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3:05-CV-01594 NELSON V. VIRGIN MOBILE USA

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

BY: *[Signature]* DEPUTY

1 ROSNER LAW & MANSFIELD
2 Hallen D. Rosner, SBN: 109740
3 Alan M. Mansfield, SBN: 125998
4 John W. Hanson, SBN 214771
5 10085 Carroll Canyon Road, First Floor
6 San Diego, CA 92131
7 (858) 348-1005

8 Attorneys for Plaintiff

9 UNITED STATES DISTRICT COURT
10 SOUTHERN DISTRICT OF CALIFORNIA

11 SCOTT NELSON, Individually and On Behalf
12 of All Others Similarly Situated,

13 Plaintiff,

14 vs.

15 VIRGIN MOBILE USA, L.L.C., and VIRGIN
16 MOBILE USA, INC.,

17 Defendants.

Case No. 05 CV 1594

WQH (NLS)

CLASS ACTION COMPLAINT

Violation of Cal. Civ. Code §§1750 et seq.,
and Cal. Bus. & Prof. Code §§17200, et
seq., Breach of Contract, and Declaratory
Relief

(Jury Trial Requested)

18 Plaintiff, Scott Nelson, on behalf of himself and all others similarly situated, all to the best
19 of his knowledge, information, and belief formed after an investigation reasonable under the
20 circumstances, which facts are likely to have evidentiary support after a reasonable opportunity for
21 further investigation and discovery, except for information identified herein based on personal
22 knowledge, hereby alleges as follows against the above-named companies (collectively,
23 "Defendants"):

24 NATURE OF ACTION

25 1. This action challenges the practices of Defendants, a major cellular phone
26 hardware/service provider that is peddling a new "Pay As You Go" service with no long-term
27 contracts. Defendants represent in their uniform advertisements that their "Pay As You Go" product
28 has "No Hidden Fees." Contrary to their "No Hidden Fees" representation, during at least the last

1 year and continuing to date, Defendants have uniformly disseminated three separate but related
2 programs representing consumers will receive "free" airtime. In fact, Defendants charge for this
3 "free" airtime. When attempts by plaintiff were made on his own to convince Defendants to change
4 their unlawful practices, he was told that Defendants had the right to change the terms of their
5 contracts whenever they saw fit, irrespective of their prior advertisements and representations.

6 2. Defendants uniformly promote their cell phones by representing consumers will
7 receive a set amount of free airtime in consideration for purchasing the phone. Then, without
8 disclosure, Defendants renege on this material representation by providing only a small fraction of
9 the promised time, using a substantially higher (and undisclosed) per-minute rate than would
10 normally be charged for such calls. After a customer purchases such products and services,
11 Defendants uniformly represent that customer calls to their customer service line are "free calls" and
12 that calls to customer service to add time to consumers' accounts "don't cost a cent." Whenever
13 plaintiff and other consumers made these calls, however, they were charged full per-minute rates
14 for making those calls.

15 3. Defendants have failed and refused to honor, change or remove these misleading
16 advertisements and representations through readily available means that they have used before.
17 Instead they continue to direct consumers to the "free" customer service and to focus on Defendants'
18 "no hidden fees" policy. These deceptions are actively concealed by the fact consumers are not
19 mailed or otherwise sent information that could reveal the unlawful charges in advance. Consumers
20 instead would have to establish an on-line account and navigate Defendants' complicated website
21 to find any clue regarding what, when, and why Defendants charged such amounts. The website
22 "disclosures" violate relevant FTC rules regarding such disclosures.

23 4. Defendants uniformly disseminated these representations. Therefore, Class members
24 received uniform and materially false and misleading statements and omissions of material facts
25 about their phone and service purchase contracts, all as part of a scheme by Defendants to bait
26 consumers into signing up with this new company and its alternative service plan and then suddenly
27 switch consumers to different rates so as not to honor their previously advertised prices and services.

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1 District. Defendants are also registered to do business, and in fact do substantial business, in this
2 District.

3 **THE PARTIES**

4 9. Plaintiff, Scott Nelson, is a natural person who resides in California.

5 10. Defendant Virgin Mobile USA, LLC (referred to hereinafter as "Virgin Mobile LLC,"
6 or collectively with Virgin Mobile USA, Inc. as "Virgin Mobile") is a limited liability company
7 formed under the laws of Delaware, with its principal place of business at 10 Independence Blvd.,
8 Warren, New Jersey. At all relevant times, Virgin Mobile LLC was engaged in the business of
9 distributing, marketing and/or selling cellular hardware and service in California and in all 50 states.

