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RECEIVED  
 DISTRICT COURT  
 COUNTY OF SAN DIEGO  
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 COURT REPORT  
 COUNTY OF SAN DIEGO

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12  
 13 Attorneys for Plaintiff

14  
 15 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
 16 **COUNTY OF SAN DIEGO**  
 17

18 BEHAR INTERNATIONAL COUNSEL, )  
 19 PLC, on behalf of itself and all others )  
 20 similarly situated and in its representative )  
 capacity pursuant to *California Business and* )  
 21 *Professions Code* section 17204, )

Case No. **GIC 820372**

CLASS ACTION

**COMPLAINT FOR:**

- (1) VIOLATIONS OF THE UNFAIR BUSINESS PRACTICES ACT;
- (2) BREACH OF CONTRACT;
- (3) CONVERSION;
- (4) VIOLATIONS OF THE CONSUMERS LEGAL REMEDIES ACT;
- (5) NEGLIGENCE; and
- (6) DECLARATORY RELIEF

22 Plaintiff,

23 vs.

24 T MOBILE USA, INC., a Delaware )  
 25 corporation, and DOES 1 through 100, )  
 inclusive, )

26 Defendants.

DEMAND FOR JURY TRIAL

1 All allegations made in this Complaint are based upon information and belief except those  
2 allegations which pertain to Plaintiff, which are based on personal knowledge. Plaintiff's  
3 information and belief are based upon, *inter alia*, Plaintiff's own investigation and the investigation  
4 conducted by Plaintiff's attorneys. Each allegation in this Complaint either has evidentiary support  
5 or is likely to have evidentiary support after a reasonable opportunity for further investigation or  
6 discovery.

### 7 NATURE OF THE ACTION

8 1. This is a consumer class action and representative action for, *inter alia*, violations of  
9 common law and California state law arising out of defendants' unfair, deceptive and misleading  
10 business practices of billing their cellular telephone customers for calls dialed to/from their cellular  
11 telephones while their customers (and their cellular telephones) were outside the United States, even  
12 though their customers never received/made the calls for which they were billed. Plaintiff brings  
13 this action in its own right, on behalf of the class defined herein of other consumers similarly  
14 situated, and in its representative capacity pursuant to *California Business and Professions Code*  
15 section 17204.

### 16 JURISDICTION AND VENUE

17 2. This Court has jurisdiction over this action pursuant to *California Code of Civil*  
18 *Procedure* section 410.10.

19 3. Venue is proper in this Court pursuant to *California Code of Civil Procedure* sections  
20 395 and 395.5 and *California Civil Code* section 1780(c) because one or more of the defendants is  
21 registered to do business in the State of California and doing business within the County of San  
22 Diego, because the Plaintiff resides within the County of San Diego, and because many of the acts  
23 giving rise to this litigation took place within the County of San Diego.

24 4. There are no federal claims alleged in this action, nor is relief sought under any  
25 federal law. The individual amount in controversy as to Plaintiff and each class member is not  
26 greater than \$75,000.00, including interest and a pro rata share of any award of attorneys' fees and  
27 costs, restitution or exemplary damages.

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**PARTIES**

5. Plaintiff BEHAR INTERNATIONAL COUNSEL, PLC ("Plaintiff") is a Professional Corporation with its principal place of business located in San Diego County, California.

6. Defendant T Mobile, USA, Inc., ("T MOBILE") and at times relevant hereto was, a Delaware Corporation with its principal place of business located in Bellevue, Washington. During times relevant to the claims alleged herein, T Mobile, USA, Inc., provided cellular telephone service within the State of California.

7. The true names and capacities, whether individual, corporate, associate or otherwise, of the defendants sued herein under *California Code of Civil Procedure* section 474 as Does 1 through 100, inclusive, are unknown to Plaintiff, who therefore sues said defendants by such fictitious names. Plaintiff will amend this complaint to insert the true names and capacities of said defendants when the same have been ascertained. Each of the defendants designated herein as a "Doe" is legally responsible in some manner for the wrongdoing alleged herein.

8. As used herein, the term "Defendants" shall refer to TMOBILE USA, Inc., and Does 1 through 100, inclusive, collectively.

9. Whenever, in this Complaint, reference is made to any act, deed or conduct of Defendants, the allegation means that Defendants engaged in the act, deed or conduct by or through one or more of their officers, directors, agents, employees or representatives who was actively engaged in the management, direction, control or transaction of the ordinary business and affairs of Defendants.

