

1 JAMES C. STURDEVANT (SBN 94551)
KAREN L. HINDIN (SBN 172226)
2 THE STURDEVANT LAW FIRM
475 Sansome Street, Suite 1750
3 San Francisco, CA 94111
Telephone: (415) 477-2410

4 F. PAUL BLAND, JR. (motion for pro hac vice admission pending)
5 MICHAEL J. QUIRK (motion for pro hac vice admission pending)
TRIAL LAWYERS FOR PUBLIC JUSTICE
6 1717 Massachusetts Avenue, NW
Suite 800
7 Washington, D.C. 20036
Telephone: (202) 797-8600

8 ARTHUR H. BRYANT
9 TRIAL LAWYERS FOR PUBLIC JUSTICE
One Kaiser Plaza, Suite 275
10 Oakland, CA 94612
Telephone: (510) 622-8150

11 Attorneys for Plaintiffs

12
13 SUPERIOR COURT OF THE STATE OF CALIFORNIA
14 IN AND FOR ALAMEDA COUNTY

15
16 DARCY TING, individually and on behalf)
of all others similarly situated, and)
17 CONSUMER ACTION, a non-profit)
membership organization, both as private)
18 attorneys general,)
19 Plaintiffs,)
20 vs.)
21 AT&T, a New York corporation,)
22 Defendant.)

Case No.

CLASS ACTION

**COMPLAINT FOR VIOLATIONS OF
THE CONSUMER LEGAL REMEDIES
ACT, THE UNFAIR BUSINESS
PRACTICES ACT, AND FOR
DECLARATORY AND INJUNCTIVE
RELIEF**

Type of Case: (Other): Unfair Business
Practices

JURY TRIAL DEMANDED

23
24
25 **INTRODUCTORY STATEMENT**

26 1. This is a lawsuit charging AT&T with unconscionably and unilaterally attempting to
27 deprive plaintiff Ting and its other customers of their constitutional rights to due process and a jury
28 trial without their consent. In the last several months, AT&T has sent plaintiff Ting and its other

1 customers a “Consumer Services Agreement” that would eliminate their ability to obtain
2 compensation for most wrongs AT&T might commit against them by, among other things, requiring
3 plaintiff Ting and AT&T’s other customers to submit to mandatory, binding, secret arbitration and
4 prohibiting them from participating in class actions.

5 2. AT&T’s “Consumer Services Agreement” is unlawful, unfair, fraudulent and
6 unconscionable – and therefore in violation of California's Consumer Legal Remedies Act and the
7 Unfair Competition Law – for several distinct reasons. First, while the proposed changes contained
8 in the “Consumer Services Agreement” would effectively immunize AT&T from liability for most
9 wrongs it might commit against its customers, AT&T has made no effort to ensure that plaintiffs and
10 its other California customers actually learned of these proposed changes or knowingly consented to
11 them. Instead, AT&T simply sent the “Consumer Services Agreement” to plaintiff Ting and its
12 other customers with their bills, knowing that most customers were unlikely even to read it, and
13 simply included a provision that any time one of its customers simply used his/her telephone, this
14 would constitute consent to the proposed changes. Such “consent,” however, is neither voluntary
15 nor meaningful under the law, and renders the “Consumer Services Agreement” unenforceable in its
16 entirety.

17 3. Second, even if plaintiff Ting and AT&T’s other customers knowingly consented to
18 AT&T’s unilateral attempt to change its contract, the “Consumer Services Agreement” is
19 nonetheless unconscionable and unenforceable because it expressly forbids any AT&T customers
20 from bringing, or participating in, any class actions, an important provision of California's public
21 policy for protecting consumers. AT&T is well aware that class actions are the only realistic means
22 that plaintiff Ting and AT&T’s other customers have for pursuing many if not most claims they are
23 ever likely to have against AT&T. Thus, if the “Consumer Services Agreement” is enforced,
24 AT&T will be insulated from most liability to its customers and be free to cheat and damage its
25 customers without being held accountable.

26 4. Finally, AT&T’s “Consumer Services Agreement” is unconscionable and
27 unenforceable because it requires class members to submit their claims to an arbitration service
28 provider – the American Arbitration Association (“AAA”) – that has strong incentives to be biased

1 in favor of AT&T and against plaintiff Ting and AT&T's other customers.

2 5. For these and other reasons, this Court should declare that AT&T's provisions
3 requiring customers to submit to mandatory arbitration and prohibiting customers from participating
4 in class actions are unlawful and unfair on their face within the meaning of the Consumer Legal
5 Remedies Act and the Unfair Competition Law, and enjoin their further enforcement.

6 **THE PARTIES**

7 **Plaintiffs**

8 6. Plaintiff Ting is over 18 years of age and is a resident of Berkeley, California. For at
9 least seven years, Ms. Ting has been an AT&T customer.

