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FEDERAL TRADE COMMISSION

13
14 UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
15 San Francisco Division

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17 FEDERAL TRADE COMMISSION,
18 Plaintiff,
19 v.
20 AT&T MOBILITY LLC, a limited liability
21 company,
22 Defendant.

Case No. _____

**COMPLAINT FOR PERMANENT
INJUNCTION AND OTHER
EQUITABLE RELIEF**

23
24 Plaintiff, the Federal Trade Commission (“Commission” or “FTC”), for its Complaint
25 alleges:

26 1. The FTC brings this action under Section 13(b) of the Federal Trade Commission
27 Act (“FTC Act”), 15 U.S.C. § 53(b), to obtain permanent injunctive relief, rescission or
28 reformation of contracts, restitution, the refund of monies paid, disgorgement of ill-gotten

COMPLAINT

1 monies, and other equitable relief for Defendant's acts or practices in violation of Section 5(a) of
2 the FTC Act, 15 U.S.C. § 45(a), in connection with the marketing of wireless broadband internet
3 access service for smartphones.

4 **JURISDICTION AND VENUE**

5 2. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1337(a),
6 and 1345, and 15 U.S.C. §§ 45(a) and 53(b).

7 3. Venue is proper in this district under 28 U.S.C. §§ 1391(b)(1), (b)(2), (c)(2), and
8 (d), and 15 U.S.C. § 53(b).

9 **INTRADISTRICT ASSIGNMENT**

10 4. Defendant markets its products throughout the United States, including
11 throughout the county of San Francisco.

12 **PLAINTIFF**

13 5. The FTC is an independent agency of the United States Government created by
14 statute. 15 U.S.C. §§ 41–58. The FTC enforces Section 5(a) of the FTC Act, 15 U.S.C. § 45(a),
15 which prohibits unfair or deceptive acts or practices in or affecting commerce.

16 6. The FTC is authorized to initiate federal district court proceedings, by its own
17 attorneys, to enjoin violations of the FTC Act and to secure such equitable relief as may be
18 appropriate in each case, including rescission or reformation of contracts, restitution, the refund
19 of monies paid, and the disgorgement of ill-gotten monies. 15 U.S.C. § 53(b).

20 **DEFENDANT**

21 7. Defendant AT&T Mobility LLC is a Delaware limited liability company with its
22 principal office or place of business at 1025 Lenox Park Boulevard NE, Atlanta, GA 30319.
23 AT&T Mobility LLC transacts or has transacted business in this district and throughout the
24 United States.

25 **COMMERCE**

26 8. At all times material to this Complaint, Defendant has maintained a substantial
27 course of trade in or affecting commerce, as “commerce” is defined in Section 4 of the FTC Act,
28 15 U.S.C. § 44.

1 **DEFENDANT’S COURSE OF CONDUCT**

2 **Defendant’s Mobile Data Plans**

3 9. Defendant is a major retailer of smartphones and provider of wireless broadband
4 internet access service for smartphones (“mobile data”). Smartphone owners use mobile data to,
5 among other things, send and receive email, use GPS navigation, watch streaming video, and
6 browse the internet.

7 10. In 2007, Defendant became the exclusive mobile data provider for the Apple
8 iPhone. Initially, Defendant offered iPhone customers an “unlimited” mobile data plan for \$20
9 per month. In 2008, when the iPhone 3G was released, Defendant increased the fee for the
10 unlimited mobile data plan to \$30 per month, and required all iPhone 3G customers to purchase
11 the data plan. As Defendant began offering subsequent versions of the iPhone and smartphones
12 from competing manufacturers, it imposed a similar requirement on purchasers of those devices.

13 11. In June 2010, Defendant ceased offering the unlimited mobile data plan to new
14 smartphone customers and, since then, has required new smartphone customers to purchase one
15 of Defendant’s “tiered” mobile data plans. Unlike the unlimited mobile data plan, Defendant’s
16 tiered mobile data plans specify a data allowance (e.g., 250 MB, 3 GB), and customers who
17 exceed the stated data allowance are charged for the additional data at the rate set forth in the
18 tiered mobile data plan.

