she would do so.  
3 But the representative instead transferred him to the “High Data Usage Hotline” recorded  
4 message.

5 95. Mr. Tietje’s data access was restored on August 3, 2013, but he was hesitant to  
6 use his data because he feared he would find himself cut off from email and internet again.

7 96. Mr. Tietje transferred his service to AT&T Wireless on October 5, 2013. Because  
8 his existing LG Optimus Dynamic was locked to Net10’s network, he purchased a new Samsung  
9 Galaxy S III smartphone for use on AT&T Wireless.

10 97. Mr. Tietje reasonably relied upon Defendant’s material misrepresentations and  
11 omissions, which, in conjunction with Defendant’s acts and practices alleged herein caused  
12 Mr. Tietje to suffer harm, injury in fact, and lost money or property. Had Mr. Tietje known  
13 that Net10’s purportedly “unlimited” plan was in fact limited in the manner that it is, he would  
14 not have purchased his Net10 smartphone or data plan.

15 **CLASS ACTION ALLEGATIONS**

16 98. Plaintiffs bring this class-action lawsuit on behalf of themselves and the proposed  
17 Class members under Rule 23(b)(3) of the Federal Rules of Civil Procedure.

18 99. Plaintiffs seek certification of the following Class:

19 All persons in California who purchased an “unlimited” Net10 wireless service plan and  
20 whose data access was terminated or throttled prior to the expiration of the service plan.

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

24 100. *Numerosity.* Plaintiffs do not know the exact number of Class members but  
25 believe that the Class comprises tens of thousands, if not hundreds of thousands, of consumers in  
26 California. As such, Class members are so numerous that joinder of all members is  
27 impracticable.  
28

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

- 5            a. Whether Defendant offered to Plaintiffs and Class members “unlimited”  
6 data plans;
- 7            b. Whether Plaintiffs and Class members accepted Defendant’s offer for  
8 “unlimited” data plans;
- 9            c. Whether the Net10 Terms and Conditions were adequately disclosed to and  
10 were consented to by Plaintiffs and Class members;
- 11            d. Whether the Net10 Terms and Conditions contain illusory terms;
- 12            e. Whether the Net10 Terms and Conditions contain unconscionable terms;
- 13            f. Whether Defendant breached Defendant’s contracts with Plaintiffs and  
14 Class members by terminating and/or throttling their data access prior to the expiration of their  
15 data plans;
- 16            g. Whether Defendant acted in bad faith or abused Defendant’s discretion in  
17 terminating or throttling Plaintiffs’ and Class members’ data access prior to the expiration of their  
18 data plans;
- 19            h. Whether Defendant’s practice of terminating or throttling Plaintiffs’ and  
20 Class members’ data access went against Plaintiffs’ and Class members’ objectively reasonable  
21 expectations;
- 22            i. Whether Defendant’s promise of “unlimited” data was likely to mislead  
23 objectively reasonable consumers;
- 24            j. Whether Defendant engaged in deceptive and unfair business and trade  
25 practices under California law;
- 26            k. Whether Plaintiffs and Class members are entitled to restitution and other  
27 equitable relief;
- 28

1  
2 l. Whether Plaintiffs and Class members are entitled to damages; and  
3 m. Whether Defendant should be enjoined from engaging in this type of  
4 conduct.

5 102. **Typicality.** Plaintiffs' claims are typical of Class members' claims. Plaintiffs and  
6 the Class members all sustained injury as a direct result of Defendant's practice of terminating or  
7 throttling data access prior to the expiration of their "unlimited" data plans.

8 103. **Adequacy.** Plaintiffs will fairly and adequately protect Class members' interests.  
9 Plaintiffs have no interests antagonistic to Class members' interests, and Plaintiffs have retained  
10 counsel that has considerable experience and success in prosecuting complex class-action and  
11 consumer-protection cases.

12 104. **Superiority.** A class action is the superior method for fairly and efficiently  
13 adjudicating this controversy for the following reasons without limitation:

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

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

22 c. Plaintiffs anticipate no unusual difficulties in managing this class action.