**AGENCY ALLEGATIONS**

10. At all material times herein, each of the Defendants was the agent, servant and/or employee of the other Defendants, acted within the purpose, scope and course of said agency, service and/or employment and with the express and/or implied knowledge, permission and consent of the other Defendants, and ratified and approved the acts of the other Defendants.

11. At all relevant times hereto, the agents and employees of Defendants who took the actions alleged herein were authorized by Defendants' officers, directors, and managing agents to

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1 act as alleged herein, and Defendants ratified the acts of their agents and employees by accepting the  
2 benefits of those acts with knowledge of them.

### 3 **FACTUAL BACKGROUND**

4 12. Plaintiff receives cellular telephone service from defendant T MOBILE.

5 13. In or around March 2003, plaintiff noticed that its T MOBILE telephone bill  
6 contained several extremely high and duplicate roaming charges for calls allegedly placed to  
7 Plaintiff's cellular phone while Plaintiff was out of the country. For these alleged one minute  
8 telephone calls, two charges of \$4.99 each appear on Plaintiff's bill.

9 14. Plaintiff was out of the country when these calls were placed to its cellular telephone.  
10 Plaintiff never made or received the calls that appear on its T MOBILE bill.

11 15. On May 15, 2003, Defendants sent Plaintiff a letter threatening to suspend its cellular  
12 telephone service for non-payment of these overcharges. When asked by Plaintiff, T MOBILE  
13 provided no explanation for the \$4.99 charges which had been placed on Plaintiff's cellular  
14 telephone bill.

15 16. In addition to being improperly billed for roaming charges, Plaintiff also was billed  
16 for taxes and surcharges on the calls that Plaintiff neither made nor received, which were in addition  
17 to the taxes and surcharges which it was charged for its normal T MOBILE cellular telephone  
18 service.

19 17. After several contacts with T MOBILE regarding this matter, Plaintiff was advised  
20 that T MOBILE would credit it approximately \$146 towards future T MOBILE services as a result  
21 of these unauthorized charges. No analysis was provided by T MOBILE as to how this amount was  
22 determined or what information was reviewed. No offer was made to pay Plaintiff a cash refund for  
23 the admittedly over-billed charges, and no cash refund was given. At no time did T MOBILE advise  
24 Plaintiff that its situation was unique or an individualized error.

### 25 **CLASS ACTION ALLEGATIONS**

26 18. Plaintiff brings this action, on behalf of itself and all others similarly situated, as a  
27 class action pursuant to *California Code of Civil Procedure* section 382 and *California Civil Code*  
28 section 1781. The class which Plaintiff seeks to represent is defined as follows: all persons residing

1 in any area code serviced by Defendants within the State of California who, at any time within the  
2 four-year period of time predating the filing of this action, were charged roaming charges while they  
3 (and their cellular telephones) were outside the United States (“international roaming charges”) even  
4 though they never received/made the calls for which they were billed.

5 19. While the exact number of members of the Class is unknown to Plaintiff at this time  
6 and can only be determined by further discovery, membership the Class is ascertainable based upon  
7 the records maintained by Defendants. Plaintiff believes that the Class likely includes at least many  
8 hundreds, if not many thousands, of members. Therefore, the Class is sufficiently numerous that  
9 joinder of all members of the Class in a single action is impracticable and the resolution of the claims  
10 alleged through the procedure of a class action will be of benefit to the parties and the Court.

11 20. Plaintiff will fairly and adequately represent and protect the interests of the members  
12 of the Class. Plaintiff is an adequate representative of the Class, as it has no interests which are  
13 adverse to the interests of the members of the Class. Plaintiff is committed to the vigorous  
14 prosecution of this action and, to that end, Plaintiff has retained counsel who are competent and  
15 experienced in handling class action litigation on behalf of consumers.

16 21. Plaintiff's claims are typical of the claims of the other members of the Class because  
17 Plaintiff and each member of the Class have been subjected to the same improper billing practices  
18 and have been damaged in the same manner thereby.

19 22. Common questions of law and fact exist as to all members of the Class and  
20 predominate over the questions, if any, which affect only individual members of the Class.

21 23. The common questions of fact shared by each of the members of the Class include,  
22 but are not limited to, the following:

23 a. Whether T MOBILE processed the cellular telephone bills sent to each class  
24 member;

25 b. Whether class members were charged roaming charges for international calls that  
26 the customer neither made nor received;

27 c. Whether the charges resulted from errors in T MOBILE's system;

28 d. Whether T MOBILE knew or had reason to know that errors in T MOBILE's

1 system were causing class members to be charged international roaming charges for calls their  
2 customers never received or made;

3 e. Whether class members have been damaged as a result of errors in T MOBILE's  
4 system and, if so, the proper measure of such damages.