10 11. Defendant Virgin Mobile USA, Inc., (referred to hereinafter as "Virgin Mobile Inc.",
11 or collectively with Virgin Mobile USA, LLC as "Virgin Mobile") is a Delaware corporation, with
12 its principal place of business at 10 Independence Blvd., Warren, New Jersey. At all relevant times,
13 Virgin Mobile, Inc. was engaged in the business of distributing, marketing and/or selling cellular
14 hardware and service in California and in all 50 states.

15 12. At all times mentioned in the causes of action alleged herein, by distributing
16 uniformly false and misleading representations about their phones and Top-Up cards as detailed
17 herein, by not publicly disclosing their wrongful conduct and by participating in a scheme to profit
18 economically from each defendant's individual and collective efforts to mislead consumers, each and
19 every defendant acted as an aider, abettor and co-conspirator of each and every other defendant, or
20 is obligated by law to be financially responsible for such conduct. At all times mentioned in the
21 causes of action alleged herein, each and every defendant was an agent and/or joint venturer of each
22 and every other defendant. By engaging in the conduct alleged herein, each and every defendant was
23 acting within the course and scope of this joint venture, agency and conspiracy, and with the
24 authorization of each of the remaining Defendants to the extent that any affirmative misrepresenta-
25 tions or omissions alleged herein were perpetrated by one or more Defendants by continuing to
26 participate in this conspiracy. As a result thereof, Defendants have engaged in a conspiracy to
27 violate the law as detailed herein, and to mislead and deceive consumers regarding the facts detailed
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1 herein, all to Defendants' individual and mutual economic benefit and to the injury of plaintiff and
2 the Class members.

3 13. Whenever this Complaint refers to any act or acts of Defendants, the reference shall
4 also be deemed to mean that the directors, officers, employees, affiliates, or agents of the responsible
5 defendant authorized such act while actively engaged in the management, direction or control of the
6 affairs of Defendants, and each of them, and/or by persons who are the parents or alter egos of
7 Defendants while acting within the scope of their agency, affiliation, or employment. Whenever this
8 Complaint refers to any act of Defendants, the reference shall be deemed to be the act of each
9 defendant, jointly and severally.

10 **PLAINTIFF'S CLASS ALLEGATIONS**

11 14. Plaintiff brings this action as a class action pursuant to Rule 23 of the Federal Rules
12 of Civil Procedure, on behalf of himself and all others similarly situated as representative members
13 of the following proposed class ("Class"): "All persons in California (and such other states as the
14 Court may find appropriate) who purchased one or more Virgin Mobile phones that advertised the
15 purchaser was entitled to a certain dollar amount of free airtime and who instead were billed for
16 such airtime at a different than advertised rate and/or were charged for calls to Defendants' *VM
17 (*86) customer service line either for general inquiries or to add time to their accounts, or both." The
18 Class excludes Defendants and their co-conspirators, subsidiaries, affiliates, officers, and employees,
19 and the Court and its staff.

20 **NUMEROSITY OF THE CLASS**

21 15. The proposed Class is so numerous that the individual joinder of all its members in
22 one action is impracticable. While the exact number and the identities of Class members are not
23 known at this time, they can be ascertained through appropriate investigation and discovery. As
24 Defendants have publicized that its rapid growth lead to over 3 million customers as of early 2005,
25 plaintiff estimates the Class potentially includes thousands of persons.

26 **TYPICALITY OF CLAIMS**

27 16. Plaintiff's claims are typical of the claims of the members of the Class because
28 plaintiff and all Class members were injured by the same wrongful conduct and scheme of the

1 Defendants alleged herein. Plaintiff was charged and not refunded or credited for advertised free
2 airtime based upon his initial product purchase, nor for the supposedly "free" calls to *VM.
3 Defendants' excuse for committing these clear misstatements was the same: they could change terms
4 and not honor their prior representations as they see fit, as they claim their Terms and Conditions
5 permitted it, irrespective of their prior representations. Plaintiff has been injured in fact and lost
6 money or property as a result of such acts and practices.