10 7. Plaintiff Consumer Action ("CA") is a non-profit membership organization
11 committed to consumer education and consumer education and advocacy. CA was established
12 nearly 30 years ago, and has approximately 1,500 members. CA is headquartered in San Francisco
13 and has members throughout California and nationwide. As a service to consumers in California
14 and elsewhere, CA publishes and distributes approximately 2,000,000 pieces of literature a year, in 8
15 different languages, on banking and utility issues, including an annual survey on long distance rates.
16 In addition, CA is actively involved in policy and legislative advocacy on telephone and utility
17 issues, among others, on behalf of consumers at both the state and national levels.

18 8. Plaintiffs are not authorized to enforce observance by defendant AT&T of federal
19 laws and regulations. Plaintiffs do not seek to control defendant AT&T but merely to obtain a
20 declaration of rights and responsibilities and injunctive relief relying on state law.

21 **Defendant**

22 9. Defendant AT&T is a long distance telephone carrier and a corporation in New York,
23 New York. It is, through its officers, agents, and employees, engaged in and sells communication
24 services, including long distance telephone services, and is doing such business in California with
25 offices located in Oakland, California and many other California locations.

26 **CLASS ALLEGATIONS**

27 10. Pursuant to California Civil Code § 1781 and California Code of Civil Procedure
28 § 382, plaintiff Ting brings this action on behalf of herself and all other persons similarly situated.

1 The class that plaintiff Ting represents (hereinafter the “Plaintiff Class”) is composed of all
2 California persons who have or have had long distance telephone service with defendant AT&T at
3 any time from July 30, 1997 forward, and whose long distance service is subject to AT&T's
4 Consumer Services Agreement challenged by this action.

5 11. Plaintiff Ting is informed and believes and on that basis alleges that the Plaintiff
6 Class numbers in excess of hundreds of thousands of persons and is so numerous that joinder of all
7 members would be impracticable. The exact size of the Plaintiff Class, and the identity of the
8 members of the class are ascertainable from the business records of AT&T.

9 12. Questions of law and fact common to the Plaintiff Class exist that predominate over
10 questions affecting only individual members, including, *inter alia*, the following:

11 a. Whether defendant AT&T's Consumer Services Agreement with members of
12 the Plaintiff Class is unconscionable;

13 b. Whether the terms of AT&T's Consumer Services Agreement violated the
14 Consumer Legal Remedies Act, Civil Code §§ 1770(a)(5), 1770(a)(9), and 1770(a)(14);

15 c. Whether AT&T's Consumer Services Agreement is unlawful, unfair and
16 fraudulent in violation of the Unfair Competition Law, Business & Professions Code
17 § 17200, *et seq.*; and

18 d. Whether plaintiff Ting and the other members of the Plaintiff Class suffered
19 damage by reason of the unlawful, unfair and/or fraudulent conduct of AT&T and the class-
20 wide measure of damages.

21 13. The claims asserted by plaintiff Ting in this action are typical of the claims of the
22 members of the Plaintiff Class as described above, the claims arise from the same course of conduct
23 by AT&T, and the relief sought is common.

24 14. Plaintiff Ting will fairly and adequately represent and protect the interests of the
25 members of the Plaintiff Class. Plaintiff Ting has retained counsel competent and experienced in
26 both consumer protection and class action litigation.

27 15. A class action is superior to other methods for the fair and efficient adjudication of
28 this controversy, since joinder of all members is impracticable. Furthermore, because the economic

1 damages suffered by the individual class members may be relatively modest, albeit significant,
2 compared to the expense and burden of individual litigation, it would be impracticable for members
3 of the Plaintiff Class to seek redress individually for the wrongful conduct alleged herein. There
4 will be no undue difficulty in the management of this litigation as a class action.

5 **PRIVATE ATTORNEY GENERAL ALLEGATIONS**

6 16. This action is brought by plaintiffs acting as private attorneys general pursuant to the
7 Unfair Business Practices Act. A private attorney general action pursuant to Business and
8 Professions Code §§17203 and 17204 is appropriate and necessary because AT&T has engaged in
9 the acts described herein as a general business practice. Plaintiffs request in this claim that this court
10 decide that the arbitration requirements unilaterally imposed on its customers by AT&T are each
11 unlawful, unfair, deceptive and unenforceable, and enjoin AT&T from unilaterally imposing these
12 requirements on its customers.

13 **VENUE**

14 17. Venue is appropriate in the County of Alameda pursuant to California Code §1780(c)
15 because defendant is doing business in Oakland.

16 **GENERAL ALLEGATIONS**

17 18. Plaintiff Ting recently received a document with the heading “Dear AT&T
18 Customer,” and entitled “AT&T Consumer Services Agreement.” This document was included
19 with several other documents in a monthly statement from AT&T. A copy of the “Consumer
20 Services Agreement” document sent to plaintiff Ting is attached as Exhibit A hereto.

