

1 Michael W. Sobol (State Bar No. 194857)  
2 Scott P. Nealey (State Bar No. 193062)  
3 Peter E. Leckman (State Bar No. 235721)  
4 LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP  
5 Embarcadero Center West  
6 275 Battery Street, 30th Floor  
7 San Francisco, CA 94111-3339  
8 Telephone: (415) 956-1000  
9 Facsimile: (415) 956-1008

6 J. Paul Gignac (State Bar No. 125676)  
7 Katherine A. Donovan (State Bar No. 236318)  
8 ARIAS OZZELLO & GIGNAC, LLP  
9 4050 Calle Real Ste 130  
10 Santa Barbara, CA 93110-3413  
11 Telephone: (805) 683-7400  
12 Facsimile: (805) 683-7401

10 Peter J. Bezek (State Bar No. 102310)  
11 Robert A. Curtis (State Bar No. 203870)  
12 FOLEY BEZEK BEHLE & CURTIS, LLP  
13 15 West Carrillo Street  
14 Santa Barbara, CA 93101-8215  
15 Telephone: (805) 962-9495  
16 Facsimile: (805) 962-0722

14 Attorneys for Plaintiff

15 UNITED STATES DISTRICT COURT  
16 NORTHERN DISTRICT OF CALIFORNIA

18 BENJAMIN D. WINIG, on Behalf of  
19 Himself and All Others Similarly Situated,

20 Plaintiff,

21 v.

22 CINGULAR WIRELESS, LLC, and DOES  
23 1-20,

24 Defendants.

Case No. C 06-4297 MMC

CLASS ACTION

**AMENDED COMPLAINT FOR  
DAMAGES, DECLARATORY AND  
INJUNCTIVE RELIEF**

DEMAND FOR JURY TRIAL

25 Plaintiff, who brings this class action on behalf of himself and all others similarly  
26 situated, by and through his undersigned attorneys, upon knowledge as to his own acts, and  
27 otherwise upon information and belief based on the investigation of counsel, alleges as follows:  
28

**BACKGROUND**

1  
2 1. This is an action to enjoin ongoing unfair business practices and to recover  
3 monetary restitution and damages arising out of Defendant Cingular Wireless, LLC’s unilateral  
4 and unannounced change in policy, whereby it now charges its customers for calling their own  
5 mobile numbers from their own mobile phones.

6 2. Defendant entered into contracts with customers, including Plaintiff and  
7 Nationwide Class Members, to provide wireless telephone services (“Service Agreements”).  
8 Under the terms of these Service Agreements, Plaintiff and Nationwide Class Members purchased  
9 plans that included a certain number of free “anytime minutes” and included free “mobile-to-  
10 mobile” calls.

11 3. At the time of entering into the Service Agreement, Defendant’s  
12 representatives promised Plaintiff that all calls made from his mobile phone to his own mobile  
13 number (primarily used as a means to check voicemail) were considered “mobile-to-mobile”  
14 calls, and therefore were free. Plaintiff’s Service Agreement stated that “enhanced voicemail” as  
15 well as “unlimited mobile to mobile minutes” were included in his plan at no additional fee.

16 4. Plaintiff’s Service Agreement also stated: “IF WE INCREASE THE  
17 PRICE OF ANY OF THE SERVICES TO WHICH YOU SUBSCRIBE . . . WE WILL  
18 DISCLOSE THE CHANGE AT LEAST ONE BILLING CYCLE IN ADVANCE . . .”

19 5. In July 2005, without informing Plaintiff, Defendant changed its long-  
20 standing billing practices and began charging Plaintiff for all calls made from his mobile phone to  
21 his own mobile number. Prior to this change in practice, Defendant billed Plaintiff’s calls to his  
22 own mobile number under the code “M2MC” (representing free “mobile-to-mobile calls”). After  
23 this change, Defendant billed Plaintiff’s calls to his own mobile number under the code “VM”  
24 (representing voicemail). As of the date of the change in policy, Defendant did not consider a  
25 “VM” call to be a mobile-to-mobile call, and therefore counts “VM” minutes against Plaintiff’s  
26 “anytime minutes.”  
27  
28



1 believes, and on the basis of that belief alleges, that each of these Doe defendants was in some  
2 manner legally responsible for the events, happenings, injuries, and damages alleged in this  
3 Complaint. As used herein, the term “Defendant” refers to Cingular and the Doe defendants.