7 **EXISTENCE AND PREDOMINANCE OF**
8 **COMMON QUESTIONS OF LAW AND FACT**

9 17. The common questions of law and fact raised in this litigation predominate over any
10 questions that may affect only individual Class members. These common questions of law and fact
11 include, but are not limited to:

- 12 (a) Whether the advertisements and statements issued by Defendants or their
13 joint venturers and agents were and are untrue and/or had a likelihood of
14 deceiving Class members;
- 15 (b) Whether Defendants could revoke or materially change their offer of free
16 airtime after acceptance of the offer by the consumer;
- 17 (c) Whether Defendants could charge for calls they uniformly represented were
18 free of charge;
- 19 (d) Whether Defendants' conduct violated consumer protection statutes;
- 20 (e) Whether Defendants' uniform course of conduct was unconscionable or
21 constitutes untrue or misleading advertising or concealment of material facts;
- 22 (f) Whether Defendants omitted to disclose material facts necessary in order to
23 make Defendants' other statements not misleading for want of disclosure of
24 such omitted facts;
- 25 (g) Whether Defendants continued to collect the monies here at issue despite
26 their knowledge of or reckless or negligent disregard for the true facts;
- 27 (h) When Defendants learned of these misrepresentations and omissions;
- 28 (i) Whether Defendants have improperly failed to notify actual and potential
Class members of the true facts;
- (j) Whether the gravity of the harm attributable to such conduct was outweighed
by any benefits attributable thereto;
- (k) The amount of revenues and profits Defendants received or saved and/or the
amount of monies or other obligations imposed on or lost by Class members
as a result of such wrongdoing;

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- (l) Whether Class members are threatened with irreparable harm and/or are entitled to injunctive and other equitable relief and, if so, what is the nature of such relief; and
- (m) Whether plaintiff and members of the Class are entitled to statutory, actual or exemplary damages, rescission or equitable relief and the appropriate measure of such relief.

ADEQUATE REPRESENTATION

15. Plaintiff will fairly and adequately protect the interests of the members of the Class in that he has no irreconcilable conflicts with or interests materially antagonistic to those of the other Class members.

16. Plaintiff has retained attorneys experienced in the prosecution of consumer class actions, and who have been previously appointed by courts as adequate class counsel.

SUPERIORITY AND SUBSTANTIAL BENEFITS OF CLASS LITIGATION

17. A Class action is manageable and superior to other available methods for the fair and efficient group-wide adjudication of this controversy for the following reasons:

- (a) it is economically impracticable for members of the Class to prosecute individual actions against Defendants;
- (b) Plaintiff is aware of no other litigation concerning this controversy already commenced by or against members of the Class;
- (c) The prosecution of separate actions by the individual members of the Class would create a risk of inconsistent or varying adjudications with respect to individual Class members, thus establishing incompatible standards of conduct for Defendants;
- (d) Because of the nature of certain aspects of the relief sought, the prosecution of separate actions by individual Class members would create a risk of adjudication with respect to them that would, as a practical matter, be dispositive of the interests of the other Class members not parties to such adjudications or would substantially impair or impede the ability of such Class members to protect their interests;
- (e) it is desirable to concentrate these claims in a single forum because no member of the Class has sustained damages sufficient to warrant litigation of the claims separately; and
- (f) there are no difficulties likely to be encountered in the management of this class action.

18. Defendants have acted on grounds generally applicable to the entire Class, thereby making final injunctive relief or corresponding declaratory relief appropriate with respect to the Class as a whole.

1 23. As of the filing of this Complaint, Defendants have not agreed to provide the relief
2 requested in either Mr. Nelson's e-mail or his certified letter.

3 24. In the "Starter Guide" that accompanied the phone under the heading "Where to Go
4 for Help," the Starter Guide states that for any questions "**Dial *VM (*86) from your mobile**
5 **phone. It's a free call!**" (Attached hereto as Exh. C, and incorporated herein by this reference, is
6 a true and correct copy of the relevant portion of Plaintiff's Starter Guide.)

7 25. During June and July, 2005, Mr. Nelson purchased several "Top-Up" cards from
8 several retailers throughout California for use on his Vox 8610 phone. Virgin Mobile included
9 instructions on the back of these cards on how to add the purchased amount of airtime from the card
10 to the consumer's account. The cards instructed, among other things, that the consumer could call
11 "***VM from your cell. Doesn't cost a cent!**" (Attached hereto as Exh. D, and incorporated herein
12 by this reference, is a true and correct copy of one of the Top-Up cards Plaintiff purchased.)
13 Nowhere is there any disclaimer that these claims can be abandoned at any time by Defendants.

14 26. Upon checking his account, Mr. Nelson noticed that he had in fact been charged for
15 every call he made to *VM customer service, whether for general inquiries or to "Top-Up" with the
16 amounts purchased through Top-Up cards. Therefore, despite Defendants having represented
17 uniformly that *VM calls were "free" and "don't cost a cent," Mr. Nelson was charged for the calls
18 just as if they were any other call.