21 19. The “Consumer Services Agreement” Document contains, in small print, an
22 arbitration provision (“AT&T’s Arbitration Provision”). This provision provides that “You have the
23 right to take any qualifying dispute to small claims court rather than arbitration. All other disputes
24 arising out of or related to this Agreement (whether based in contract, tort, statute, fraud,
25 misrepresentation or any other legal or equitable theory) must be resolved by final and binding
26 arbitration.”

27 20. AT&T’s Arbitration Provision further provides:

28 THIS SECTION PROVIDES FOR RESOLUTION OF DISPUTES THROUGH
FINAL AND BINDING ARBITRATION BEFORE A NEUTRAL ARBITRATOR

1 INSTEAD OF IN A COURT BY A JUDGE OR JURY OR THROUGH A CLASS
2 ACTION.

3 (Capitals in original).

4 21. AT&T's Arbitration Provision further states that "NO DISPUTE MAY BE JOINED
5 WITH ANOTHER LAWSUIT, OR IN AN ARBITRATION WITH A DISPUTE OF ANY OTHER
6 PERSON, OR RESOLVED ON A CLASS-WIDE BASIS." (Capitals in original).

7 22. AT&T's Arbitration Provision also provides

8 BY ENROLLING IN, USING, OR PAYING FOR THE SERVICES, YOU AGREE
9 TO THE PRICES, CHARGES, TERMS AND CONDITIONS IN THIS
10 AGREEMENT. IF YOU DO NOT AGREE TO THE PRICES, CHARGES, TERMS
11 AND CONDITIONS, DO NOT USE THE SERVICES, AND CANCEL THE
12 SERVICES IMMEDIATELY BY CALLING AT&T AT 1(888) 288-4099 FOR
13 FURTHER DIRECTIONS .

14 (Capitals in original).

15 23. AT&T's Arbitration Provision incorporates the AAA's Consumer Arbitration Rules
16 (for disputes involving \$10,000 or less) or its Commercial Arbitration Rules (for disputes in excess
17 of \$10,000). It does not explain, however, what either of these sets of rules provides. To obtain a
18 copy of the current version of either set of the AAA rules, a customer must go to either AT&T's or
19 the AAA's website.

20 24. AT&T's Arbitration Provision also makes clear that both sets of the AAA rules can
21 be unilaterally changed without further notice to or agreement by plaintiff Ting or AT&T's other
22 customers, as the rules that apply are those "which are in effect on the date a dispute is submitted to
23 the AAA.

24 25. The AAA requires a claimant to pay certain fees to proceed with the claim. Under
25 the Commercial Arbitration Rules, as the amount of damages claimed by a plaintiff increases, so do
26 these fees increase.

27 26. AT&T's Arbitration Provision provides that "[t]he prevailing party may, however,
28 seek to recover the AAA's fees and the expenses of the arbitrator from the other party."

29 27. AT&T's Arbitration Provision states that the decision of the arbitrator will be "final
30 and binding."

1 28. The Consumer Services Agreement further provides that “We can assign all or part of
2 our rights and duties under this Agreement without notifying you. If we do that, we have no further
3 obligations to you. You may not assign this Agreement or the Services without our prior written
4 consent.”

5 29. The AT&T Consumer Services Agreement further states that “We [AT&T] may
6 change this Agreement, including the incorporated AT&T Service Guides, from time to time.”

7 30. The AT&T Consumer Services Agreement further provides that, if AT&T decides to
8 exercise its self-declared right unilaterally to change the agreement, it will notify the consumer of
9 the changes “by one or more of the following: posting on our Website, recorded announcement, bill
10 message, bill insert, newspaper ad, postcard, letter, call to your billed telephone number, or e-mail to
11 an address provided by you.” Thus, the agreement provides that it can be unilaterally amended with
12 as little notice as a posting on AT&T’s website and with no specified time period for notice.

13 31. The Consumer Services Agreement also provides for limitations on the remedies that
14 a customer may have against AT&T:

15 IF OUR NEGLIGENCE CAUSES DAMAGE TO PERSON OR PROPERTY, WE
16 WILL BE LIABLE FOR NO MORE THAN THE AMOUNT OF DIRECT
17 DAMAGES TO THE PERSON OR PROPERTY. FOR ANY OTHER CLAIM, WE
18 WILL NOT BE LIABLE FOR MORE THAN THE AMOUNT OF OUR CHARGES
19 FOR THE SERVICES DURING THE AFFECTED PERIOD. . . . WE ALSO WILL
20 NOT BE LIABLE FOR PUNITIVE, RELIANCE OR SPECIAL DAMAGES.
21 THESE LIMITATIONS APPLY EVEN IF THE DAMAGES WERE
22 FORESEEABLE OR WE WERE TOLD THEY WERE POSSIBLE, AND THEY
23 APPLY WHETHER THE CLAIM IS BASED ON CONTRACT, TORT, STATUTE,
24 FRAUD, MISREPRESENTATION, OR ANY OTHER LEGAL OR EQUITABLE
25 THEORY.