4 **JURISDICTION AND VENUE**

5 12. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331  
6 because this matter arises under federal law, 47 U.S.C. § 201. This Court should also exercise  
7 supplemental jurisdiction under 28 U.S.C. § 1367 over the state law claims because they are  
8 derived from a nucleus of operative facts common to the federal law claim such that Plaintiff  
9 would ordinarily expect to try them in one proceeding.

10 13. Personal jurisdiction over Defendant is proper because it has purposefully  
11 availed itself of the privilege of conducting business activities within the State of California by  
12 employing workers within California and selling its services within the State. Defendant  
13 generally has maintained systematic and continuous business contacts with California.

14 14. Venue is proper in this district pursuant to 28 U.S.C. § 1391. Many of the  
15 acts complained of herein occurred in this district and gave rise to the claims alleged. Defendant  
16 conducts business in this district and employs hundreds of workers within the State of California.

17 **CLASS ACTION ALLEGATIONS**

18 15. Plaintiff brings this class action pursuant to Federal Rule of Civil  
19 Procedure 23(a), (b)(2), and (b)(3) on behalf of a nationwide class (the “Nationwide Class”)  
20 consisting of:

21 All customers of Defendant, whose Service Agreements with  
22 Defendant included free “mobile-to-mobile” minutes, and who  
23 made one or more calls to their own mobile telephone number after  
24 Defendant unilaterally changed their policy to start charging  
25 customers for these calls. Excluded from the Class are  
26 (a) employees, officers, directors, agents, and legal representatives  
27 of Defendant and its affiliated entities; (b) governmental agencies;  
28 and (c) persons who validly exclude themselves from the Class.

1           16. Plaintiff also brings this class action pursuant to Federal Rule of Civil  
2 Procedure 23(a), (b)(2), and (b)(3) on behalf of a California state subclass (the ‘California  
3 Subclass’) consisting of:

4           All residents of California who are customers of Defendant, whose Service  
5 Agreements with Defendant included free “mobile-to-mobile” minutes, and who  
6 made one or more calls to their own mobile telephone number after Defendant  
7 unilaterally changed their policy to start charging customers for these calls.  
8 Excluded from the California Subclass are (a) employees, officers, directors,  
9 agents, and legal representatives of Defendant and its affiliated entities;  
10 (b) governmental agencies; and (c) persons who validly exclude themselves from  
11 the California Subclass.

12           17. Each Nationwide Class Member has been damaged in his, her or its  
13 property as a proximate result of Defendant’s omission and failure to disclose the existence of a  
14 new policy to charge customers for calls made from their mobile phone to their own mobile  
15 phone number and/or by Defendant’s breach of its Service Agreements.

16           18. Plaintiff is a member of the Nationwide Class that he seeks to represent.  
17 The members of the Nationwide Class are so numerous that joinder is impractical. The  
18 Nationwide Class consists of at least thousands of members, the identities of whom are within the  
19 knowledge of and can be ascertained by Defendant by reference to its customer records.