19 27. During the first week of July, 2005, Mr. Nelson e-mailed Virgin Mobile and sent
20 them a certified letter complaining that Virgin Mobile had reneged on their representations that calls
21 to *VM were free. Mr. Nelson requested a refund of the amounts he and other consumers like him
22 had paid for *VM calls and demanded that Virgin Mobile stop charging for calls that they have
23 advertised and promised were free.

24 28. Virgin Mobile's representatives responded on July 6, 2005 to Mr. Nelson's e-mail,
25 denying him and all others any refund, refusing to change their practice, and stating that they had the
26 right to "change our terms, including pricing, from time to time" and that Virgin Mobile can "modify
27 or cancel [our service]... at any time without prior notice and for any reason."
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1 29. Admitting that this was a class-wide deception, the same responding e-mail stated
2 that: “[O]ur practice of charging customers for *86 customer service calls is not, in fact, a policy
3 specific to you or any grouping of customers. This is an across-the-board change that, also
4 unfortunately, lies well within our rights as stated by the.... Terms and Conditions....” This is a
5 classic “bait and switch” tactic that has been illegal for years, and is contrary to Defendants’ prior
6 representations.

7 30. The e-mail suggested Mr. Nelson check the Virgin Mobile website at
8 www.virginmobileusa.com for current information on pricing and terms. Mr. Nelson visited that
9 website and was unable to find any mention of or disclaimers regarding the advertised *VM charges,
10 or \$10 free airtime. As of the filing of this Complaint, no such specific disclaimers exist.

11 31. During the relevant time period, Virgin Mobile has disseminated uniformly similar
12 advertisements for “\$10 free starter airtime,” for free calls to customer service and “Top Up” at *86,
13 and for “no hidden fees” with many of its phones, not just on the Vox 8610. Virgin Mobile also
14 uniformly advertised the same offers through a variety of other means, such as print and electronic
15 media and by its sales staff.

16 32. Defendants have failed to comply with the representations made in their
17 advertisements and written materials and with their statutory obligations, despite demand having
18 been made therefor by plaintiff for both himself and the Class.

19 33. Defendants have held Class members accountable for continuing obligations that
20 were not legally due and/or required the payment of monies that were not owed due to the false or
21 misleading nature of such representations, to the detriment and injury of plaintiffs and members of
22 the Class who lost money or property and/or were injured in fact as a result thereof.

23 34. As a result of the foregoing, Defendants have systemically engaged in a series of
24 transactions in violation of California and other applicable law.

25 35. Defendants may assert that they were permitted to collect such monies under their
26 agreements despite their representations to the contrary. If the agreements were construed in such
27 a way, the agreements (or Defendants’ claimed interpretation thereof) would be unconscionable,
28 because there would have been unequal economic bargaining power, terms imposed on a take it or

1 leave it basis, and a material and adverse change in an important term of the parties' understanding
2 based on the prior representations of Defendants, with no notice thereof and to the surprise of
3 members of the Class and no opportunity to change the terms, all to the detriment of and prejudice
4 to the rights of the Class members but with significant benefit to Defendants. Because the
5 agreements were drafted by Defendants, and since any construction resulting in an absurd result or
6 an unconscionable and illegal term should be avoided, while plaintiff believes no ambiguities about
7 the illegality and voidability of such transactions exist, any ambiguities in the construction of the
8 agreements in terms of permitting such conduct in contravention of these requirements must be
9 construed against Defendants and in favor of members of the Class in light of the statutory
10 prohibitions set forth above.

11 36. As a result of the above, Defendants failed to abide by their legal obligations and
12 collected monies from plaintiff and the Class, even though such monies were illegally collected.

13 37. Class members are particularly vulnerable to such deceptive and fraudulent practices.
14 Most persons possess limited knowledge of such a potential for such illegal conduct, and Defendants
15 have admittedly targeted the teenage market for selling such products and services. Moreover, such
16 amounts are relatively small, making it unlikely such illegal charges would be caught by reasonable
17 consumers. Thus, Class members could not have reasonably been expected to determine whether
18 such limitations or illegal conduct existed, even after they took place.

19 38. Class members had their rights infringed upon, were injured in fact and/or lost money
20 or property as a result of Defendants' failure to comply with their obligations imposed under the
21 applicable laws referenced herein. Class members should therefore receive all amounts improperly
22 paid or billed by Defendants, with interest thereon.

23 39. Class members have not received a return of the improperly paid or retained monies
24 despite demand therefor and are currently owed such amounts, plus any direct or exemplary
25 damages, restitution, interest or other legal or equitable monetary relief required to be paid to them
26 by law.