26 32. The “Frequently Asked Questions” portion of the cover note transmitted with
27 AT&T’s Consumer Service Agreement states that “Arbitration is a quicker and more convenient
28 way to settle disputes without the hassle and cost of a court case.”

29 33. The “Frequently Asked Questions” portion of the cover note transmitted with
30 AT&T’s Consumer Service Agreement states that the arbitrator will be “an objective third party,”
31 and the arbitration provision itself refers to “neutral” arbitrators.

32 ///

33 ///

1 STATUTE, FRAUD, MISREPRESENTATION, OR ANY OTHER LEGAL OR EQUITABLE
2 THEORY.” The arbitration provision prohibits all punitive damages claims even though Section
3 3294 of the California Civil Code provides for such relief for a variety of types of conduct that
4 AT&T could potentially commit against its customers.

5 **AT&T’S ARBITRATION PROVISION SEEKS TO**
6 **IMMUNIZE AT&T FROM LIABILITY BY PREVENTING**
7 **ITS CUSTOMERS FROM PARTICIPATING IN CLASS ACTIONS**

8 37. As set forth above, AT&T’s Arbitration Provision prohibits its customers from
9 proceeding against AT&T on a class action basis. By doing so, AT&T’s Arbitration Provision seeks
10 to eliminate the only realistic remedy that its customers have for most wrongs it might commit
11 against them.

12 38. The recent history of consumer litigation establishes that most individual claims
13 against telecommunications companies are for very modest sums of a few hundred or (at the most) a
14 few thousand dollars.

15 39. It is not economically feasible for consumers to pursue such relatively small claims
16 on an individual basis against a large corporation such as AT&T. Very few, if any, attorneys are
17 financially able or willing to pursue individual claims for modest sums against large, powerful
18 companies such as AT&T. And when a consumer’s claims are quite small on an individual basis, it
19 is economically infeasible for him/her to hire an attorney to represent his/her interests on a billable-
20 hour basis.

21 40. Consumer attorneys *are*, however, often able to pursue such claims on a class action
22 basis. When similar claims are aggregated, the amount in controversy becomes sufficiently large for
23 consumers to be able to locate counsel who will represent them and defend their interests. Indeed,
24 there have been several cases across the nation in recent years where consumer companies were held
25 accountable for widespread wrongdoing through consumer class actions. As the California Supreme
26 Court recently held, “class actions offer consumers a means of recovery for most individual
27 damages. . . .” *Linder v. Thrift Oil Co.* (2000) 23 Cal. 4th 429, 445.

28 41. California's public policy demonstrates the importance of class actions as an
instrumentality of consumer protection.

1 42. If AT&T’s customers are barred from pursuing class litigation, then they will likely
2 be denied any meaningful remedy for most wrongs that AT&T might commit against them.
3 Accordingly, AT&T’s Arbitration Provision does not offer customers an equally effective
4 alternative method of dispute resolution; rather it eliminates the only realistic method of dispute
5 resolution available.

6 43. If AT&T successfully immunizes itself from any class-wide legal accountability, it
7 will free itself to commit widespread wrongdoing. As the California Supreme Court has recognized,
8 class actions “often produce several salutary by-products, including a therapeutic effect upon those
9 sellers who indulge in fraudulent practices, [and] aid to legitimate business enterprises by curtailing
10 illegitimate competition. . . .” *Linder, supra*, 23 Cal. 4th at 445 (internal quotation marks and
11 citations omitted). The Supreme Court went on to state that “defendants should not profit from their
12 wrongdoing simply because their conduct harmed large numbers of people in small amounts instead
13 of small numbers of people in large amounts.” *Id.* at 446 (internal quote, citation omitted).

14 44. It is unconscionable for a contract to compel an individual to submit his or her claims
15 to arbitration when the arbitrator cannot provide the same opportunity to effectively vindicate those
16 claims that could have been provided in court.

17 **AT&T’S ARBITRATION PROVISION REQUIRES ITS CUSTOMERS WITH**
18 **CLAIMS GREATER THAN \$10,000 TO PAY ENORMOUS ARBITRATION FEES**

19 45. If plaintiff Ting or any of AT&T’s customers were to have a dispute with AT&T in
20 which he/she claim damages of more than \$10,000, under AT&T’s Arbitration Provision he/she
21 would be required to arbitrate this dispute under AAA’s Commercial Rules.

22 46. Under the AAA’s Commercial Rules, the minimum filing fee for a claimant is \$500,
23 and filing fees then quickly escalate as the amount of the claim increases. A claimant must also pay
24 one half of the fees of the arbitrator(s) handling the case. AAA arbitrators frequently charge fees of
25 \$300 to \$400 per hour and more for each hour spent on the matter, including research and
26 preparation.