20           19. Class certification is appropriate because common questions of law and  
21 fact exist as to all members of the Nationwide Class and predominate over any questions affecting  
22 solely individual Nationwide Class Members. Among the questions of law and fact common to  
23 the Nationwide Class are:

24           a. whether Defendant made false claims and/or misrepresentations  
25 and/or omitted to disclose and tell the truth to Plaintiff and the other Nationwide Class Members  
26 that, contrary to the express, agreed terms of the Service Agreements, Defendant would charge  
27 Nationwide Class Members for any calls made from their mobile phones to their own mobile  
28 numbers;

1                   b.       whether Defendant provided proper, sufficient and/or adequate  
2 notice to Nationwide Class Members of its change in billing practices from not charging its  
3 customers for calls made to their own telephone numbers to charging its customers for these calls;

4                   c.       whether Defendant's actions and/or omissions constitute a violation  
5 of the Federal Communications Act and/or the Declaratory Judgment Act;

6                   d.       whether Defendant breached its obligations and duties to Plaintiff  
7 and other Nationwide Class Members under the Service Agreements by failing to count calls  
8 from a Nationwide Class Member's mobile phone to that mobile phone's wireless phone number  
9 as a free "mobile-to-mobile" call; and

10                  e.       the measure of damages and other relief.

11                  20.       Plaintiff's claims are typical of the other Nationwide Class Members'  
12 claims in that, through Defendant's actions and/or omissions, Plaintiff and the other Nationwide  
13 Class Members have been and are required to pay Defendant for calls made from their own  
14 mobile cellular phones to their own mobile cellular phone numbers even though Defendant  
15 represented to them that such calls would be included as free "mobile-to-mobile" calls.

16                  21.       Plaintiff will fairly and adequately represent and protect the interests of the  
17 other Nationwide Class Members. Plaintiff has retained counsel experienced in complex  
18 consumer class actions and consumer litigation. Plaintiff does not have any interests which are  
19 antagonistic to or are in conflict with the other members of the Class whom Plaintiff seeks to  
20 represent.

21                  22.       A class action is superior to other available methods for the fair and  
22 efficient adjudication of the claims alleged on behalf of the Nationwide Class, and no unusual  
23 difficulties are likely to be encountered in the management of this case as a class action. The  
24 prosecution of separate actions by members of the Nationwide Class would create a risk of  
25 inconsistent or varying adjudications which could confront the Defendant with incompatible  
26 standards of conduct or could lead to adjudications which could be dispositive of the interests of  
27 other Nationwide Class Members not parties to the adjudication or substantially impair or impede  
28 their ability to protect their interests. Damages to the individual Nationwide Class Members are

1 relatively small in comparison to the costs of litigation, making the expense of individual  
2 litigation of these claims prohibitive for Plaintiff and the other Nationwide Class Members.

3 23. Plaintiff's and each Nationwide Class Member's individual ascertainable  
4 losses and damages are not sufficiently large to justify instituting individual actions.

5 24. Plaintiff is a member of the California Subclass which he seeks to  
6 represent. The members of the California Subclass are so numerous that joinder is impractical.  
7 The California Subclass consists of at least thousands of members, the identities of whom are  
8 within the knowledge of and can be ascertained by Defendant by reference to its customer  
9 records.

10 25. Certifying the California Subclass is appropriate because common  
11 questions of law and fact exist as to all members of the California Subclass and predominate over  
12 any questions affecting solely individual California Subclass Members. Among the questions of  
13 law and fact common to the California Subclass are:

14 a. whether Defendant made false claims and/or misrepresentations  
15 and/or omitted to disclose and tell the truth to Plaintiff and the other California Subclass Members  
16 that, contrary to the express, agreed terms of the Service Agreements, Defendant would charge  
17 California Subclass Members for any calls made from their mobile phones to their own mobile  
18 numbers;

19 b. whether Defendant provided proper, sufficient and/or adequate  
20 notice to California Subclass Members of its change in billing practices from not charging its  
21 customers for calls made to their own telephone numbers to charging its customers for these calls;

22 c. whether Defendant's actions and/or omissions violate California  
23 Business and Professions Code § 17200, *et seq.*;

24 d. whether Defendant's actions and/or omissions violate California's  
25 Consumers Legal Remedies Act, Civ. Code § 1750, *et seq.*; and

26 e. the measure of damages and other relief.

