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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO

STANLEY H. EPSTEIN, an individual, on) Case No. 37-2009-00103309-CU-BT-CTL
behalf of himself and all others similarly)
situated,) FIRST AMENDED COMPLAINT
Plaintiff,) CLASS ACTION
v.)
(JURY TRIAL DEMANDED)
AT&T COMMUNICATIONS OF)
CALIFORNIA, INC., a California Corporation,)
and DOES 1-100,)
Defendants.)

Plaintiff Stanley H. Epstein ("Plaintiff"), by and through his attorneys, on behalf of the class, hereby submits his first amended complaint pursuant to California Code of Civil Procedure, Section 472. Plaintiff alleges upon personal knowledge as to himself and his acts stated herein, and as to all other matters upon information and belief based upon, *inter alia*, the investigation made by his attorneys, as follows:

I.
NATURE OF THE ACTION

1
2
3 1. Plaintiff brings this action on behalf of a class of AT&T Communications of
4 California, Inc. (“AT&T”) customers. AT&T represents and promises to its customers that it
5 charges pay-per-use customers for three-way calling services only when such customers agree to
6 use such services - by *completing* a three-way call. Despite the fact that Plaintiff and the class
7 did not complete a three-way call, AT&T wrongfully charged them a fee for three-way calling
8 service anyway. At no time did AT&T disclose to its customers that they would be charged for
9 such incomplete calls.

10 2. AT&T has had, and continues to have, a business practice during at least the past
11 four (4) years prior to the date this action was filed, of wrongfully charging its customers a fee
12 for three-way calls the customers did not make, or complete. For example, AT&T charges
13 customers for three-way calls when the customer either a) unsuccessfully attempts to answer a
14 second caller using AT&T’s “call waiting” service, or b) begins the process of making a three-
15 way call, but does not actually complete a three-way call.¹ AT&T further deceives customers by
16 failing to identify on customer bills the date, time and telephone numbers applicable to the fee –
17 making it more difficult for customers to question the charge.

18 3. Such fees are unfair, fraudulent and inconsistent with AT&T’s representations
19 and promises. Plaintiff and the class reasonably relied upon their agreements with AT&T,
20 including its promise and representation that it would only charge them fees for those pay-per-
21 use services Plaintiff and the class agreed to purchase.

22 4. Plaintiff and the class could not have expected AT&T to charge them fees for
23 services they did not want and did not agree to purchase. In reliance upon AT&T’s
24 representations and promises, Plaintiff and the class used AT&T’s telephone service, which
25 caused Plaintiff and the class to incur a fee for each incomplete three-way call.

26
27 ¹ For ease of reference, “a” and “b” referred to in paragraph 2 may individually and collectively be referred to as
28 “incomplete three-way calls”, even though the call-waiting customers were not attempting to make a three-way
call.

1 was acting within the course and scope of such agency, employment or representation, on behalf
2 of such partnership, joint venture, and/or as such alter ego with the authority, permission,
3 consent, and/or ratification of each of the other Defendants.

4
5 **IV.**
SUBSTANTIVE ALLEGATIONS

6 **A. AT&T's Stated Billing Practice:**

7 12. AT&T represents to its customers that it will charge them only for successful
8 three-way calls. Section 4.5.1 of the AT&T Service Guide Applicable to Residential Local
9 Exchange Services represents that only successful activation of a three-way call will result in a
10 charge to the customer when the customer uses the three-way call feature on a "pay-per-use"
11 basis:

12 4.5.1 Calling Feature Descriptions

13 Pay-Per-Use Features Allow customers to use Call Return, Call
14 Trace, Repeat Dialing and Three-Way Calling on a pay-per-use
15 basis. Customers are charged for each successful activation of the
16 feature.

17 13. "Pay-Per-Use customers" are those customers who do not sign up for a monthly
18 service, *i.e.* three-way calling service, in exchange for a fixed monthly fee. Pay-per-use
19 customers may agree to use such services at their discretion, on demand. Such customers are not
20 supposed to be charged for such services, unless they actually use the services.²

21 **B. AT&T's Deceptive Charge For Three-Way Calls**

22 14. Contrary to its stated billing practice and representations and agreements with its
23 customers, AT&T charges its customers for incomplete three-way calls, without ever informing
24 its customers that it would do so. Its practice, described more specifically below, is
25 unconscionable, unfair, fraudulent, unlawful and offensive to specific policies found in the law.
26 The customer agreements are contracts of adhesion. The charge is unconscionable in that AT&T
27 fails to disclose to its customers that it will charge them for incomplete three-way calls. AT&T's

28 ² Unless otherwise noted, all references to "customers" shall refer to "Pay-Per-Use Customers", which includes Plaintiff and the Class.