19 12. By the time Defendant stopped offering the unlimited mobile data plan to new
20 customers, millions of customers had accepted Defendant’s offer to purchase an unlimited
21 mobile data plan. Since June 2010, Defendant has offered to grandfather these customers’
22 unlimited mobile data plan when they purchase a new smartphone, giving them the opportunity
23 to continue with their unlimited mobile data plan, rather than requiring them to switch to
24 Defendant’s tiered mobile data plans. The renewed plan continues to cost \$30 per month.

25 13. Defendant has offered to grandfather customers’ existing unlimited mobile data
26 plan to induce customers who have this plan not to switch mobile data providers. Competing
27 mobile data providers have offered data service for smartphones for several years, including,
28 since 2011, for the iPhone.

1 14. Defendant has communicated to existing customers the offer to renew their
2 unlimited mobile data plan via in-store or telephone representatives or on Defendant's website.
3 In response to this offer, millions of Defendant's unlimited mobile data plan customers have
4 elected to keep their unlimited mobile data plan rather than switch to a tiered mobile data plan or
5 obtain service from another provider.

6 **Defendant's Data Throttling Program**

7 15. In July 2011, Defendant decided to begin reducing the data speed for unlimited
8 mobile data plan customers, a practice commonly known as "data throttling." Under
9 Defendant's throttling program, if an unlimited mobile data plan customer exceeds the limit set
10 by Defendant during a billing cycle, Defendant substantially reduces the speed at which the
11 customer's device receives data for the rest of that customer's billing cycle.

12 16. In October 2011, Defendant began restricting the data speed for unlimited mobile
13 data plan customers whose data usage exceeded thresholds imposed by Defendant. Initially, the
14 data usage threshold at which Defendant throttled customers varied across geographic markets.
15 The threshold was as low as 2 GB per billing cycle in dense markets like New York City and the
16 San Francisco Bay Area.

17 17. In March 2012, Defendant modified its data throttling program. Under the
18 revised version, Defendant set a uniform nationwide data usage threshold of 3 GB per billing
19 cycle for devices using Defendant's 3G network (e.g., iPhone 3G, 3GS, 4) and HSPA+ network
20 (e.g., iPhone 4S), and 5 GB per billing cycle for devices using Defendant's LTE network (e.g.,
21 iPhone 5, 5S, 6, 6 Plus).

22 18. Under the original version of Defendant's throttling program, from October 2011
23 through February 2012, Defendant capped the data speed at 128 Kbps for customers who
24 exceeded the data usage threshold. Under the revised version, starting in March 2012 and
25 continuing to the present, Defendant caps the data speed at 256 Kbps for customers with 3G and
26 HSPA+ devices and 512 Kbps for customers with LTE devices.

27 19. Typical unthrottled speeds on AT&T's network range from 700 Kbps to 1.7 Mbps
28 for 3G devices, 2 to 6 Mbps for HSPA+ devices, and 5 to 12 Mbps for LTE devices.

1 20. Customers who have been throttled by Defendant have experienced drastically
2 reduced service under both the original and revised versions of the throttling program.
3 Numerous customers using 3G devices have experienced an 80–90% decrease in speed when
4 throttled under the original version of Defendant’s throttling program, and a 60–85% decrease
5 under the revised version. Numerous customers using HSPA+ devices have experienced a 90–
6 95% decrease in speed when throttled under the original version, and an 85–95% decrease under
7 the revised version. Numerous customers using LTE devices have experienced a 95% decrease
8 in speed when throttled under the original version, and a 90–95% decrease under the revised
9 version. As a result, under both versions, many everyday applications, such as web browsing,
10 GPS navigation, and streaming video, are significantly slower, and in some cases are severely
11 impaired or rendered practically inoperable.