27 40. Defendants' failure to abide by their legal obligations is ongoing and continues to this
28 date.

1 **TOLLING OF APPLICABLE STATUTES OF LIMITATION**

2 41. Any applicable statutes of limitation have been equitably tolled by Defendants'
3 affirmative acts of fraudulent concealment, suppression, and denial of the true facts regarding the
4 existence of the practices at issue herein. Such acts of fraudulent concealment included covering up
5 and refusing to publicly disclose the fact they were not honoring their uniform representations,
6 advertisements and offers and/or by claiming they had a legal and contractual right to do so when
7 they did not. Through such acts of fraudulent concealment, Defendants were able to actively conceal
8 from the Class members the truth about and justification for Defendants' practices, thereby tolling
9 the running of any applicable statutes of limitation. Defendants still refuse to this day to take full
10 responsibility for their actions, despite being aware that such conduct has taken place, and are still
11 affirmatively misrepresenting the facts as stated herein.

12 **COUNT I**
13 **Violation of Cal.Civ. Code §§1750, et seq.**
14 **The California Consumers Legal**
15 **Remedies Act and Comparable Consumer Protection Laws**
16 **(Against All Defendants)**

17 42. Plaintiff hereby incorporates by reference, as if fully set forth herein, each and every
18 allegation contained in ¶¶1-41 hereof, and further alleges as follows.

19 43. The California Consumers Legal Remedies Act, Cal. Civ. Code §§1750, et seq.
20 ("CLRA"), has adopted a comprehensive statutory scheme prohibiting various deceptive practices
21 in connection with the conduct of a business providing goods, property or services to consumers
22 primarily for personal, family or household purposes.

23 44. The transactions, policies, acts and practices engaged in by Defendants and alleged
24 herein were intended to and/or did result in the sale of the products and services here at issue to a
25 number of the members of the Class primarily for personal, family or household purposes, and
26 violated and continued to violate the CLRA (and other comparable and relevant consumer protection
27 laws) in at least the following respects:

- 28 a. In violation of Cal. Civ. Code §1770(a)(5), Defendants' acts and practices constitute
misrepresentations that the products and services in question have characteristics,
benefits or uses that they do not have;

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- b. In violation of Cal. Civ. Code §1770(a)(9), Defendants advertised the products and services at issue with the intent not to sell them as advertised or represented;
- c. In violation of Cal. Civ. Code §1770(a)(13), Defendants made false or misleading statements of fact concerning reasons for, existence of, or amounts of price reductions.
- d. In violation of Cal. Civ. Code §1770(a)(14), Defendants misrepresented that a transaction confers or involves legal rights, obligations, or remedies of certain members of the Class concerning the products and services at issue when it does not or which are prohibited by law;
- e. In violation of Cal. Civ. Code §1770(a)(16), Defendants represented that the products and services were supplied in accordance with previous representations when they were not;
- f. In violation of Cal. Civ. Code §1770(a)(17), Defendants represented that the consumer will receive a rebate, discount, or other economic benefit, if the earning of the benefit is contingent on an event to occur subsequent to the consummation of the transaction; and
- g. In violation of Cal. Civ. Code §1770(a)(19), by unilaterally imposing contractual provisions in contravention of what the law required, Defendants attempted to insert an unconscionable provision in an agreement.

45. As a result, members of the Class have had their legal rights infringed upon and suffered irreparable harm, entitling them to both injunctive relief and restitution as detailed herein.

46. In compliance with the provisions of California Civil Code §1782, plaintiff has given written notice to Defendants of the intention to file an action for damages under California Civil Code §§1750, *et seq.* Plaintiff also requested Defendants offer an appropriate correction plus interest and other appropriate relief to all affected consumers.

47. As Defendants failed, within 30 days after the §1782 notice, to adequately respond to Plaintiff's demand to correct or otherwise rectify the wrongful conduct described above on behalf of all consumer Class members, plaintiff seeks for all Class members all actual and exemplary

1 damages permitted for violation of the CLRA (and any other comparable statutes the Court finds
2 applicable), including for statutory damages of up to \$1,000 per consumer and/or up to \$5,000 per
3 consumer who qualifies as a "senior citizen" under the CLRA. In addition, Plaintiff seeks and is
4 entitled to, pursuant to California Civil Code §1780(a)(2), an order enjoining the above-described
5 wrongful acts and practices of Defendants, providing restitution to all members of the Class who are
6 so entitled, ordering the payment of costs and attorneys' fees, and such other relief as deemed
7 appropriate and proper by the Court under California Civil Code §1780. To the extent Defendants
8 claim such relief has been waived by agreement, pursuant to California Civil Code §1751, such
9 claims are contrary to public policy and by statute are void.