1 customers are subjected to unfair surprise, in that customers did not complete a three-way call
2 and AT&T charged them anyway.

3 15. During the class period, AT&T has had a practice of billing its customers for
4 charges for incomplete three-way calls. The charges are applied where customers a) are on the
5 telephone with one party and *unsuccessfully* attempt to answer another call using the “call
6 waiting” feature; or b) begin the process of making a three-way call but do not complete a three-
7 way call.

8 16. When customers are on two-way calls and another party attempts to call them,
9 their telephone will prompt them indicating that another caller is “waiting”. Using the “call
10 waiting” feature, its customers have the ability to answer the incoming call by pressing the “hook
11 switch” or “flash button” – causing the first caller to be placed on hold while they answer the
12 second caller. This feature is called “call waiting”.

13 17. But if the second caller hangs up before the customer presses the “flash button” or
14 the “switch hook” the customer will only hear a dial tone and will not speak to the second caller.
15 If this happens, it has been AT&T’s practice during the class period, and it continues to be
16 AT&T’s practice, to bill customers for a three-way call.

17 18. Similarly, when customers begin the process of making a three-way call, but do
18 not complete a three-way call, AT&T’s practice has been and continues to be to charge
19 customers for a three-way call. This occurs when a customer is on a two-way call and presses
20 the “flash button” or “switch hook” and receives a dial tone, but does not complete the three-way
21 call. Although this is the first step in making a three-way call, the customer does not complete a
22 three-way call unless the customer dials the third-party’s number and again presses the flash
23 button or switch hook once the third-party is on the line – resulting in a conference call. If the
24 customer decides not complete the three-way call by dialing the third-party’s number, AT&T
25 still charges the customer for a three-way call.

26 19. Causing more confusion for its customers, AT&T fails to provide any information
27 about the three-way call when it sends a bill to its customers. For example, the AT&T bill fails
28 to disclose the date and time of the three-way call or identify the numbers to which the three-way

1 call was placed. This kind of information is provided for other charges, such as long-distance
2 charges, but not three-way call charges. Although Plaintiff inquired with AT&T about the
3 specific time, date, and phone number of the call that generated the three-way-call charge,
4 AT&T's customer service representatives stated that AT&T could not provide him with the
5 information, making it difficult for him to determine which specific call he was being charged
6 for.

7 20. It is AT&T's billing practice, as described above, which causes wrongful charges
8 to its customers for three-way calls that the customers did not agree to, did not want and did not
9 expect to be charged.

10 **C. Allegations Directly Relating To Plaintiff**

11 21. Plaintiff is and has been an AT&T telephone service customer during all relevant
12 times. During each of the periods of July 20, 2009 through August 19, 2009 and October 19,
13 2009 through November 19, 2009, Plaintiff was engaged in a two-way call when his telephone
14 prompted him that another caller was waiting. In each case, Plaintiff attempted to answer the
15 other caller using AT&T's call waiting feature, but the second caller had already hung up.
16 Plaintiff received a dial-tone but he never actually connected to the waiting caller. AT&T
17 improperly registered both of Plaintiff's call waiting attempts as completed three-way calls. It
18 charged Plaintiff \$.75, for each instance, claiming that Plaintiff used its three-way calling
19 service.

20 22. In unsuccessfully attempting to use AT&T's call waiting service, Plaintiff relied
21 upon the fact that he would only be charged for services that he used. In each instance, Plaintiff
22 did not want to make a three-way call, he did not agree to make a three-way call, and he did not
23 complete a three-way call. Plaintiff's reliance was reasonable.

24 23. Plaintiff received his bills for August and November 2009. Each bill reflected a
25 three-way calling charge of \$.75 plus taxes and fees, which Plaintiff paid to AT&T.
26
27
28

1 **D. AT&T's Wrongful Conduct Violates Important Public Policies That Are Tethered**
2 **To Consumer Protection Laws Regulating Telephone Service Providers**

3 24. The Federal Communication Act Section 201 regulates services and charges of
4 common carriers of wire or radio communications. *See* 47 U.S.C. §201.

5 25. Section 201 provides in relevant part:

6 All charges, practices, classifications, and regulations for and in
7 connection with such communication service, *shall be just and*
8 reasonable, and any such charge, practice, classification, or
9 regulation that is unjust or unreasonable is declared to be unlawful

...