12 21. When it implemented its throttling program, Defendant possessed internal focus
13 group research indicating that its throttling program was inconsistent with consumer
14 understanding of an “unlimited” data plan. The researchers concluded that, “[a]s we’d expect,
15 the reaction to [a proposed data throttling program] was negative; consumers felt ‘unlimited
16 should mean unlimited[.]’” The focus group participants thought the idea was “clearly unfair.”
17 The researchers highlighted a consumer’s comment that “[i]t seems a bit misleading to call it
18 Unlimited.” The researchers observed that “[t]he more consumers talked about it the more they
19 didn’t like it.” This led the researchers to advise that “[s]aying less is more, [so] don’t say too
20 much” in marketing communications concerning such a program.

21 22. When it revised its throttling program, Defendant was aware of third-party
22 research showing that, at 256 Kbps, two-thirds of customers are unsatisfied with webpage render
23 time, and that, at 512 Kbps, one-third of customers are unsatisfied with render time. According
24 to the same research, at 128 Kbps, 93% of customers are unsatisfied with webpage render time.

25 23. Thousands of customers have submitted written complaints concerning
26 Defendant’s throttling program to Defendant, the Better Business Bureau, and government
27 agencies. In addition, Defendant has received more than 190,000 customer calls relating to its
28 throttling program.

1 24. Numerous complaining customers have accused Defendant of failing to live up to
2 its end of their bargain because its throttling program imposes a limitation on their unlimited data
3 plan. The following excerpts are illustrative of the consumer complaints:

- 4 a. “Unlimited means without restriction, [but] AT&T slowing the speed of
5 data by 90% is RESTRICTING my data.”
- 6 b. “I would like AT&T to honor the contract that we signed up with that
7 allowed us to continue our unlimited data plan I would like the
8 advertisement of ‘Nation[?]s fastest LTE Network’ to be honored.”
- 9 c. “If [I’m] being punished for using my phone and plan as advertised[,] then
10 I have lost a lot of respect for [AT&T].”
- 11 d. “This is a clear case of bait and switch.”
- 12 e. “I have a 2–3 hour commute to my job and use [P]andora and YouTube.
13 . . . I am losing money paying for Hulu, Netflix, and Pandora . . . because
14 AT&T has changed the rules yet again”

15 25. Many customers also have expressed their frustration at the effect Defendant’s
16 throttling program has on their ability to load webpages and to perform common functions they
17 had come to rely on. The following excerpts are illustrative of the consumer complaints:

- 18 a. “When loading a page, it can take forever for it to load or it doesn’t load at
19 all. . . . When I needed to use the GPS when I am lost, I am unable [to]
20 because they slowed down my data plan to the point that I am not able to
21 use it to look up directions.”
- 22 b. “Recently, AT&T has . . . effectively slow[ed] my speed down to where I
23 cannot listen to music during the day or stream video.”
- 24 c. “I’m no longer able to access basic functions, such as email or [F]acebook,
25 because the [data] speed . . . does not allow these services to function.”
- 26 d. “Apps such as email, social media, calendar, word processing, streaming
27 music, navigation, and data backup frequently stop working without the
28 ability to reliably connect to the data network at a reasonable speed.”

1 e. “My speed [has] been decreased from 50mbps to 0.5mbps! . . . I have to
2 go to find [Wifi] to be able to post pictures, videos and use my device.”

3 26. The speed reductions and service restrictions in effect under Defendant’s
4 throttling program are not determined by real-time network congestion at a particular cell tower.
5 Throttled customers are subject to this reduced speed even if they use their smartphone at a time
6 when Defendant’s network has ample capacity to carry the customers’ data, or the use occurs in
7 an area where the network is not congested. Once customers have been throttled during a given
8 billing cycle, Defendant caps their download speed until the end of the billing cycle, at which
9 time Defendant restores the data speed for these customers to full speed.

10 27. Since October 2011, Defendant has throttled its customers more than 25 million
11 times, affecting more than 3.5 million unique customers. When a customer is throttled, the
12 customer’s data speed is reduced, on average, for the last twelve days of the customer’s thirty-
13 day billing cycle.