10 **COUNT II**
11 **Violation of Cal.Bus.&Prof.Code §17200, et seq. and Comparable Consumer Protection**
12 **Laws Prohibiting Unlawful, Unfair or Fraudulent Business Acts and Practices**
13 **(Against All Defendants)**

14 48. Plaintiff hereby incorporates each and every allegation contained in ¶¶1-47 as if fully
15 alleged herein and further alleges as follows.

16 49. Defendants' acts and practices as detailed above constitute acts of unfair competition.
17 Defendants have engaged in an unlawful, unfair or fraudulent business act and/or practice within the
18 meaning of California Business & Professions Code §17200. Such conduct also violates other
19 applicable state consumer protection laws, which laws do not materially conflict with Business &
20 Professions Code Section 17200.

21 50. Defendants have engaged in an "unlawful" business act and/or practice by charging
22 for airtime that was represented in promotional materials and documents to be free or would not be
23 subject to charge, claiming a right to do so that did not exist or was unlawful, and attempting to
24 impose unlawful contractual terms. As detailed above, these business acts and practices violated
25 numerous provisions of law, including, in addition to the foregoing, *inter alia*, California Civil Code
26 § 1670.5, California Civil Code §1709, the Consumers Legal Remedies Act, California Civil Code
27 §§1750, *et seq.*, and Business and Professions Code §§17500 *et seq.* Plaintiff reserves the right to
28 identify additional violations of law as further investigation warrants.

1 51. By engaging in the above-described conduct, Defendants have engaged in an "unfair"
2 business act or practice in that the justification for selling such products or services based on the
3 business acts and practices described above is outweighed by the gravity of the resulting harm,
4 particularly considering the available alternatives, and/or offends public policy, is immoral,
5 unscrupulous, unethical and offensive, or causes substantial injury to consumers and competitors.

6 52. By engaging in the above-described conduct, Defendants have engaged in a
7 "fraudulent" business act or practice in that the business acts and practices described above had a
8 tendency and likelihood to deceive purchasers of such goods or services, and particularly those
9 targeted by the acts and practices challenged herein.

10 53. Defendants need only to have violated one of the three provisions set forth above to
11 be strictly liable under this Cause of Action.

12 54. The above-described unlawful, unfair or fraudulent business acts and practices
13 engaged in by Defendants continue to this day and present a threat to the Class in that Defendants
14 have failed to comply with their previous representations, publicly acknowledge the wrongfulness
15 of their actions and provide the complete relief required by the statute.

16 55. Pursuant to California Business & Professions Code §17203 (and any other
17 comparable statutes the Court finds applicable), Plaintiff, individually and on behalf of the Class,
18 seeks an order of this Court prohibiting Defendants from continuing to engage in the unlawful,
19 unfair, or fraudulent business acts or practices set forth in this Complaint and from failing to fully
20 disclose the true facts as set forth herein, correcting Class members' records, and/or ordering
21 Defendants engage in a corrective informational campaign. Plaintiff additionally requests an order
22 from the Court requiring that Defendants provide complete equitable monetary relief, including that
23 they disgorge and return or pay Defendants' ill-gotten gains and such other monies as the trier of fact
24 may deem necessary to deter such conduct or prevent the use or enjoyment of all monies wrongfully
25 obtained either directly or indirectly, and/or pay restitution, including cancellation of the above
26 obligations or the return of any monies paid to Defendants that would not otherwise have been paid
27 had the true facts been disclosed by Defendants or if they had complied with their legal obligations
28 and previous representations, plus any interest earned by Defendants on such sums. Such an order

1 is necessary so as to require Defendants to surrender all money obtained either directly or indirectly
2 through such acts of unfair competition, including all monies earned as a result of such acts and
3 practices, so that Defendants are prevented from benefitting or profiting from the practices that
4 constitute unfair competition or the use or employment by Defendants of any monies resulting from
5 the sale of such goods or services and/or to ensure the return of any monies as may be necessary to
6 restore to any person in interest who lost money or property as a result of such acts or practices any
7 money or property which may have been acquired by means of such acts of unfair competition.
8 Plaintiff also requests the Court order that an asset freeze or constructive trust be imposed over all
9 monies that rightfully belong to members of the Class.