10 (emphasis added)

11 26. Section 201 reflects a strong public policy designed to protect consumers from
12 unscrupulous billing practices.

13 27. AT&T's practice of wrongfully billing its customers for charges for services the
14 customers did not want and did not use, violates the public policy reflected in Section 201.
15 Indeed, at no time did AT&T disclose to its customers that it would charge them for incomplete
16 three-way calls, as alleged herein.

17 **V.**
18 **CLASS ALLEGATIONS**

19 28. Plaintiff brings this suit as a class action under section California Code of Civil
20 Procedure Section 382 on behalf of the following class:

21 For the period December 4, 2005 through the date of trial, all
22 AT&T customers who AT&T charged for three-way calls on a
pay-per-use basis when they did not make a three-way call.

23 29. Excluded from the class are Defendants herein, any person, firm, trust,
24 corporation, officer, director or other individual or entity in which any of the Defendants have a
25 controlling interest and the legal representatives, heirs, successors-in-interest or assigns of any
26 such excluded party.

1 30. There are thousands of AT&T customers who fall within the class definition and
2 joinder of all class members would be impracticable. Plaintiff's claims are typical of the claims
3 of the members of the class.

4 31. Plaintiff will fairly and adequately protect the interests of the members of the
5 class and Plaintiff has no interest which is contrary to or in conflict with class members he seeks
6 to represent. Plaintiff has retained competent counsel experienced in class action litigation to
7 further ensure such protection and he intends to prosecute this action vigorously.

8 32. A class action is superior to other available methods for the fair and efficient
9 adjudication of this controversy, particularly given that the harm or injury suffered by individual
10 class members is relatively small making individual claims highly impracticable, overly
11 expensive and inefficient. The result would be that individual class members would receive no
12 compensation for their loss. Plaintiff knows of no difficulty that will be encountered in the
13 management of this litigation that would preclude its maintenance as a class action.

14 33. Common questions of law and fact exist as to all class members and predominate
15 over any questions affecting solely individual class members.

16 **VI.**
17 **CAUSES OF ACTION**

18 **FIRST CAUSE OF ACTION**

19 **Violation of Cal. Bus. & Prof. Code §17200**
20 **(Against AT&T and DOES 1-100)**

21 34. Plaintiff incorporates by reference each of the preceding allegations as though
22 fully set forth herein.

23 35. The acts and practices of Defendants as alleged herein constitute unlawful, unfair
24 and fraudulent business acts and practices within the meaning of California Business &
25 Professions Code Section 17200, *et seq.*

26 36. Defendants have engaged in unfair business practices and acts by wrongfully
27 charging its customers, including Plaintiff and the Class, an undisclosed fee for three-way calling
28 services Plaintiff and the class never agreed to, never wanted and never actually used.

1 37. Defendants have also engaged in unfair business acts and practices in that the
2 harm caused by Defendants' conduct outweighs any utility of such conduct and such conduct
3 offends public policy, is immoral, unscrupulous, unethical, deceitful and offensive, and causes
4 substantial injury to consumers, including Plaintiff and class members. Defendants' conduct
5 specifically violates public policies tethered to laws that were designed to protect consumers
6 from the type of conduct alleged against AT&T herein.

7 38. Defendants' practices are also unlawful in violation of the Federal
8 Communications Act, 47 U.S.C. §201.

9 39. Defendants' unlawful, unfair and fraudulent acts and practices are ongoing and
10 continue to the date of this filing. Defendants have failed to publicly acknowledge the wrongful
11 nature of their actions and have not corrected their unfair practice.

12 40. As a direct and proximate result of these acts and practices, consumers have been
13 and are being injured and harmed. Plaintiffs bring this action pursuant to Bus. & Prof. Code
14 Sections 17203 and 17204 to enjoin Defendants' practices.

15 **SECOND CAUSE OF ACTION**
16 **Negligent Misrepresentation**
(Against AT&T and DOES 1-100)

17 41. Plaintiff incorporates by reference each of the preceding allegations as though
18 fully set forth herein.

19 42. Defendants negligently and recklessly made misrepresentations of past or existing
20 material fact regarding its charges for pay-per-use three-way calling service. Defendants
21 represented that customers, including Plaintiff and the class, would only be charged for three-
22 way calling service to the extent they a) agreed to use such services, and b) actually used such
23 services by completing the three-way call, *i.e.* actually conferencing three people on a single
24 telephone conversation.

25 43. Defendants' representation was false. Indeed, Defendants billed customers,
26 including Plaintiff and the class, for three-way calls they never agreed to and never actually
27 completed.