14 28. Defendant has numerous alternative ways to reduce data usage on its network that
15 do not involve violating its promise to customers. One alternative would involve Defendant
16 requiring existing unlimited data customers to switch to a tiered data plan at renewal. Defendant
17 considered and rejected this approach in part because of concern that renewing customers would
18 switch providers rather than switch to one of Defendant’s tiered data plans. Another alternative
19 would involve Defendant introducing its throttling program at renewal, with disclosures at point
20 of sale. Defendant considered and rejected such an alternative, in part because it “[a]pplied to all
21 customers” and would not let Defendant “isolat[e] communications to [the] heaviest users.” Yet
22 other alternatives might include limited, narrowly tailored throttling programs that are consistent
23 with Defendant’s contracts, advertising, and other public disclosures.

24 29. At the same time that Defendant has been throttling unlimited mobile data plan
25 customers who exceed 3 or 5 GB of data usage during a billing cycle, Defendant has been
26 offering individual tiered mobile data plans for data usage of at least 30 GB per billing cycle.
27 Defendant does not throttle its tiered mobile data plan customers, regardless of the amount of
28 data that a tiered mobile data plan customer uses.

1 **Defendant’s Unlimited Mobile Data Plan Advertisements and Contracts**

2 30. Defendant has disseminated or has caused to be disseminated advertisements and
3 promotional materials for mobile data plans, including but not limited to the attached Exhibits A
4 to C. These advertisements and promotional materials contain the following statements:

5 a. iPhone Brochure (Exhibit A)

6 iPhone combines three amazing products—a mobile phone, a widescreen
7 iPod and a breakthrough Internet device—into one small, lightweight,
8 handheld device with rich HTML email, web browsing, searching and
9 Google Maps.

10

11 **Breakthrough Internet Device**

12 iPhone offers a rich HTML email client and Safari—the most advanced
13 web browser ever on a portable device. It automatically syncs bookmarks
14 from a PC or Mac and has built-in Google and Yahoo! Search. It also
15 multitasks, so you can read a web page while downloading your email in
16 the background over Wi-Fi or EDGE.

17

18 **AT&T Plans for iPhone**

19 To use iPhone, you’ll need to sign up for a 2-year service agreement or a
20 renewed 2-year service agreement if you are already an AT&T customer.
21 Plans start at \$59.99 and include Visual Voicemail, Unlimited Data (email
22 and web) and 200 SMS text messages—for use in the U.S. . . . You can
23 browse the Internet and send emails as often as you like without being
24 charged extra.

25

26 **Data Plans for iPhone (U.S. Coverage Packages)**

27 . . . A Data Plan for iPhone gives you Visual Voicemail, Unlimited Data
28 (email and web) and SMS text messaging—for use in the U.S.

29 b. iPhone 3G Brochure (Exhibit B)

30 Introducing iPhone 3G. With fast 3G wireless technology, Maps with
GPS, support for enterprise features like Microsoft Exchange, and the new
App Store, iPhone 3G puts even more features at your fingertips. And like
the original iPhone, it combines three products in one—a revolutionary

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phone, a widescreen iPod, and a breakthrough Internet device with rich HTML email and full web browsing. iPhone 3G. It redefines what a mobile phone can do—again.

....

Internet In Your Pocket

iPhone uses fast 3G and Wi-Fi wireless connections to deliver rich HTML email, Maps with GPS, and Safari—the most advanced web browser on a portable device. iPhone automatically syncs bookmarks from your PC or Mac and has Google and Yahoo! search built in. Since iPhone multitasks, you can even make a phone call while emailing a photo or surfing the web over a Wi-Fi or 3G connection.

Maps with GPS

Find your location, get directions, and search for nearby businesses—all from your phone. Maps on iPhone 3G combines GPS, Wi-Fi, and cell tower location technology to create the best map application on a mobile phone.

....

AT&T Plans for iPhone 3G (U.S. Coverage Packages)

AT&T NationSM

UNLIMITED Data (Email/Web)

....

AT&T FamilyTalkSM

Includes 2 lines

UNLIMITED Data (Email/Web)

c. iPhone 3GS Brochure (Exhibit C)

AT&T Advantages

The Nation’s Fastest 3G Network

....