27 47. The total fees billed by AAA for arbitrations conducted under its commercial rules
28 are often very high:

1 a. In one sexual harassment case brought in California captioned *Warner v. Von*
2 *Buettner Ristow*, a claimant was required to pay \$18,260 to AAA. When she did not prevail on the
3 claim, the AAA Arbitrator assessed the claimant \$207,271 for the defendant employer's attorneys'
4 fees.

5 b. In a legal malpractice case brought in California captioned *Paul v. Alred*, a
6 claimant was required to pay \$15,000 to AAA, even though she waited for more than four years for
7 the arbitrator even to hold a hearing on the merits of her claim.

8 c. In a dispute between a small chicken farmer and a large agribusiness brought
9 in Mississippi captioned *Gatlin v. Sanderson Farms*, AAA informed the farmer that he would be
10 required to pay a minimum of \$11,000 to have his claim heard.

11 d. In a personal injury case brought in Connecticut captioned *Mahler v.*
12 *Terminex*, two homeowners were charged \$7,000 each to arbitrate their claims.

13 48. As a result of such high AAA arbitration fees, many consumers are unable to pursue
14 their claims against corporations such as AT&T.

15 **AT&T'S ARBITRATION PROVISION REQUIRES ITS CUSTOMERS**
16 **TO SUBMIT TO ARBITRATION WITH A PROVIDER (THE AAA) THAT**
17 **IS BIASED IN FAVOR OF CORPORATE DEFENDANTS SUCH AS AT&T**

18 49. Plaintiff Ting and all of AT&T's customers are entitled by law to have any legal
19 disputes that they may have with AT&T resolved according to law by a genuinely unbiased, neutral,
20 independent decision maker.

21 50. AT&T's Arbitration Provision is unfair and unconscionable because AT&T has
22 chosen an arbitrator – the AAA – with very strong incentives to be biased in its favor. AAA is very
23 sympathetic to and favorable towards corporate defendants.

24 51. AAA's arbitrators know that there are numerous other providers of arbitration
25 services, and AAA's development staff directly competes for corporate business with other
26 providers such as JAMS and the National Arbitration Forum. All or nearly all of the business for
27 AAA's for-profit arbitrators comes from having corporations designate AAA as the arbitration
28 service provider for the corporations' customers in their standard form contracts. AAA has a
development team that focuses upon convincing corporations to select it as the corporations'

1 arbitration service providers.

2 52. AAA’s arbitrators know that if they were to rule for consumers too often by the
3 standards of the corporations selecting them or their defense lawyers, or enter awards for consumers
4 that were too large by the standards of these corporations and their defense lawyers, these companies
5 would cancel or not renew their contracts with the AAA, and the arbitrators would lose this lucrative
6 business.

7 53. In addition to the filing fees that AAA receives when cases are lodged with it, and the
8 arbitrators’ fees that its arbitrators receive for handling particular cases, AAA also receives regular
9 and substantial cash stipends, retainers, or payments from a large number of corporations.

10 54. AAA regularly files *amicus* briefs with courts that support the efforts of corporate
11 defendants to force individuals to submit their claims to arbitration. In a series of cases before the
12 U.S. Supreme Court and other courts, AAA has filed supposedly “neutral” *amicus* briefs that were
13 purportedly in support of neither party. In each of these cases, a corporate defendant was attempting
14 to compel an individual claimant to arbitrate his or her claims, and the individual claimant was
15 seeking to pursue his or her constitutional right to have his or her day in court and right to a trial by
16 jury. In each case, despite AAA’s claims of neutrality, AAA’s *amicus* brief set forth legal and/or
17 factual arguments in support of compelling arbitration in these cases, which was the ultimate
18 position sought by the corporate defendant and opposed by the individual plaintiff. After AAA filed
19 an ostensibly neutral brief with the Supreme Court in a recent case involving employment disputes,
20 one AAA arbitrator wrote AAA that “Taking the strong position the Association took in this brief,
21 where half of its clients in the employment arena – claimants – take the opposing position, is not
22 only unseemly, but destroys AAA’s hard earned neutrality.” Michael Joe, *Embattled Brief: AAA*
23 *Faces Criticism from Two of Its Own for Weighing In On a Mandatory ADR Case*, The Recorder,
24 September 27, 2000 (quoting Oakland arbitrator R. Elaine Leitner).

25 55. AAA also sometimes assists corporations in their efforts to pitch their mandatory
26 arbitration clauses to individual consumers and/or employees. In a case involving Red Lobster
27 Restaurants, for example, a man identified as Bruce Chapin, an AAA arbitrator, appeared in a
28 corporate-produced video tape aimed at convincing employees to accept Red Lobster’s new

1 mandatory arbitration policy. When an employee (or an actor pretending to be an employee) asks
2 about the right to a jury trial, Mr. Chapin states: “Certainly anyone who is ever charged with a crime
3 should insist upon a jury trial. But in a civil setting, a dispute in the workplace, for instance, this is
4 not a matter that would be best tried in front of a jury.” Thus, AAA is so eager to help corporate
5 clients impose mandatory pre-dispute arbitration upon individuals that its representatives will urge
6 those individuals to conclude that it is “best” for them to waive their constitutional rights.