23 **INAPPLICABLE OR UNENFORCEABLE ARBITRATION CLAUSE**

24 105. Section 16 of the Net10 Terms and Conditions purports to require that certain  
25 disputes be individually arbitrated. Section 16 is unenforceable because it is never adequately  
26 disclosed or agreed to by consumers, and Defendant does not require consumers who purchase  
27 Net10 SIM cards, service plans, or phones to view the arbitration clause before making their  
28 purchase. Section 16 is unenforceable because it is unconscionable and/or is against public



1 policy. Section 16 is substantively unconscionable because, among other reasons, it lacks  
2 mutuality in that it purports to require consumers to arbitrate all claims while explicitly  
3 permitting Defendant to bring state or federal lawsuits for certain types of claims important to  
4 Defendant; it prohibits any damages arising out of the use of or inability to use Net10 data  
5 services, and prohibits punitive damages in all circumstances, while specifying \$5,000 liquidated  
6 damages payable to Defendant by consumers regarding certain types of claims important to  
7 Defendant; it requires consumers to bear their own attorneys' fees and costs, even where, as  
8 here, the law allows for the prevailing party to be awarded such fees and costs; it requires  
9 arbitrations to occur in Miami, Florida regardless of the consumer's state of residence; and it  
10 provides that consumers must pay a minimum claim filing fee of \$200 per AAA rules effective  
11 March 1, 2013. Section 16 is procedurally unconscionable because, among other reasons, it is  
12 presented to consumers, if at all, on a take-it-or-leave-it basis and is not conspicuous.

13 106. Section 16 is not enforceable as to any of Plaintiffs' and Class members' claims  
14 because it is illusory, in that Defendant reserves the right to modify or change it at any time  
15 without notice to or consent from consumers.

16 107. Section 16 is not applicable to Plaintiffs' claims for public injunctive relief,  
17 because such claims are not arbitrable.

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

22  
23 **COUNT I**  
24 **Breach of Contract**

25 109. Plaintiffs reallege and incorporate by reference every allegation set forth in the  
26 preceding paragraphs as though alleged in this Count.

27 110. Defendant offered to Plaintiffs and Class members "unlimited" data plans for use  
28 with Net10 SIM cards or Net10 branded and locked smartphones.

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111. In exchange for Defendant's promise of "unlimited" data plans, Plaintiffs and Class members paid for 30-day service plans, SIM cards, and Net10 branded and locked smartphones.

112. Plaintiffs and Class members gave consideration that was fair and reasonable, and have performed all conditions, covenants, and promises required to be performed.

113. Defendant breached Defendant's promise of providing "unlimited" data by terminating or throttling Plaintiffs' and Class members' data access prior to the expiration of their data plans.

114. The Net10 Terms and Conditions do not form a contract and are not a part of the above-described bargain for lack of mutual assent. Defendant does not (a) adequately disclose the existence of such terms to Plaintiffs or Class members prior to or at the time of the purchase and activation of their Net10 data plans; (b) require Plaintiffs or Class members to acknowledge or assent to the Terms and Conditions; or (c) provide an opportunity for Plaintiffs or Class members to reject the terms in the event that they discover the terms subsequent to the purchase and activation of their data plans. Defendant also does not provide any new consideration in exchange for any subsequent agreement to the Terms and Conditions.

115. The Net10 Terms and Conditions do not form a contract and are not a part of the above-described bargain because the terms described therein are illusory. Specifically, the Terms and Conditions provide that Net10 may change or modify the terms at any time, in its sole discretion, and without notice to or consent from Plaintiffs or Class members, rendering all of the terms therein illusory.

116. In the alternative, assuming that the Net10 Terms and Conditions do form part of the basis of the bargain, Sections 2, 7, 8, 10, 16, 17, 18, and 20 of the Terms and Conditions are unconscionable and, therefore, unenforceable.

117. In the alternative, assuming that the Net10 Terms and Conditions do form part of the basis of the bargain, Sections 3 and 20 of the Terms and Conditions are so contradictory, vague, and ambiguous as to render them meaningless and unenforceable.

1 118. Defendant directly benefitted from, and is being unjustly enriched by,  
2 Defendant's breach of Defendant's promise to provide "unlimited" data.

3 119. As a result of Defendant's breach of Defendant's promise to provide "unlimited"  
4 data, Plaintiffs and Class members have been harmed and have suffered damages in an amount  
5 to be determined by this Court, including interest on all liquidated sums.

6  
7 **COUNT II**  
**Breach of the Covenant of Good Faith and Fair Dealing**

8 120. Plaintiffs reallege and incorporate by reference every allegation set forth in the  
9 preceding paragraphs as though alleged in this Count.

10 121. Plaintiffs and Class members bring this claim in the alternative to their Breach of  
11 Contract claim.