10 **COUNT III**
11 **Breach of Contract**
12 **(Against All Defendants)**

13 56. Plaintiff hereby incorporates each and every allegation contained in ¶¶ 1- 55 as if fully
14 alleged herein and further alleges as follows.

15 57. Plaintiff and members of the Class, on the one hand, and Defendants, on the other,
16 entered into a series of agreements by virtue of the documents referenced herein through which
17 Defendants promised (1) to provide \$10 of free airtime for each phone purchased, (2) to not charge
18 for calls to customer service (*VM/*86) for purposes of phone time "Top-Ups," and (3) to not
19 charge for customer service (*VM/*86) calls for any purpose.

20 58. Plaintiff and members of the Class accepted Defendants' offers and provided
21 consideration therefor.

22 59. Plaintiff and each member of the Class have fully performed all conditions, covenants
23 and promises required to be performed or were excused from any conditions, covenants and
24 promises.

25 60. All conditions required for Defendants' performance of such promises have occurred.

26 61. Nevertheless, Defendants have failed and continue to fail to honor the above promises
27 and instead provide only a portion of the free airtime promised and charge for certain customer
28 service calls. Demand has been made to Defendants to perform consistent with these contractual
obligations, and such demand has been refused.

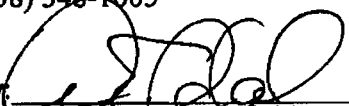
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JURY DEMAND

Plaintiff demands a trial by jury on all causes of action so triable.

DATED this 10th day of August, 2005.

ROSNER LAW & MANSFIELD
10085 Carroll Canyon Road, First Floor
San Diego, CA 92131
(858) 348-1005

By 

Alan M. Mansfield
John W. Hanson

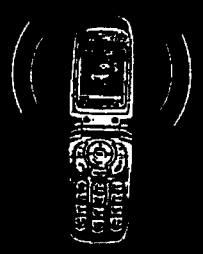
EXHIBIT A



VOX 8610

Pay As You Go
No Contracts
No Hidden Fees
No Monthly Bills

VM8610AVPAK609



Full-Color Screen
Real Music Ringtones

All Digital Nationwide Coverage
Your Exclusive Connection to *MTV



EXHIBIT B

VOX 8610

Phone Features

- Real music ringtones.
- Vibrant color screen.
- Two-way speakerphone.
- Games.
- Text messaging.



What's Included

- Your Vox 8610 phone, battery, and charger.
- \$10 free starter airtime.
- User Guide and a VirginXtras Roadmap.

Superior Airtime Pricing

- 10¢ after 10 minutes.** 29¢ per minute for the first 10 minutes, 10¢ per minute for the rest of the day.
- Text messages are 10¢ each to send.
- Long distance is included.
- No roaming, activation fees, or mysterious monthly charges.



Live without a plan.

Enhanced Audio. VirginXtras. *MTV

- Real music ringtones, downloaded actual song clips.
- VirginXtras-Virgin's Hot + Rescue Ring, a full suite of music features. We contain celebrity information, and much more.
- Exclusive Access to MTV-Music news, video voting, games, and MTV updates.

You Control the Phone

- Activate your phone at www.virginmobileusa.com or call **Virgin Mobile At Your Service** at 1-698-322-1122.
- Keep your old number and don't pay a monthly service fee (yes, others charge for that).
- Add a route to your account when and how you want—we call it Topping-Up.
- Buy a Top-Up card from one of thousands of retailers, or register your credit/debit card to instantly Top-Up online or from your phone.
- Just Top-Up at least 10 every 90 days.

We Gotcha Covered

- Full coverage on the Sprint Nationwide PCS Network—the most comprehensive digital, advanced wireless network in the nation. All of your services work the same way as you do on the network.

Check out www.virginmobileusa.com for up-to-the-minute product, service, and pricing info.

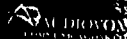


EXHIBIT C

Where to Go for Help

www.virginmobileusa.com

Find answers to all your Virgin Mobile queries in the **May we help you** section. Manage your account with a click of your mouse. Log-in on our home page to Top-Up, change your settings, or see your account detail.

Need a new phone or an accessory? Find them in the **Get it** section.

Virgin Mobile At Your Service

Located in beautiful Spokane, WA, and lovely Colorado Springs, CO, **Virgin Mobile At Your Service** is ready to help. They have the answers to all your questions.. except for why some guys still wear toupees, but nobody knows that.

Dial *VM (*86) from your mobile phone. It's a free call!
Or call 1-888-322-1122 toll-free from your home or work phone.