7 56. In a number of cases with mandatory pre-dispute arbitration clauses specifying AAA
8 as the arbitration service provider, individual claimants have initiated the arbitration process against
9 corporations only to have AAA select an arbitrator who was in the same business as the corporate
10 defendant or who represented other corporations in that business, or to identify a list of potential
11 arbitrators primarily or solely composed of such individuals.

12 57. Plaintiffs are informed and believe that AAA’s arbitrators are overwhelmingly and
13 disproportionately drawn from the ranks of attorneys who principally represent corporations in
14 defending actions brought by individuals.

15 58. AAA places such an emphasis on developing new lucrative corporate business that in
16 its San Francisco office Paul Loon, the Regional Vice President of AAA, on January 14, 2000, sent a
17 memorandum to all AAA arbitrators in that area asking for the arbitrators’ help, as “[part of our
18 marketing effort for 2000 will be to develop business contracts with corporations headquartered in
19 Northern California.” He asked the arbitrators to “make the introduction for us” to any contacts they
20 might have with any corporation listed on an attachment to the memo. This memorandum was
21 circulated despite the fact that AAA’s Code of Ethics for Arbitrators in Commercial Disputes states,
22 Canon I at B, that “[i]t is inconsistent with the integrity of the arbitration process for persons to
23 solicit appointment for themselves.”

24 59. AAA represents that individuals forced to arbitrate their claims before it will have
25 their rights protected by its Consumer Due Process Protocol, a set of rules that AAA asserts will
26 protect the rights of consumers required to take part in mandatory arbitration. In fact, despite its
27 representations to the contrary, AAA regularly administers arbitrations or otherwise endorses the
28 validity of mandatory pre-dispute arbitration clauses that do not comply with its Due Process

1 Protocol. In at least one case, AAA refused to even respond to correspondence from individuals
2 facing a motion to compel arbitration (or to correspondence from state and elected officials writing
3 on the individuals' behalf) that requested that AAA state that it would not administer arbitration
4 pursuant to an arbitration clause that did not comply with AAA's Consumer Due Process Protocol.
5 In February of 2000, one AAA representative publicly announced that AAA had never yet refused to
6 administer arbitration under an arbitration clause on the grounds that it did not comply with its Due
7 Process Protocol.

8 **AT&T'S ARBITRATION PROVISION WAS COMMUNICATED**
9 **TO CONSUMERS IN SUCH A WAY THAT FEW OF ITS**
10 **CONSUMERS WOULD VOLUNTARILY, KNOWINGLY AND**
11 **INTELLIGENTLY CONSENT TO THE ARBITRATION PROVISION**

12 60. AT&T's Arbitration Provision was communicated to plaintiff Ting and AT&T's
13 other customers in such a way that ensures that few would have read it, much less have voluntarily,
14 knowingly, and intelligently consented to it.

15 61. AT&T did not send its Arbitration Provision to plaintiff Ting or to its other customers
16 in a document that they must read, sign and return.

17 62. AT&T's prior version of its Customer Agreement does not refer specifically to
18 dispute resolution.

19 63. No AT&T employee telephoned or contacted plaintiff Ting to inform her about its
20 Arbitration Provision or to notify her that she would be losing her federal and state constitutional
21 rights to trial by judge or jury.

22 64. Upon information and belief, no AT&T employee telephoned or contacted any of
23 AT&T's other customers to inform them about its Arbitration Provision or to notify them that they
24 would be losing their federal and state constitutional right to trial by judge or jury.

25 65. In short, AT&T did not use any method or marketing device that would insure that
26 plaintiff Ting or its other customers would actually read and understand the AT&T Arbitration
27 Provision.

28 66. Major telecommunications companies such as AT&T are extremely sophisticated
with respect to marketing, and with respect to consumer behavior in response to communications

1 from financial services companies. Like other companies in the telecommunications industry,
2 AT&T retains and employs a number of persons who study the number of consumers who read and
3 respond to various sorts of mailings.

4 67. The California Constitution recognizes that the right to jury trial is a fundamental
5 right for all citizens of California protected by Cal. Const. art. I, § 16. In addition, the Seventh
6 Amendment to the United States Constitution recognizes the right to a jury trial in all federal cases.
7 The California Constitution and the Fifth and Fourteenth Amendments to the United States
8 Constitution protect the right of all citizens to Due Process of law.

9 68. AT&T's Arbitration Provision deprives its customers of these constitutional rights.

10 69. Under California's generally applicable law of contracts, an individual will not be
11 found to have waived a constitutional right (such as the rights to due process and a jury trial) by
12 contract unless they have voluntarily, knowingly, and intelligently consented to waive those rights.