1 44. Defendants had no reasonable grounds for believing their representations to be
2 true.

3 45. Defendants made the false representations with the intent to induce its customers,
4 including Plaintiff and the class to rely upon them.

5 46. Plaintiff and the class were unaware of the falsity of the representations and they
6 were reasonable and justified in their reliance upon Defendants' misrepresentations.

7 47. As a direct and proximate result of Plaintiff's and the class' reliance on
8 Defendants' misrepresentations, Plaintiff and the class have suffered damages.

9 **THIRD CAUSE OF ACTION**
10 **Violation of 47 U.S.C. §201**
(Against AT&T and DOES 1-100)

11 48. Plaintiff incorporates by reference each of the preceding allegations as though
12 fully set forth herein.

13 49. Defendants are common carriers, as defined under in 47 U.S.C. §153(10), and
14 provide wire and/or radio communications services.

15 50. The Federal Communications Act, 47 U.S.C. §201(a), requires that all charges
16 and practices for and in connection with wire and radio communication services be just and
17 reasonable.

18 51. Defendants' undisclosed charges for pay-per-use three-way calls is unjust and
19 unreasonable in that they are not disclosed to customers, including Plaintiff and the class, and
20 they are not clearly identified on customer bills because Defendants fail to identify the date, time
21 and telephone numbers called during the three-way call.

22 52. Defendants' charges and practices alleged herein are unlawful, pursuant to 47
23 U.S.C. §201(a).

24 53. Plaintiff and the class have been damaged as a direct and proximate cause of
25 Defendants' unlawful conduct in violation of 47 U.S.C. §201.

1 **FOURTH CAUSE OF ACTION**
2 **Breach of Contract**
3 **(Against AT&T and DOES 1-100)**

4 54. Plaintiff incorporates by reference each of the preceding allegations as though
5 fully set forth herein.

6 55. Plaintiff, and the class, entered into a valid and binding written agreement with
7 Defendants in which Defendants agreed to provide certain telephone services to Plaintiff and the
8 class. Defendants agreed to charge Plaintiff and the class only for three-way calls that they
9 successfully activated, *i.e.* actually completed.

10 56. Plaintiff and the class performed all of their obligations under the contract.

11 57. Defendants failed to perform material obligations under the contract, in that
12 Defendants wrongfully charged Plaintiff and the class an undisclosed fee when they did not ask
13 for and did not use Defendants' three-way calling service.

14 58. As a result, Plaintiff and the class have been damaged.

15 **FIFTH CAUSE OF ACTION**
16 **Breach of Implied Covenant of Good Faith & Fair Dealing**
17 **(Against AT&T and DOES 1-100)**

18 59. Plaintiff incorporates by reference each of the preceding allegations as though
19 fully set forth herein.

20 60. Plaintiff, and the class, entered into a valid and binding written agreement with
21 Defendants in which Defendants agreed to provide certain telephone services to Plaintiff and the
22 class. Defendants agreed to charge Plaintiff and the class only for three-way calls that they
23 successfully activated, *i.e.* actually completed. The agreement included an implied covenant of
24 good faith and fair dealing.

25 61. Plaintiff and the class performed all of their obligations under the contract.

26 62. Defendants breached the implied covenant of good faith and fair dealing by
27 secretly charging Plaintiff and the class an undisclosed fee for three-way calls they never
28 successfully activated.

63. As a direct and proximate result of this breach, Plaintiff and the class suffered
damages.

PRAYER

Wherefore, Plaintiff requests judgment in favor of himself and the class and against Defendants as follows:

A. A determination that this case may be properly maintained as a class action;

B. A determination that Plaintiff is a proper representative of the class and that Plaintiff's Counsel, Krause, Kalfayan, Benink & Slavens, LLP, are proper counsel on behalf of the class;

C. Equitable and injunctive relief enjoining Defendants from continuing to engage in the acts and practices alleged in this action;

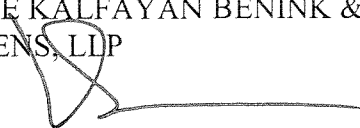
D. Damages, restitution and/or disgorgement in an amount to be determined at trial;

E. The expenses and disbursements incurred by Plaintiff in connection with this action, including reasonable attorneys' fees as permitted by law;

F. Such other relief as the Court deems just and proper.

Dated: April ²⁶~~22~~, 2010

KRAUSE KALFAYAN BENINK &
SLAVENS, LLP



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Attorneys for Plaintiff