27 26. Plaintiff's claims are typical of the other California Subclass Members'  
28 claims in that, through Defendant's actions and/or omissions, Plaintiff and the other California

1 Subclass Members have been and are required to pay Defendant for calls made from their own  
2 mobile cellular phones to their own mobile cellular phone numbers even though Defendant  
3 represented to them that such calls would be included as free “mobile-to-mobile” calls.

4 27. Plaintiff will fairly and adequately represent and protect the interests of  
5 the other California Subclass Members. Plaintiff has retained counsel experienced in complex  
6 consumer class actions and consumer litigation. Plaintiff does not have any interests which are  
7 antagonistic to or are in conflict with the other members of the California Subclass whom  
8 Plaintiff seeks to represent.

9 28. A class action is superior to other available methods for the fair and  
10 efficient adjudication of the claims alleged on behalf of the California Subclass, and no unusual  
11 difficulties are likely to be encountered in the management of this case as a class action. The  
12 prosecution of separate actions by members of the California Subclass would create a risk of  
13 inconsistent or varying adjudications which could confront the Defendant with incompatible  
14 standards of conduct or could lead to adjudications which could be dispositive of the interests of  
15 other California Subclass Members not parties to the adjudication or substantially impair or  
16 impede their ability to protect their interests. Damages to the individual California Subclass  
17 Members are relatively small in comparison to the costs of litigation, making the expense of  
18 individual litigation of these claims prohibitive for Plaintiff and the other California Subclass  
19 Members.

20 29. Plaintiff’s and each California Subclass Member’s individual ascertainable  
21 losses and damages are not sufficiently large to justify instituting individual actions.

22 **SUBSTANTIVE ALLEGATIONS REGARDING**  
23 **PLAINTIFF’S SERVICE AGREEMENT**

24 30. According to Plaintiff’s Service Agreement with Defendant, he was to  
25 receive free “mobile-to-mobile” calls that would not count against his set number of monthly  
26 “anytime” minutes. Under the Service Agreement, any unused anytime minutes would roll-over  
27 to the succeeding month.

1                   31. According to Plaintiff’s Service Agreement with Defendant, he was to  
2 receive free “enhanced voicemail.”

3                   32. According to Plaintiff’s Service Agreement with Defendant, Defendant  
4 promised: “IF WE INCREASE THE PRICE OF ANY OF THE SERVICES TO WHICH YOU  
5 SUBSCRIBE . . . WE WILL DISCLOSE THE CHANGE AT LEAST ONE BILLING CYCLE  
6 IN ADVANCE . . .”

7                   33. Plaintiff maintained his phone services and Service Agreement with  
8 Defendant and performed all of his obligations under his Service Agreement.

9                   34. Up to and until July 2005, Defendant did not charge Plaintiff for calls made  
10 from his mobile phone to his own mobile number. These calls were classified as free “mobile-to-  
11 mobile” minutes.

12                   35. In July 2005, without informing Plaintiff, Defendant changed its long-  
13 standing billing practices and began charging Plaintiff for all calls made from his mobile phone to  
14 his own mobile number. Prior to this change in practice, Defendant billed Plaintiff’s calls to his  
15 own mobile number under the code “M2MC” (representing free “mobile-to-mobile calls”). After  
16 this change, Defendant began billing Plaintiff’s calls to his own mobile number under the code  
17 “VM” (representing voicemail). Defendant does not consider a “VM” call to be a mobile-to-  
18 mobile call, and therefore counts “VM” minutes against Plaintiff’s “anytime minutes.”

19                   36. Defendant concealed or failed adequately to disclose to Plaintiff, this  
20 change in the terms of his Service Agreement.

21                   37. As a result of this change in practice, Plaintiff is forced to pay for calls  
22 made from his mobile phone to his own mobile number.

23                   38. As a result of Defendant’s change in practice, deception, and breach of  
24 contract, Plaintiff’s bills have increased significantly. Accordingly, Defendant’s conduct has  
25 proximately caused ascertainable monetary losses and damages to Plaintiff.