13 70. If an individual does not both actually read and fully comprehend a contractual
14 document purporting to waive her or his constitutional rights, that individual cannot be said to have
15 voluntarily, knowingly and intelligently consented to waive those rights.

16 71. It is therefore unlawful, unfair, fraudulent and unconscionable for AT&T to seek to
17 force its customers into mandatory pre-dispute arbitration without a knowing, voluntary and
18 intelligent waiver of their right to a day in court.

19 **AT&T'S ARBITRATION PROVISION ENSHRINES SWEEPING SECRECY**

20 72. AT&T's Arbitration Provision compels plaintiff Ting and all of AT&T's customers
21 to submit to an entirely secretive system of dispute resolution, and deprives plaintiff and the other
22 customers of their right to public, open, reviewable dispute resolution. It provides that "Any
23 arbitration shall remain confidential. Neither you nor AT&T may disclose the existence, content, or
24 results of any arbitration or award, except as may be required by law, or to confirm and enforce an
25 award."

26 73. As a result of the secrecy enshrined in AT&T's Arbitration Provision, AT&T has the
27 ability to conceal not only the truth about AAA's performance, but even its mere existence,
28 eliminating any realistic check against any abuses that AAA arbitrators might commit. AAA could

1 rule for AT&T in *every single* case it arbitrates (and thus give AT&T a strong incentive to continue
2 to patronize AAA), and this fact would forever remain “confidential” from AT&T’s customers and
3 the public at large. The extraordinary secrecy enshrined in AAA’s rules permits AT&T and AAA to
4 exercise unchecked discretion.

5 74. The secrecy provisions of AT&T’s Arbitration Provision also remove the resolution
6 of disputes from the public domain, and deprive consumers of the benefit of discovering precedents
7 in cases decided in their favor.

8 **FIRST CAUSE OF ACTION FOR INJUNCTIVE RELIEF AND DAMAGES**

9 (Violation of Consumer Legal Remedies Act, California Civil Code §§1750 *et seq.*,
10 Brought by the Individual Plaintiff)

11 75. Plaintiff Ting realleges and incorporates herein as though set forth in full, the
12 allegations of paragraphs 1 through 74 above, except paragraph 15.

13 76. Plaintiff Ting brings this action seeking injunctive relief pursuant to California Civil
14 Code §§ 1770 and 1780. The Consumer Legal Remedies Act, Civil Code §§ 1750, *et seq.* is
15 designed to protect consumers against unfair and deceptive business practices. It applies to AT&T’s
16 conduct because it covers transactions which are intended to result or which result in the sale or
17 lease of goods and services to consumers. The Act specifically proscribes in § 1770(n) representing
18 that a transaction confers or involves rights, remedies, or obligations which it does not have or
19 involve or which are prohibited by law, and prohibits in § 1770(s) inserting an unconscionable
20 provision in a contract.

21 77. AT&T possesses bargaining strength and power far superior to that of plaintiff Ting
22 and its other customers. Without discussion or negotiation, it offers to its customers standardized
23 form contracts, drafted by AT&T, which are contracts of adhesion because they are offered on a
24 take-it-or-leave-it basis and the customer has the opportunity only to adhere to the contract or close
25 his or her account. Many of its customer agreements with customers were entered into years ago.

26 78. The AT&T Arbitration Provision is substantially one-sided in favor of AT&T, and
27 AT&T knows that the Arbitration Provision is substantially one-sided in its favor.

28 79. The AT&T Arbitration Provision does not fall within the reasonable expectations of

1 plaintiff Ting or of AT&T's other customers, and is unduly oppressive. It is, therefore, unlawful,
2 unfair, fraudulent and unconscionable.

3 80. AT&T's Arbitration Provision would unlawfully, unfairly, fraudulently and
4 unconscionably deprive plaintiff Ting and all of AT&T's other customers of their state and federal
5 constitutional rights to trial by judge and jury without their voluntary, knowing and intelligent
6 consent.

7 81. AT&T's Arbitration Provision also unlawfully, unfairly, fraudulently and
8 unconscionably deprives plaintiff Ting and AT&T's other customers of their constitutional right to
9 Due Process of law by denying them any effective remedy for their legal claims without their
10 voluntary, knowing and intelligent consent.

11 82. AT&T's Arbitration Provision unlawfully, unfairly, fraudulently and unconscionably
12 bars plaintiff Ting and its other Customers from participating in class actions.

13 83. AT&T's Arbitration Provision unlawfully, unfairly, fraudulently and unconscionably
14 requires plaintiff Ting and AT&T's other customers to submit to arbitration before AAA, which has
15 strong incentives to be biased in favor of AT&T and against its customers, and who has created, at
16 the least, a strong appearance of improper bias in favor of AT&T and against its consumers.