12 122. A covenant of good faith and fair dealing is implied in every contract.

13 123. Where a contract vests one party with discretion, but provides no standards for  
14 exercising that discretion, the duty of good faith and fair dealing applies and the party exercising  
15 the discretion must do so in a commercially reasonable manner or in a manner that satisfies the  
16 objectively reasonable expectations of the other party.

17 124. Based on Defendant's promises and representations, it was objectively reasonable  
18 for Plaintiffs and Class members to expect that Defendant would deliver "unlimited" data access  
19 in connection with their data plans. There exists no objectively reasonable reason to expect that  
20 Defendant would have secret data usage limits and terminate or throttle Plaintiffs' and Class  
21 members' data access at any time, without warning, and for any or no reason, regardless of the  
22 manner in which the data was used.

23 125. Defendant abused any discretion Defendant had under the Net10 Terms and  
24 Conditions or otherwise by regularly terminating or throttling Plaintiffs' and Class members'  
25 promised "unlimited" data access, often without notice, without regard to the manner in which  
26 the data was used, and without explanation to Plaintiffs and Class members.

27 126. Plaintiffs and Class members performed all required duties, and all conditions  
28 required for Defendant's performance occurred.

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2 127. As a result of Defendant's breach of the implied covenant of good faith and fair  
3 dealing, Plaintiffs and the Class sustained damages in an amount to be determined by this Court,  
4 including interest on all liquidated sums.

5 **COUNT III**  
6 **Unjust Enrichment**

7 128. Plaintiffs reallege and incorporate by reference every allegation set forth in the  
8 preceding paragraphs as though alleged in this Count.

9 129. Plaintiffs and Class members bring this claim in the alternative to their Breach of  
10 Contract and Breach of the Covenant of Good Faith and Fair Dealing claims.

11 130. Defendant knowingly retained a benefit at the expense of Class members, in the  
12 form of substantial revenues and payments from Plaintiffs and Class members for Net10  
13 "unlimited" data plans, phones, and SIM cards, from Defendant's conduct in misrepresenting  
14 that Defendant's data plans were "unlimited," and regularly terminating or throttling "unlimited"  
15 customers' data access.

16 131. Plaintiffs' and Class members' detriment and Defendant's enrichment are  
17 traceable to, and resulted directly and proximately from, the conduct challenged in this  
18 Complaint.

19 132. It would be inequitable for Defendant to retain the benefits Defendant received  
20 and continues to receive from Plaintiffs and Class members without payment to Plaintiffs and  
21 Class members.

22 133. Plaintiffs and the Class have no adequate remedy at law.

23 134. Plaintiffs seek disgorgement of and/or a constructive trust on all of the inequitable  
24 payments and profits Defendant retained from Plaintiffs and Class members.

25 **COUNT IV**  
26 **Violations of California's Unfair Competition Law**  
27 **California Business & Professions Code § 17200 et seq.,**

28 135. Plaintiffs reallege and incorporate by reference every allegation set forth in the  
preceding paragraphs as though alleged in this Count.

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

3           137. Defendant violated the “unlawful” prong of the UCL by making material  
4 misrepresentations that Net10 data plans offer “unlimited” data, when in fact Defendant  
5 regularly terminates or throttles customers’ data access, in violation of California’s Consumer  
6 Legal Remedies Act, Cal. Civ. Code § 1750 *et seq.*

7           138. Defendant’s practice of regularly terminating or throttling customers’ “unlimited”  
8 data access, often without notice, violated the “unfair” prong of the UCL because it was  
9 immoral, unethical, oppressive, unscrupulous, unconscionable, and/or substantially injurious to  
10 Plaintiffs and Class members. Defendant’s practice was also contrary to legislatively declared  
11 and public policy and the harm it caused to consumers outweighed its utility, if any.

12           139. Defendant violated the “fraudulent” prong of the UCL by making material  
13 misrepresentations that Net10 data plans were “unlimited” when they were not, and by failing to  
14 disclose and actively concealing material information regarding Defendant’s practice of  
15 regularly terminating or throttling customers’ data access. These material misrepresentations  
16 and nondisclosures were likely to mislead consumers.

17           140. Plaintiffs relied on Defendant’s material misrepresentations and nondisclosures,  
18 and would not have purchased, or would have paid less money for, Net10 service plans,  
19 compatible phones, or SIM cards had they known the truth.