26                   39. Plaintiff believes that all Nationwide Class Members and California  
27 Subclass Members were subject to this same wrongdoing.  
28

1 **FIRST CLAIM FOR RELIEF**  
2 **(Violation of the Federal Communications Act, 47 U.S.C. § 201)**  
3 **(On behalf of the Nationwide Class and the California Subclass)**

4 40. Plaintiff hereby incorporates by reference the allegations contained in  
5 paragraphs 1 through 39 of this complaint.

6 41. Defendant is a common carrier engaged in interstate communication by  
7 wire for the purpose of furnishing communication services within the meaning of § 201(a) of the  
8 Federal Communications Act (“FCA”).

9 42. Defendant, without adequate notice, began charging customers for calls  
10 made from their own mobile phone to their own mobile phone number, reversing Defendant’s  
11 long-standing practice of not charging for such calls. As a result, Defendant’s charges for such  
12 calls constitutes an unjust and unreasonable charge and practice in connection with  
13 communication service and, therefore, violates § 201(b) of the FCA.

14 43. As a direct and proximate result of Defendant’s violation of § 201(b) of the  
15 FCA, Plaintiff, the Nationwide Class members and the California Subclass Members have been  
16 damaged in an amount according to proof at trial.

17 **SECOND CLAIM FOR RELIEF**  
18 **(Breach of Contract)**  
19 **(on behalf of the Nationwide Class and the California Subclass)**

20 44. Plaintiff hereby incorporates by reference the allegations contained in  
21 paragraphs 1 through 43 of this complaint.

22 45. Plaintiff, the Nationwide Class members and the California Subclass  
23 Members fulfilled and performed all contractual obligations.

24 46. Plaintiff, the Nationwide Class Members and the California Subclass  
25 Members were promised in their Service Agreements that all calls made from their mobile phones  
26 to their mobile numbers would be free. In breach of that agreement, Defendant changed its policy  
27 without adequate notice and began to count Nationwide Class Members’ calls from their mobile  
28 phones to their mobile numbers as “anytime minutes,” thereby charging Plaintiff, Nationwide  
Class Members and the California Subclass Members for these calls.



1 Members, including, but not limited to, imposing unreasonable and unlawful charges and refusing  
2 to refund all or any part of the improper charges.

3 55. In engaging in the conduct alleged herein, Defendant unfairly and in bad  
4 faith enriched itself, at the expense of Plaintiff, the Nationwide Class Members and the California  
5 Subclass Members, and injured their rights to receive the benefits of their agreements.

6 56. As a direct and proximate result of Defendant's acts or practices, Plaintiff,  
7 Nationwide Class Members and the California Subclass Members have been damaged.

8 **FIFTH CLAIM FOR RELIEF**  
9 **(Unfair Competition In Violation Of California Bus. & Prof. Code § 17200, et seq.)**  
10 **(on behalf of the California Subclass only)**

11 57. Plaintiff hereby incorporates by reference the allegations contained in  
12 paragraphs 1 through 56 of this complaint.

13 58. Defendant has engaged in and continues to engage in an unfair, unlawful  
14 and fraudulent business practice of unauthorized billing.

15 59. By engaging in this practice, Defendant has committed one or more acts of  
16 unfair competition within the meaning of California Business and Professions Code § 17200, *et*  
17 *seq.*

18 60. Under the circumstances alleged herein, it would be inequitable and result  
19 in a miscarriage of justice for Defendant to continue to retain the property of Plaintiff and the  
20 California Subclass Members.

21 61. Defendant's practice is unfair because it is not fully and adequately  
22 disclosed at the time that customers of Defendant contract to obtain their wireless telephone  
23 service through Defendant and, therefore, is immoral, unethical, oppressive, unscrupulous and/or  
24 substantially injurious to the member of the California Subclass.

25 62. Defendant's practice is unlawful because it violates the Federal  
26 Communications Act and the Consumers Legal Remedies Act. The Defendants' practice is also  
27 unlawful because it constitutes a breach of contract, breach of the covenant of good faith and fair  
28 dealing, and unjust enrichment.