5 24. The common questions of law shared by each of the members of the Class include,  
6 but are not limited to, the following:

7 a. Whether the actions and conduct of Defendants have violated one or more  
8 provisions of the Consumers Legal Remedies Act;

9 b. Whether the actions and conduct of Defendants resulted from the failure of  
10 Defendants to exercise the duty of care which Defendants owed to the class members and thereby  
11 constituted negligence on the part of Defendants;

12 c. Whether the actions and conduct of Defendants constituted a breach of the cellular  
13 telephone contract with the class members; and

14 d. Whether the actions and conduct of Defendants constituted a conversion of  
15 monies due to the class members.

16 25. Plaintiff is aware of no difficulty which will be encountered in the management of  
17 this litigation which should preclude its maintenance as a class action.

18 26. The names and addresses of the members of the Class are available from Defendants'  
19 records. Notice can be provided to the members of the Class via first class mail or otherwise using  
20 techniques and a form of notice similar to those customarily used in consumer class actions arising  
21 under California law. Specifically, notice can be provided to the members of the Class by including  
22 a notice in the monthly cellular telephone bills sent to T MOBILE customers, with the minimal cost  
23 of such notice to be borne by Defendants.

#### 24 REPRESENTATIVE ACTION ALLEGATIONS

25 27. In addition to asserting class action claims in this action, Plaintiff asserts claims in  
26 its representative capacity pursuant to *California Business and Professions Code* section 17204 in  
27 order to enjoin Defendants from engaging in the unfair business practices alleged in this Complaint  
28 and to require Defendants to disgorge and restore to the affected residents of the State of California

1 all monies wrongfully obtained by Defendants through their unfair and unlawful business practices.

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3 A representative action is necessary and appropriate because Defendants have engaged in, and  
4 continue to engage in, the wrongful acts described herein as a general business practice.

### 5 FIRST CAUSE OF ACTION

6 (Violations of the Unfair Business Practices Act -  
7 *California Business & Professions Code § 17200, et seq.*)

8 28. Plaintiff repeats and incorporates herein by reference each and every allegation in  
9 paragraphs 1 through 17 and 27, inclusive, as though fully set forth herein.

10 29. Plaintiff brings this cause of action in its representative capacity on behalf the  
11 residents of the State of California effected by Defendants' wrongdoing.

12 30. Defendants' acts, as alleged herein, violated and continue to violate *California*  
13 *Business and Professions Code* section 17200, which prohibits unlawful, unfair, or fraudulent  
14 business practices, by virtue of the following facts:

15 a. Defendants wrongfully bill their cellular telephone customers for calls dialed  
16 to their customers' cellular telephones while the customers (and their cellular telephones) are outside  
17 the United States, even though the customers neither make nor receive the calls for which they are  
18 billed.

19 b. When and if a customer complains sufficiently, Defendants do not provide  
20 a cash refund of the overcharges but, rather, provide a credit to the customer instead of refunding the  
21 customer's money;

22 c. Defendants provide, as a business practice, credits whenever a refund is due  
23 for any reason, instead of providing a cash refund; and

24 d. The credit issued by Defendants does not make the customer whole.

25 31. Defendants' practices have deceived and are likely to deceive members of the public.

26 32. Unless Defendants are enjoined from continuing to engage in these unfair, unlawful  
27 and deceptive business practices, Plaintiff and other residents of the State of California will continue  
28 to be injured by the wrongful actions and conduct of Defendants.

1 33. So as not to be unjustly enriched by their own wrongful actions and conduct,  
2 Defendants should be required to disgorge and restore to Plaintiff and all other affected residents of  
3 the State of California all monies wrongfully obtained and retained by Defendants as a result of their  
4 unfair, unlawful and deceptive business practices, together with interest thereon.

5 **SECOND CAUSE OF ACTION**  
6 (Breach of Contract)

7 34. Plaintiff repeats and incorporates herein by reference each and every allegation in  
8 paragraphs 1 through 26, inclusive, as though fully set forth herein.

9 35. Plaintiff brings this cause of action on behalf of itself and the members of the Class  
10 defined herein.

11 36. On or about April 26, 2003, Plaintiff entered into a written service agreement with  
12 defendant T MOBILE. A true and correct copy of the Service Agreement is attached hereto as  
13 Exhibit "A" and incorporated herein by this reference.