17 84. AT&T's Arbitration Provision unlawfully, unfairly, fraudulently and unconscionably
18 deprives plaintiff Ting and AT&T's other customers of their right to (and of the benefits of) a public
19 forum for the resolution of their legal claims.

20 85. The statements in the Consumer Service Agreement about arbitration being cheaper
21 and more convenient than litigation in court are fraudulent and misleading, in that (a) being forced to
22 pay filing fees and individually pursue arbitration is certainly more of a "hassle" and involved
23 greater costs than being a member of a class in a class action; and (b) for AT&T consumers subject
24 to AAA's Commercial Rules, the arbitral and administrative filing fees and arbitrators' hourly fees
25 will dwarf the filing fees that would be required in any court action.

26 86. The statements in the Consumer Service Agreement referring to "objective"
27 arbitrators are deceptive in light of the facts set forth above with respect to AAA's conduct, and
28 none of those facts are disclosed in the Consumer Service Agreement.

1 ///

2 87. Pursuant to California Civil Code §§ 1770 and 1780, plaintiffs are entitled to enjoin
3 implementation of AT&T's Arbitration Provision and to recover their reasonable attorneys' fees and
4 costs.

5 **SECOND CAUSE OF ACTION FOR INJUNCTIVE RELIEF AND RESTITUTION**

6 (Violation of the Unfair Competition Law, California Business and Professions
7 Code §§ 17200, *et seq.*, Brought by All Plaintiffs)

8 88. Plaintiffs reallege and incorporate herein by this reference each and every allegation
9 set forth in paragraphs 1 through 87 above, except paragraph 15.

10 89. Plaintiffs file this Second Cause of Action acting as private attorneys general to
11 challenge AT&T's requirement that its customers resolve disputes through arbitration. The Unfair
12 Trade Practices Act defines unfair competition to include any "unlawful," "unfair" or "fraudulent"
13 business act or practice. Business and Professions Code § 17200. The Act authorizes injunctive
14 relief and restitution for violations. *Id.* at § 17203. Defendant AT&T has imposed its Arbitration
15 Provision as a business practice. Plaintiffs request that this Court enjoin this practice as unlawful,
16 unfair and fraudulent.

17 90. The imposition of AT&T's Arbitration Provision is an unlawful, unfair and
18 fraudulent business practice for all of the reasons set forth in the preceding cause of action as to why
19 it violates the Consumer Legal Remedies Act.

20 **THIRD CAUSE OF ACTION**
21 (Declaratory Relief, Brought by the All Plaintiffs)

22 91. Plaintiffs reallege and incorporate herein as though set forth in full the allegations of
23 paragraphs 1 through 90 above, except paragraph 15.

24 92. An actual controversy has arisen and now exists relating to the rights and duties of
25 the parties herein in that plaintiffs contend that the defendant's Arbitration Provision is unlawful,
26 unfair, fraudulent, unenforceable, void and of no force or effect in all respects, whereas defendant
27 contends that its Arbitration Provision is valid, creates binding contracts, and is enforceable in all
28 respects. Plaintiffs maintain that each such notice is unlawful, unfair, fraudulent and unenforceable

1 in that it is unconscionable, deceptive and misleading in violation of the Consumer Legal Remedies
2 Act, violates the Unfair Competition Law, Business and Professions Code §17200, *et seq.*, does not
3 create a binding contract, infringes on protections guaranteed by the California Constitution and
4 applicable statutes, and is oppressive and unfair. Defendant disputes these contentions and asserts
5 that each notice of change of terms is valid, contractually binding, and enforceable.

6 93. Plaintiffs desire a declaration as to the validity and enforceability of the Arbitration
7 Provision and whether defendant AT&T's unilateral attempt to impose it is unlawful, unfair or
8 fraudulent. A judicial declaration is necessary and appropriate at this time so that plaintiffs may
9 ascertain their rights and duties, and those of other affected persons in regard to the resolution of
10 disputes with defendant Bank of America.

11 WHEREFORE, plaintiffs pray:

12 1. That this Court declare that AT&T's practice of imposing its Arbitration Provision on
13 its customers violates the Consumer Legal Remedies Act;

14 2. That this Court declare AT&T's practice of imposing its Arbitration Provision on its
15 consumers violates the Unfair Competition Law.

16 3. That this Court preliminarily and permanently enjoin AT&T from unilaterally
17 imposing its Arbitration Provision on plaintiff Ting and all other customers;

18 4. That plaintiffs be awarded reasonable attorney's fees and costs of suit; and

19 5. That plaintiffs be awarded such other and further relief as the Court may deem
20 appropriate, just and proper.

21
22 Dated: July 30, 2001

Respectfully submitted,

23 THE STURDEVANT LAW FIRM, P.C.

24 TRIAL LAWYERS FOR PUBLIC JUSTICE, P.C.

25
26
27 By: _____
James C. Sturdevant

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