1           71. Defendant violated Civil Code § 1770(a)(9) when it advertised its services  
2 with the intent not to sell them as advertised.

3           72. Defendant violated Civil Code § 1770(a)(19) by inserting unconscionable  
4 provisions in its Service Agreement contracts, including clauses that purport to force Defendant's  
5 customers to (1) arbitrate "all disputes and claims (including ones that already are the subject of  
6 litigation) arising out of or relating to [the Service] Agreement, or to any prior oral and written  
7 agreement, for Equipment or services between" the Defendant and its customers; and (2) waive  
8 all rights to class litigation, demanding that customers may not serve as "a plaintiff or class  
9 member in any purported class or representative proceeding."

10           73. In engaging in the foregoing unfair or deceptive conduct, Defendant failed  
11 to disclose material facts about its billing practices that would cause the cost to consumers to  
12 increase.

13           74. Defendant's change in policy was a material fact that a reasonable person  
14 would have considered important in deciding whether or not to purchase (or to pay the same price  
15 for) Defendant service.

16           75. Unless Defendant is enjoined from continuing to engage in violations of  
17 the CLRA, Plaintiff and the California Subclass Members will continue to be injured by  
18 Defendant's actions and conduct. Accordingly, Plaintiff, on behalf of himself and the California  
19 Subclass Members, demands judgment against Defendant under the CLRA for injunctive relief.

20           76. Pursuant to section 1782(a) and (d) of the CLRA, on July 13, 2006,  
21 Plaintiff, by his counsel, notified Defendant in writing by certified mail, return receipt requested,  
22 addressed to Defendant's agent for service of process and principal place of business, of  
23 Defendant's particular violations of the CLRA, as alleged herein, and demanded that Defendant  
24 correct said violations. A true and correct copy of this letter is attached as Exhibit "A."

25           77. More than thirty days have passed since Defendant received Plaintiff's  
26 notice and demand letter. Defendant has taken no action to remedy its continued violations of  
27 Civil Code § 1770 and has not responded to the notice and demand letter.



1 C. Restitution of all charges paid by Plaintiff, the Nationwide Class Members,  
2 and the California Subclass Members because of Defendant’s unlawful, unfair, and/or fraudulent  
3 business practices complained of herein;

4 D. For disgorgement and restitution to Plaintiff and to members of the  
5 California Subclass of all monies wrongfully obtained and retained by Defendant;

6 E. For compensatory damages in an amount to according to proof at trial;

7 F. For prejudgment interest commencing on the date of payment of the  
8 charges and continuing through the date of entry of judgment in this action;

9 G. For punitive and exemplary damages in an amount according to proof at  
10 trial;

11 H. For the reasonable attorneys’ fees and expenses incurred by Plaintiff in  
12 connection with the commencement and prosecution of this action pursuant to California Civil  
13 Code section 1780(d); and

14 I. Such other and further declaratory and equitable relief as the Court deems  
15 necessary, just and proper.

16 **JURY TRIAL DEMAND**

17 Plaintiff hereby requests a jury trial for all issues so triable.

18 Dated: August 17, 2006

Respectfully submitted,

19 LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP

20  
21 By: /s/ Michael W. Sobol

Michael W. Sobol (State Bar No. 194857)

22 Scott P. Nealey (State Bar No. 193062)  
23 Peter E. Leckman (State Bar No. 235721)  
24 LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP  
25 Embarcadero Center West  
26 275 Battery Street, 30th Floor  
27 San Francisco, CA 94111-3339  
28 Telephone: (415) 956-1000  
Facsimile: (415) 956-1008

Attorneys for Plaintiff

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J. Paul Gignac (State Bar No. 125676)  
Katherine A. Donovan (State Bar No. 236318)  
ARIAS OZZELLO & GIGNAC, LLP  
4050 Calle Real Ste 130  
Santa Barbara, CA 93110-3413  
Telephone: (805) 683-7400  
Facsimile: (805) 683-7401