14 37. Pursuant to paragraph 12 of the "Terms and Conditions" of the Service Agreement,  
15 T Mobile was authorized to charge Plaintiff, and Plaintiff agreed to pay T MOBILE, for "Usage  
16 charges". As defined in the Service Agreement, Usage charges include, *inter alia*, "messages and  
17 data that are sent from *or received by* your Unit when you are outside our local calling area  
18 ('roaming' charges)." (Emphasis is added.)

19 38. The Service Agreement is a uniform contract that T MOBILE entered into with each  
20 member of the Class and, at least as to the provision regarding the billing of T MOBILE's customers  
21 for roaming charges, does not vary substantively from one class member to another.

22 39. Plaintiff has performed all conditions, covenants and promises required of Plaintiff  
23 under the Service Agreement in accordance with the terms and conditions of the Service Agreement,  
24 except to the extent that such performance was excused, released or waived by the actions, conduct  
25 or agreement of Defendants.

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1 *Civil Code* §1750 et seq. (“the CLRA”). If determined to be appropriate, Plaintiff may amend its  
2 complaint in the future to seek damages on behalf of itself and the other members of the Class.

3 52. The CLRA applies to Defendants’ actions and conduct described herein because it  
4 extends to transactions which are intended to result, or which have resulted, in the sale or lease of  
5 goods or services to consumers.

6 53. Plaintiff and each member of the Class is a “consumer” within the meaning of  
7 *California Civil Code* §1761(d).

8 54. The cellular telephone charges at issue are charges for “services” within the meaning  
9 of *California Civil Code* §1761(a).

10 55. Defendants have violated, and continue to violate, the CLRA in at least the following  
11 respects:

12 a. in violation of section 1770(a)(5) of the CLRA, Defendants have represented  
13 that services have characteristics and benefits which they do not have;

14 b. in violation of section 1770(a)(14) of the CLRA, Defendants have represented  
15 that a transaction confers or involves rights, remedies or obligations which it does not have or  
16 involve; and

17 c. in violation of section 1770(a)(17) of the CLRA, Defendants have represented  
18 that consumers will receive a rebate, discount or other economic benefit, where the earning of the  
19 benefit is contingent on an event to occur subsequent to the consummation of the transaction.

20 56. Unless Defendants are enjoined from continuing to engage in these violations of the  
21 CLRA, Plaintiff and the other members of the Class will continue to be injured by the wrongful  
22 actions and conduct of Defendants.

### 23 FIFTH CAUSE OF ACTION

24 (Negligence)

25 57. Plaintiff repeats and incorporates herein by reference each and every allegation in  
26 paragraphs 1 through 26, inclusive, as though fully set forth herein.

27 58. Plaintiff brings this cause of action on behalf of itself and the members of the Class  
28 defined herein.

1 59. Defendants owed a duty to Plaintiff and each member of the Class to exercise due  
2 care and diligence in placing charges for cellular telephone services on their bills.

3 60. Defendants breached their duties of care to Plaintiff and the other members of the  
4 Class by failing to exercise ordinary care and due diligence in negligently permitting the  
5 circumstances to exist that led to Plaintiff and the other members of the Class being billed for calls  
6 dialed to/from their cellular telephones while they (and their cellular telephones) were outside the  
7 United States, even though they never received/made the calls for which they were billed.

8 61. Defendants' activities were a substantial factor in causing the damages to Plaintiff  
9 and the other members of the Class as complained of herein.

10 62. As a direct and proximate result of Defendants' negligence, Plaintiff and the other  
11 members of the Class have been damaged in an amount according to proof at trial.

12 **SIXTH CAUSE OF ACTION**

13 (Declaratory Relief)

14 63. Plaintiff repeats and incorporates herein by reference each and every allegation in  
15 paragraphs 1 through 26, inclusive, as though fully set forth herein.

16 64. Plaintiff brings this cause of action on behalf of itself and the members of the Class  
17 defined herein.

18 65. An actual controversy has arisen and now exists between Plaintiff and the other  
19 members of the Class, on one hand, and Defendants, on the other hand, concerning their respective  
20 rights and duties in that Plaintiff and the other members of the Class contend that Defendants are  
21 engaging in and continue to engage in improper practices as described herein, while Defendants  
22 contend that their actions and conduct are lawful and proper.

23 66. A judicial declaration is necessary and appropriate at this time, under the  
24 circumstances presented, in order that Plaintiff and the other members of the Class may ascertain  
25 their rights and duties with respect to the practices described herein.