20           141. As a direct and proximate result of Defendant’s unfair, unlawful, and fraudulent  
21 conduct, Plaintiffs lost money or property.

22           142. Defendant’s conduct caused substantial injury to Plaintiffs and Class members.  
23 Accordingly, Plaintiffs seek an order enjoining Defendant from committing such unlawful,  
24 unfair, and fraudulent business practices, and seek the full amount of money that Plaintiffs and  
25 Class members paid for their Net10 service plans, compatible phones, and SIM cards and/or  
26 restitutionary disgorgement of profits. Plaintiffs also seek attorneys’ fees and costs under Cal.  
27 Code Civ. Proc. § 1021.5.  
28

1  
2 **COUNT V**  
3 **Violations of California's Consumer Legal Remedies Act**  
4 **California Civil Code §1750 et seq.**

5 143. Plaintiffs reallege and incorporate by reference every allegation set forth in the  
6 preceding paragraphs as though alleged in this Count.

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

8 145. Plaintiffs and the Class members are "consumers," as defined by Cal. Civ. Code  
9 §1761(d).

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

12 147. Plaintiffs' and Class members' purchases of Net10 service plans, compatible  
13 phones, and SIM cards constitute "transactions," as defined by Cal. Civ. Code § 1761(e).

14 148. Plaintiffs and Class members purchased Net10 service plans, compatible phones,  
15 and SIM cards for personal, family, and household purposes as meant by Cal. Civ. Code  
16 § 1761(d).

17 149. Venue is proper under Cal. Civil Code § 1780(d) because a substantial portion of  
18 the transactions at issue occurred in this county. Plaintiffs' declarations establishing that this  
19 Court has proper venue for this action are attached as Exhibit A.

20 150. Defendant deceived consumers in that Defendant misrepresented that Net10  
21 service plans offered "unlimited" data and also failed to disclose or actively concealed that  
22 Defendant would regularly terminate or throttle customers' data access.

23 151. Defendant's misrepresentations, active concealment, and failures to disclose  
24 violated the CLRA in the following manner:

25 a. Defendant misrepresented that Defendant's Net10 service plans, phones,  
26 and SIM cards had characteristics, benefits, or uses that they did not have (Cal. Civ. Code  
27 § 1770(a)(5));  
28

1                   b. Defendant misrepresented that Defendant's Net10 service plans, phones,  
2 and SIM cards were of a particular standard, quality, and/or grade when they were of another  
3 (Cal. Civ. Code § 1770(a)(7));

4                   c. Defendant advertised Net10 service plans, phones, and SIM cards with an  
5 intent not to sell them as advertised (Cal. Civ. Code § 1770(a)(9));

6                   d. Defendant misrepresented that Net10 service plans, phones, and SIM cards  
7 conferred or involved rights, remedies, or obligations that they did not have (Cal. Civ. Code  
8 § 1770(a)(14));

9                   e. Defendant misrepresented that Net10 service plans, phones, and SIM cards  
10 were supplied in accordance with previous representations when they were not (Cal. Civ. Code §  
11 1770(a)(16));

12                   f. Defendant inserted unconscionable provisions in the Net10 Terms and  
13 Conditions, including Sections 2, 7, 8, 10, 16, 17, 18, and 20 (Cal. Civ. Code § 1770(a)(19)).

14                   152. Defendant's misrepresentations and nondisclosures regarding Net10 "unlimited"  
15 data plans and Defendant's practice of regularly terminating or throttling customers' data access  
16 were material to Plaintiffs and Class members because a reasonable person would have  
17 considered them important in deciding whether or not to purchase the Net10 service plans,  
18 phones, and SIM cards, and because Defendant had a duty to disclose the truth.

19                   153. Plaintiffs and Class members relied upon Defendant's material misrepresentations  
20 and nondisclosures, and had Plaintiffs and Class members known the truth, they would have  
21 acted differently.

22                   154. As a direct and proximate result of Defendant's material misrepresentations and  
23 nondisclosures, Plaintiffs and the Class have been irreparably harmed.

24                   155. On behalf of the Class, Plaintiffs seek injunctive relief in the form of an order  
25 enjoining Defendant from making such material misrepresentations and failing to disclose or  
26 actively concealing their practice of terminating or throttling data access. Plaintiffs also seek  
27 attorneys' fees and costs.  
28

1 156. In accordance with Cal. Civ. Code § 1782(a), on November 13, 2013, Plaintiffs’  
2 counsel served Defendant with notice of Defendant’s CLRA violations by certified mail, return  
3 receipt requested. A true and correct copy of that notice is attached as Exhibit B.