Peter J. Bezek (State Bar No. 102310)  
Robert A. Curtis (State Bar No. 203870)  
FOLEY BEZEK BEHLE & CURTIS, LLP  
15 West Carrillo Street  
Santa Barbara, CA 93101-8215  
Telephone: (805) 962-9495  
Facsimile: (805) 962-0722

# **Exhibit A**

**LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP**

ATTORNEYS AT LAW

EMBARCADERO CENTER WEST  
275 BATTERY STREET, 30TH FLOOR  
SAN FRANCISCO, CALIFORNIA 94111-3339  
TELEPHONE: (415) 956-1000  
FACSIMILE: (415) 956-1008  
mail@lchb.com  
www.lchb.com

NEW YORK  
WASHINGTON, D.C.  
NASHVILLE

MICHAEL W. SOBOL  
PARTNER

July 12, 2006

**VIA CERTIFIED MAIL RETURN RECEIPT REQUESTED**

Cingular Wireless, LLC  
Attention: President, Director, or Chief Officer  
c/o Corporation Service Company  
2730 Gateway Oaks, Ste. 100  
Sacramento, CA 95833

Cingular Wireless, LLC  
Attention: President, Director, or Chief Officer  
5565 Glenridge Connector  
Atlanta, Georgia 30342

Re: *Benjamin D. Winig, et al. v. Cingular Wireless, LLC, et al.*  
Notice of Violation of California Consumer Legal Remedies Act

Dear Sir or Madam:

Pursuant to the California Consumers Legal Remedies Act ("CLRA"), California Civil Code Section 1750 *et seq.* (specifically, Section 1782(a)(1) and (2)), we hereby notify you, on behalf of individual and proposed class representative plaintiff Benjamin D. Winig, that Cingular Wireless, LLC ("Cingular") is alleged to have violated the CLRA. Cingular had agreed that free mobile-to-mobile minutes included calls made from a customer's mobile phone to that customer's own mobile number (a common method for checking voicemail). However, Cingular has, without adequate notice, reversed its long-standing practice and has begun charging and continues to charge customers for these calls.

Cingular's unannounced change in billing practices and its conduct in designing, marketing, advertising, selling and distributing these service plans constitutes the following violations of the CLRA:

1. Cingular violated Civil Code § 1770(a)(5) by representing that "mobile-to-mobile" minutes had characteristics they did not actually have. Specifically, Cingular represented that free mobile-to-mobile minutes

Cingular Wireless, LLC

July 12, 2006

Page 2

included calls made from a customer's mobile phone to that customer's own mobile number. In fact, Cingular charges and continues to charge customers for these calls.

2. Cingular violated Civil Code § 1770(a)(7) by falsely representing that "mobile-to-mobile" minutes were of a particular standard, quality or grade. Specifically, Cingular represented that free mobile-to-mobile minutes included calls made from a customer's mobile phone to that customer's own mobile number. In fact, Cingular charges customers for these calls.
3. Cingular violated Civil Code § 1770(a)(9) when it advertised its services with the intent not to sell them as advertised.

Pursuant to Section 1782 of the CLRA, based on the foregoing, we hereby demand that within thirty (30) days of receiving this letter, Cingular (1) agree to cease billing plaintiff and the class members he seeks to represent for calling their own mobile number from their own mobile phones; (2) agree to compensate plaintiff and the class members he seeks to represent for the expenses they have incurred as a result of the aforementioned conduct.

Unless Cingular takes such action as demanded above within thirty (30) days after receipt of this letter, we intend to seek monetary damages for the named plaintiff and a proposed class of similarly-situated California residents, in addition to equitable relief, from Cingular under the CLRA.

Please advise us immediately if you dispute the effectiveness of this notice. If you have any questions regarding this notice and demand, feel free to contact me at (415) 956-1000.

Very truly yours,



Michael W. Sobol

MWS:lh

cc: J. Paul Gignac  
Robert Curtis

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