AT&T NationSM for iPhone

Unlimited Data, Unlimited Mobile to Mobile, Unlimited Nights & Weekends, Visual Voicemail and Rollover[®]

1

2 **AT&T FamilyTalkSM for iPhone (includes 2 lines)**
3 Unlimited Data, Unlimited Mobile to Mobile, Unlimited Nights &
4 Weekends, Visual Voicemail and Rollover[®]

5 31. Defendant's wireless customer agreements for unlimited mobile data plan
6 customers prohibit the use of Defendant's data service for certain activities, such as operating a
7 server, using peer-to-peer file-sharing services, sending spam email, and using data in a way that
8 adversely impacts network or service levels or hinders access to the wireless network. The
9 agreements provide that Defendant may modify, deny, disconnect, or terminate the service of
10 customers who use the service for such prohibited activities. See, for example, Defendant's
11 Wireless Customer Agreement for the period March 2008 to August 2012, attached as Exhibit D,
12 at Section 6.2 ("What Are The Intended Purposes Of The Wireless Data Service?").

13 32. Defendant's wireless customer agreements do not state that an unlimited mobile
14 data plan customer's use of more than a specified amount of data is a prohibited activity. Nor do
15 the agreements provide that Defendant may modify, diminish, or impair the service of unlimited
16 mobile data plan customers engaged in permissible activities if these customers use more than a
17 specified amount of data.

18 33. Defendant requires most customers with an unlimited mobile data plan, when
19 purchasing a new smartphone, to enter into a contract with a long-term service commitment
20 (typically lasting two years) in which customers who cancel service before the end of the service
21 commitment must pay an early termination fee ("ETF"), typically in the hundreds of dollars.

22 34. Defendant does not inform unlimited mobile data plan customers at renewal that
23 their access to mobile data may be severely limited by Defendant's throttling program.

24 35. The only information concerning Defendant's throttling program that Defendant
25 sent to most customers prior to their renewal of their unlimited mobile data plan was a statement
26 included in their July or August 2011 monthly bill. The statement read as follows:

27 **Important Update for Unlimited Data Plan Customers**

28 To provide the best possible network experience, starting 10/01/11, smartphone

1 customers with unlimited data plans whose usage is in the top 5% of users can
2 still use unlimited data but may see reduced data speeds for the rest of their
3 monthly billing cycle. We'll alert you if you near the top 5%. To avoid slowed
4 speeds you may use Wi-Fi or choose a tiered data plan. Details @
att.com/dataplans.

5 The statement failed to disclose the degree to which the customers' data speed would be reduced,
6 and the impact that the reduced speed would have on customers' ability to use their device. It
7 also failed to adequately disclose that the speed reduction was due to a limit intentionally
8 imposed by Defendant, as opposed to general network congestion. Many unlimited mobile data
9 plan customers have renewed their contract months, or even years, after this statement appeared
10 in their bill.

11 36. A minority of unlimited mobile data plan customers have received one or more
12 text messages concerning Defendant's throttling program prior to renewing their unlimited
13 mobile data plan. Only those customers who approach or exceed the data usage threshold are
14 sent a text message. A subset of these customers also have been sent an email concerning
15 Defendant's throttling program. Most unlimited mobile data plan customers have never been
16 sent a text message or email concerning Defendant's throttling program.

17 37. Even those customers who are sent a text message or email concerning
18 Defendant's throttling program prior to renewing their unlimited mobile data plan are not
19 adequately informed of the throttling program. The text messages and emails do not adequately
20 disclose the limits that Defendant's throttling program imposes on their unlimited mobile data
21 plan, and many customers renew their contract months, or even years, after Defendant sends
22 such a text message or email.

23 38. Many of Defendant's customers subscribe to family plans. Family plans cover
24 more than one wireless device and may share minutes and text messaging among those devices.
25 Each smartphone on a family plan is typically subject to a separate long-term service
26 commitment with Defendant for the provision of mobile data. Family plan customers who wish
27 to cancel service for their family must pay an ETF for each smartphone on the plan that is
28 currently subject to such a fee.

1 39. Defendant throttles unlimited mobile data plan customers regardless of whether
2 the customers' contract permits them to cancel without incurring a substantial ETF.