4 157. If Defendant fails to provide appropriate relief for Defendant’s CLRA violations  
5 within 30 days of Plaintiffs’ November 13, 2013 notification letter, Plaintiffs will amend this  
6 complaint to seek compensatory and exemplary damages as permitted by Cal. Civ. Code §§  
7 1780 and 1782(b).

8  
9 **COUNT VI**  
**Unconscionability**

10 158. Plaintiffs reallege and incorporate by reference every allegation set forth in the  
11 preceding paragraphs as though alleged in this Count.

12 159. Defendant’s practice of offering Net10 “unlimited” data plans while  
13 simultaneously purporting to retain the right to arbitrarily and unilaterally terminate or throttle  
14 data access at any time and for any reason, with or without warning, is unfair and  
15 unconscionable.

16 160. Plaintiffs and Class members have no meaningful choice with respect to the  
17 Net10 Terms and Conditions or Defendant’s unilateral and arbitrary practice of terminating and  
18 throttling data access. The Terms and Conditions were not adequately disclosed, if at all, to  
19 Plaintiffs and Class members before or during their purchases and activations of Net10 service  
20 plans, phones, and SIM cards, and are in any event offered on a take-it-or-leave-it basis.  
21 Defendant did not offer Plaintiffs or Class members an opportunity to reject the Net10 terms,  
22 and Net10 data plans and SIM cards are non-refundable.

23 161. Defendant’s purported discretion to terminate or throttle data access is  
24 unreasonably favorable to Defendant and unduly harsh with respect to Plaintiffs and the Class,  
25 and is therefore substantively unconscionable.

26 162. Defendant’s enforcement of such unconscionable terms have harmed Plaintiffs  
27 and Class members and have caused them to suffer damages in an amount to be determined by  
28 this Court, including interest on all liquidated sums.



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**PRAYER FOR RELIEF**

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

2. An order certifying Plaintiffs' proposed Class and appointing Plaintiffs and their 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 Plaintiffs 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 Plaintiffs and Class members actual damages;

6. A judgment awarding Plaintiffs 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**

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

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Dated: November 14, 2013

Respectfully submitted,

LIEFF CABRASER HEIMANN & BERNSTEIN, LLP

By:   
Michael W. Sobol

Michael W. Sobol  
msobol@lchb.com  
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Daniel M. Hattis  
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HATTIS LAW  
1134 Crane Street, Suite 216  
Menlo Park, CA 94025  
Telephone: (650) 980-1990

*Attorneys for Plaintiffs*

# **EXHIBIT A**

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 Marisha Johnston, Mona Gandhi and Marshall Tietje, who purchased Net10 “unlimited” wireless phone plans. 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 Net10 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 Net10 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 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 Net10 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.

Relying on TracFone's promise of "unlimited" data, on March 25, 2013, Marisha Johnston purchased a Net10 SIM card for \$15 from a local Kmart store for use with her unlocked LG Android phone. Ms. Johnston also purchased a \$50 "unlimited" Net10 data plan, and signed up for Net10's "auto refill" program. In early June 2013, Mr. Johnston upgraded to an Apple iPhone and received a Net10 AT&T compatible SIM card for use with the phone. Two weeks later, Net10 terminated Ms. Johnston's data without warning. Net10 restored Ms. Johnston's data on June 23, 2013, when she was automatically charged for a new month of service. However, within two weeks of her data being restored, Net10 again terminated her data.

Similarly, advertisements for the Net10 "unlimited" data plan induced Mona Gandhi to purchase a Net10 AT&T compatible SIM card from a local Net10 authorized dealer in February 2013 for \$20. Ms. Gandhi also purchased a \$50 "unlimited" data plan, and signed up for Net10's "auto refill" program. In July 2013, Net10 terminated Ms. Gandhi's data without warning. When Ms. Gandhi called Net10 customer service, she was told that the "unlimited" plan was now capped at 1.5 GB of data, and that her data would not be restored until she purchased another "unlimited" plan.

Net10 advertisements for Net10's "unlimited" data plan likewise induced Marshall Tietje to purchase a Net10 locked CDMA phone for \$69 on or about July 3, 2013, from a local Kmart store. Mr. Tietje also purchased a \$50 "unlimited" Net10 data plan. Three weeks later, on July 26, 2013, Net10 terminated Mr. Tietje's data without warning. Net10 informed Mr. Tietje his data would not be restored until his current plan expired on August 3, 2013.