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**On The Fourth Cause Of Action**

1. For injunctive relief in the form of an order enjoining Defendants from: (1) billing their cellular telephone customers for calls dialed to/from their cellular telephones while their customers (and their cellular telephones) are outside the United States under circumstances in which their customers never receive/make the calls for which they are billed; (2) providing their customers with credits rather than cash refunds for improperly billed calls which result in overcharges; (3) failing to reimburse their customers for the taxes paid on overcharges; and (4) failing to pay their customers interest on overcharges;

2. For the reasonable attorneys' fees and expenses incurred by Plaintiff in connection with the commencement and prosecution of this action pursuant to *California Civil Code* §1780(d).

**On The Fifth Cause Of Action**

- 1. For compensatory damages in an amount according to proof at trial; and
- 2. For prejudgment interest commencing on the date of nonpayment of the amounts due.

**On The Sixth Cause Of Action**

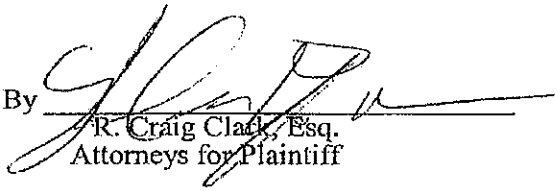
1. For a judicial declaration that Defendants' practices, as alleged herein, are unfair, unlawful and improper as a matter of law.

**On All Causes Of Action**

- 1. For all attorneys' fees, expenses and recoverable costs reasonably incurred in connection with the commencement and prosecution of this action; and
- 2. For such other and further relief as the Court deems just and proper.

Dated: October 24, 2003

**FOLEY & BEZEK, LLP  
CLARK and ASSOCIATES  
ARIAS, OZZELLO & GIGNAC, LLP**

By   
R. Craig Clark, Esq.  
Attorneys for Plaintiff

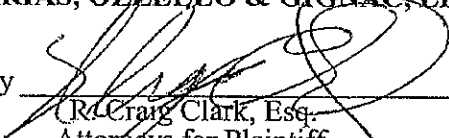
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**DEMAND FOR JURY TRIAL**

Plaintiff demands a trial by jury of all issues so triable in this action.

Dated: October 29 2003

**FOLEY & BEZEK, LLP  
CLARK and ASSOCIATES  
ARIAS, OZZELLO & GIGNAC, LLP**

By   
\_\_\_\_\_  
Craig Clark, Esq.  
Attorneys for Plaintiff

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15 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
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18 BEHAR INTERNATIONAL COUNSEL, )  
 19 PLC, on behalf of itself and all others )  
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 22 Plaintiff, )

23 vs. )

24 T MOBILE, USA, INC., a Delaware )  
 25 corporation, and DOES 1 through 100, )  
 inclusive, )

26 Defendants. )  
 27

Case No.

**CLASS ACTION**

**DECLARATION OF GIACOMO J. BEHAR  
 RE PROPER COUNTY FOR  
 COMMENCEMENT AND TRIAL OF  
 ACTION**

[*California Civil Code* section 1780(c)]



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**DECLARATION OF GIACOMO J. BEHAR**

I, Giacomo J. Behar, state and declare as follows:

1. I have personal knowledge of the matters stated herein except as to those matters stated on information and belief, which I believe to be true based upon the advice of my counsel.

2. If called and sworn as a witness, I could and would testify truthfully and competently to the matters stated herein.

3. I submit this declaration pursuant to *California Civil Code* section 1780(c).

4. I am the President of Behar International Counsel, PLC ("BIC, PLC") and, as such, authorized to act and speak on its behalf.

5. BIC, PLC maintains its principal place of business in San Diego, California.

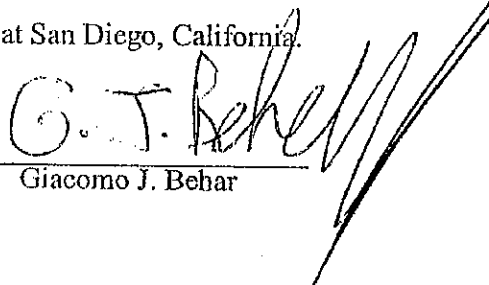
6. Defendant T Mobile USA, Inc., does business within the County of San Diego.

7. BIC, PLC entered into its Service Agreement with T Mobile USA, Inc., in the County of San Diego.

8. Based on the foregoing, I am informed and believe that the County of San Diego is the proper county for the commencement and trial of this action according to the requirements set forth under *California Civil Code* section 1780(c).

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

Executed this 24<sup>th</sup> day of October, 2003, at San Diego, California.

  
\_\_\_\_\_  
Giacomo J. Behar