3 40. Defendant has not given unlimited mobile data plan customers subject to
4 Defendant's throttling program the opportunity to cancel their individual or family plans without
5 incurring one or more substantial ETFs.

6 41. Numerous unlimited mobile data plan customers have canceled their unlimited
7 mobile data plans after being throttled by Defendant.

8 42. Defendant has collected substantial ETFs from unlimited mobile data plan
9 customers who cancelled service after being throttled.

10 **FTC ACT VIOLATIONS**

11 43. Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), prohibits "unfair or deceptive acts
12 or practices in or affecting commerce."

13 44. Misrepresentations or deceptive omissions of material fact constitute deceptive
14 acts or practices prohibited by Section 5(a) of the FTC Act.

15 **Count I**

16 **Unfair Mobile Data Throttling Program**

17 45. In the advertising, sale, and renewal of mobile data plans, Defendant entered into
18 numerous mobile data contracts that were advertised as providing access to unlimited mobile
19 data, and that do not provide that Defendant may modify, diminish, or impair the service of
20 customers who use more than a specified amount of data for permissible activities.

21 46. While such contracts were in effect, Defendant imposed significant data speed
22 restrictions on customers who used more than a fixed amount of data in a given billing cycle.

23 47. Defendant's practice has caused or is likely to cause substantial injury to
24 consumers that is not outweighed by countervailing benefits to consumers or competition and is
25 not reasonably avoidable by consumers themselves. This practice was, and is, an unfair act or
26 practice.

27 \\
28 \\
29

1 **Count II**

2 **Deceptive Failure to Disclose Mobile Data Throttling Program**

3 48. In the advertising, sale, and renewal of mobile data plans, Defendant has
4 represented, directly or indirectly, expressly or by implication, to unlimited mobile data plan
5 customers that the amount of data that the customer could access in any billing period would not
6 be limited.

7 49. Since August 2011, Defendant has failed to disclose, or has failed to disclose
8 adequately, that it imposes significant and material data speed restrictions on unlimited mobile
9 data plan customers who use more than a fixed amount of data in a given billing cycle. The
10 failure to disclose or adequately disclose this fact, in light of the representations made, was, and
11 is, a deceptive act or practice.

12 **CONSUMER INJURY**

13 50. Consumers have suffered and will continue to suffer substantial injury as a result
14 of Defendant's violations of the FTC Act. In addition, Defendant has been unjustly enriched as a
15 result of its unlawful acts or practices. Absent injunctive relief by this Court, Defendant is likely
16 to continue to injure consumers, reap unjust enrichment, and harm the public interest.

17 **THIS COURT'S POWER TO GRANT RELIEF**

18 51. Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), empowers this Court to grant
19 injunctive and such other relief as the Court may deem appropriate to halt and redress violations
20 of any provision of law enforced by the FTC. The Court, in the exercise of its equitable
21 jurisdiction, may award ancillary relief, including rescission or reformation of contracts,
22 restitution, the refund of monies paid, and the disgorgement of ill-gotten monies, to prevent and
23 remedy any violation of any provision of law enforced by the FTC.

24 **PRAYER FOR RELIEF**

25 Wherefore, Plaintiff FTC, pursuant to Section 13(b) of the FTC Act, 15 U.S.C. § 53(b),
26 and the Court's own equitable powers, requests that the Court:

27 A. Enter a permanent injunction to prevent future violations of the FTC Act by
28 Defendant;

1 B. Award such relief as the Court finds necessary to redress injury to consumers
2 resulting from Defendant's violations of the FTC Act, including but not limited to rescission or
3 reformation of contracts, restitution, the refund of monies paid, and the disgorgement of ill-
4 gotten monies; and

5 C. Award Plaintiff the costs of bringing this action, as well as such other and
6 additional relief as the Court may determine to be just and proper.

7 Dated: Oct. 28, 2014

Respectfully submitted,

8 DAVID C. SHONKA
9 Acting General Counsel

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11 _____

12 EVAN ROSE
13 MATTHEW D. GOLD
14 LAURA FREMONT
15 ERIC EDMONDSON
16 KERRY O'BRIEN
17 DAVID M. NEWMAN

18 Attorneys for Plaintiff
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