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

1. TracFone misrepresented that its Net10 phones, 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 Net10 phones, 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 Net10 phones, 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 Net10 phones, 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 Net10 phones, SIM cards, and data plans were supplied in accordance with previous representations when they were not (Cal. Civ. Code § 1770(a)(16));

November 14, 2013

Page 3

6. TracFone inserted unconscionable provisions in the Net10 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 Net10 "unlimited" subscribers whose data was terminated or throttled paid for Net10 phones, 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,

A handwritten signature in black ink, appearing to read "Michael Sobol". The signature is fluid and cursive, with the first name "Michael" and last name "Sobol" clearly distinguishable.

Michael W. Sobol

1140580.1

1140580.1

# **EXHIBIT B**

1 Michael W. Sobol (State Bar No. 194857)  
Nicole D. Reynolds (State Bar No. 246255)  
2 LIEFF CABRASER HEIMANN & BERNSTEIN LLP  
275 Battery Street, 29th Floor  
3 San Francisco, CA 94111  
Telephone: (415) 956-1000  
4 E-mail: msobol@lchb.com  
nreynolds@lchb.com

5 Daniel Hattis (State Bar No. 232141)  
6 HATTIS LAW  
1134 Crane Street, Suite 216  
7 Menlo Park, CA 94025  
Telephone: (650) 980-1990  
8 E-mail: dan@hattislaw.com

9 *Attorneys for Plaintiff*

10 UNITED STATES DISTRICT COURT  
11 NORTHERN DISTRICT OF CALIFORNIA  
12 SAN FRANCISCO DIVISION

14 MONA GANDHI, MARISHA  
15 JOHNSTON, and MARSHALL TIETJE,  
individually and on behalf of all others  
16 similarly situated,

17 Plaintiffs,

18 v.

19 TRACFONE WIRELESS, INC.

20 Defendant.

Case No. \_\_\_\_\_

**DECLARATION OF MONA GANDHI**



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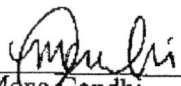
I, Mona Gandhi, hereby declare and state as follows:

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

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

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

Executed on September 4, 2013, in Hayward California.

  
\_\_\_\_\_  
Mona Gandhi

1 Michael W. Sobol (State Bar No. 194857)  
2 Nicole D. Reynolds (State Bar No. 246255)  
3 LIEFF CABRASER HEIMANN & BERNSTEIN LLP  
4 275 Battery Street, 29th Floor  
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13 Telephone: (650) 980-1990  
14 E-mail: dan@hattislaw.com

15 *Attorneys for Plaintiff*

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

19 MONA GANDHI, MARISHA  
20 JOHNSTON, and MARSHALL TIETJE,  
21 individually and on behalf of all others  
22 similarly situated,

23 Plaintiffs,

24 v.

25 TRACFONE WIRELESS, INC.

26 Defendant.

Case No. \_\_\_\_\_

**DECLARATION OF MARISHA  
JOHNSTON**

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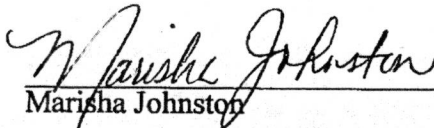
I, Marisha Johnston, hereby declare and state as follows:

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

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

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

Executed on September 5, 2013, in Hollister California.

  
\_\_\_\_\_  
Marisha Johnston

1 Michael W. Sobol (State Bar No. 194857)  
Nicole D. Reynolds (State Bar No. 246255)  
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9 *Attorneys for Plaintiff*

10 UNITED STATES DISTRICT COURT  
11 NORTHERN DISTRICT OF CALIFORNIA  
12 SAN FRANCISCO DIVISION  
13

14 MONA GANDHI, MARISHA  
15 JOHNSTON, and MARSHALL TIETJE,  
individually and on behalf of all others  
16 similarly situated,

17 Plaintiffs,

18 v.

19 TRACFONE WIRELESS, INC.

20 Defendant.  
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Case No. \_\_\_\_\_

**DECLARATION OF MARSHALL TIETJE**

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I, Marshall Tietje, hereby declare and state as follows:

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

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

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

Executed on September 8, 2013, in Big Bear Lake California.

  
\_\_\_\_\_  
Marshall Tietje