Your Phone

It's right in front of you, put it to good use. Check your balance, track your minutes, or Top-Up. You'll find your Virgin Mobile phone is more than a phone, it's the quickest, easiest way to stay connected to the world around you. Bye.

EXHIBIT D

Pay 3062'00-⁰⁰ Go,
Sim **COMPU** Easy.
9/22/04

- Our e-go service means you add airtime to your account how, when and where you want
- No peak/off-peak, special-occasion-a-blue-moon, home-calling, or long distance rates.
- Just get this card and go!

\$50
Blah, blah, blah.

Virgin mobile

Top-Up Card:

Virgin Mobile USA, LLC provides telecommunications services related to the enclosed Top-Up Card. Airtime associated with this Top-Up Card is intended for domestic and international calls originating within the United States only from phones purchased from Virgin Mobile USA. The value of this card cannot be applied to any other wireless service.

To keep your Virgin Mobile account active, you must add at least \$20 to your balance every 90 days or your account will become inactive. If your account remains inactive for 60 days, you will lose your phone number and balance. Calls are billed in one-minute increments, with a minimum time per call of one minute. Airtime rates are subject to change without prior notice. Additional regulatory surcharges and taxes may apply. Please visit our website at virginmobileusa.com or contact Central Intelligence at 1-888-322-1122 with any questions concerning service from Virgin Mobile USA. If you are unable to resolve your concerns with Virgin Mobile USA, you may file a complaint with the Federal Communications Commission, Washington, DC 20554.



0741261272775715

Gently scratch the panel above to reveal the 16-digit PIN.

Then either:

- Go to the Top-Up Menu on your Virgin Mobile phone.
 - OR
 - Give us a call at 1-888-322-1122 from any phone or *VM from your cell. Doesn't cost a cent!
 - Follow the simple instructions to Top-Up your account.
- Now you're ready to start talking!

Please visit virginmobileusa.com for more information on Top-Up and Virgin Mobile service.



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(Rev. 07/89)

CIVIL COVER SHEET

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE SECOND PAGE OF THIS FORM.)

FILED

I (a) PLAINTIFFS

Scott Nelson Individually and On Behalf of All Others Similarly Situated

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF San Diego (EXCEPT IN U.S. PLAINTIFF CASES)

DEFENDANTS

Virgin Mobile, USA, LLC and Virgin Mobile USA, Inc.

COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT (IN U.S. PLAINTIFF CASES ONLY) Warren, NJ

05 AUG 11 PM 3:34 CLERK, U.S. DISTRICT COURT SOUTHERN DISTRICT OF CALIFORNIA

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED

DEPUTY

(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)

Alan M. Mansfield, Esq. Rosner, Law & Mansfield 10085 Carroll Canyon Rd., Ste 100 San Diego, CA 92131 (858) 348-1005

ATTORNEYS (IF KNOWN)

05 CV 1594 WQH (NLS)

II. BASIS OF JURISDICTION (PLACE AN X IN ONE BOX ONLY)

- U.S. Government Plaintiff Federal Question (U.S. Government Not a Party)
U.S. Government Defendant Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (PLACE AN X IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT)

Table with columns for Plaintiff and Defendant citizenship: Citizen of This State, Citizen of Another State, Citizen or Subject of a Foreign Country, Incorporated or Principal Place of Business in This State, Incorporated and Principal Place of Business in Another State, Foreign Nation.

IV. CAUSE OF ACTION (CITE THE US CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE. DO NOT CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY).

Violation of Cal. Civ. Code §§1750, et seq., Cal. Bus. & Prof. Code §§17200, et seq., Breach of Contract, Declaratory Relief
Jurisdiction: 28USCS.C. §1332(d)(2)(A).

V. NATURE OF SUIT (PLACE AN X IN ONE BOX ONLY)

Large table with categories: CONTRACT, REAL PROPERTY, TORTS, CIVIL RIGHTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES. Includes sub-categories like Personal Injury, Personal Property, etc.

VI. ORIGIN (PLACE AN X IN ONE BOX ONLY)

- Original Proceeding, Removal from State Court, Remanded from Appellate Court, Reinstated or Reopened, Transferred from another district (specify), Multidistrict Litigation, Appeal to District Judge from Magistrate Judgment

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER f.r.c.p. 23

DEMAND \$ TBD

Check YES only if demanded in complaint: JURY DEMAND: YES NO

VIII. RELATED CASE(S) IF ANY (See Instructions):

DATE 8-11-05

SIGNATURE OF ATTORNEY OF RECORD [Signature]

116242 \$250.00 8/11/05