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14 UNITED STATES DISTRICT COURT  
15 NORTHERN DISTRICT OF CALIFORNIA  
16 SAN FRANCISCO DIVISION

DMR

17 CV 13 3440

18 DAVID HANSEL, EDWARD TOOLEY,  
19 and CHRISTOPHER VALDEZ,  
20 individually and on behalf of all others  
similarly situated,

21 Plaintiffs,

22 v.

23 TRACFONE WIRELESS, INC., d.b.a.  
24 STRAIGHT TALK WIRELESS, and  
WAL-MART STORES, INC.,

25 Defendants.

Case No. \_\_\_\_\_

**CLASS ACTION COMPLAINT**

**JURY TRIAL DEMANDED**

ORIGINAL  
FILED  
JUL 24 2013  
RICHARD W. WIEKING  
CLERK, U.S. DISTRICT COURT,  
NORTHERN DISTRICT OF CALIFORNIA

1 Plaintiffs, individually and on behalf of all others similarly situated, allege on personal  
2 knowledge, investigation of their counsel, and on information and belief as follows:

3 **NATURE OF THE ACTION**

4 1. This proposed class action alleges that TracFone Wireless, Inc. (“TracFone”) and  
5 Wal-Mart Stores, Inc. (“Walmart,” together with TracFone, “Defendants”) falsely advertise  
6 Straight Talk cellular phone plans as providing “unlimited” data service, when in fact the Straight  
7 Talk subscribers in the class have had their supposed “unlimited” data service “throttled” or  
8 terminated.

9 2. Defendants co-founded Straight Talk in 2009, and since that time have  
10 continuously advertised “unlimited” data service plans, thereby becoming one of the largest  
11 prepaid phone brands in the United States.

12 3. Defendants prominently advertise that Straight Talk wireless plans include  
13 “unlimited” data, but fail to disclose that Defendants “throttle” (*i.e.* reduce the speed of), or  
14 terminate altogether, subscribers’ access to data. On information and belief, Defendants throttle  
15 or terminate data access when subscribers near or exceed Defendants’ internally established, but  
16 undisclosed, data usage limits, or when Defendants’ wireless network partners (*e.g.* AT&T) direct  
17 Defendants to do so even where subscribers’ usage is below Defendants’ internal, undisclosed  
18 limits in order to limit the strain on Defendants’ wireless partners’ networks.

19 4. In response to complaints from the members of the proposed Class, Defendants  
20 routinely blame customers for “misusing” their data service, but fail to disclose how customers  
21 allegedly misused their data or explain the reasons that Defendants have throttled or terminated  
22 customers’ data access.

23 5. After Defendants throttle or terminate data service to their “unlimited” data plan  
24 customers, they engage in the practice of failing to restore data access or regular data speeds  
25 unless and until subscribers’ current prepaid data plans expire *and* subscribers purchase new  
26 Straight Talk service plans.  
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**JURISDICTION AND VENUE**

14. The Court has subject matter jurisdiction over this matter pursuant to 28 U.S.C. § 1332(d)(2) as the amount in controversy exceeds \$5,000,000 among the proposed nationwide Class, believed to number at least in the tens of thousands, who are entitled to damages in the amount of the purchase price of Straight Talk “unlimited” service plans, compatible phones, and SIM cards.

15. This Court has personal jurisdiction over Defendants because they are authorized to do business and regularly conduct business in California, and they marketed, sold, and issued Straight Talk service plans, phones, and SIM cards in California. Defendants have conducted business in California with certain of the Plaintiffs. Defendants have sufficient minimum contacts with this state to render the exercise of jurisdiction by this Court permissible.

16. Venue is proper under 28 U.S.C. §§ 1391(a) and (b) because a substantial part of the events or omissions giving rise to Plaintiffs’ claims occurred in this District.

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**COMMON FACTUAL ALLEGATIONS**

**A. Defendants Falsely Advertise Straight Talk Wireless Phone Plans as Providing “Unlimited” Data.**

17. Since Defendants co-founded Straight Talk in 2009, Straight Talk has become one of the largest prepaid phone brands in the United States.

18. Defendants market and sell Straight Talk branded prepaid wireless service plans, phones, and SIM cards at Walmart stores, online at Walmart.com or StraightTalk.com, or over the phone.

19. Defendants offer two wireless phone plans: The Straight Talk “All You Need” service plan with data expressly limited to 30MB per month and the Straight Talk “Unlimited” service plan which Defendants advertise as including “unlimited” data. Consumers may sign up for the “unlimited” data plan by purchasing a 1-month, 1-month international, 3-month, 6-month, or 1-year service plan for \$45, \$60, \$130, \$255, or \$495, respectively.

20. Straight Talk branded and locked smartphones currently comprise approximately 70% of the phone models offered for sale by Straight Talk. On January 8, 2013, Defendants

1 began selling Straight Talk branded iPhones, in addition to their Android smartphone lineup.  
 2 Walmart offered special no-interest financing for Straight Talk iPhones purchased at its stores.

3 21. In February 2012, Defendants promoted their “Bring Your Own Phone” program  
 4 as a new way for consumers to sign up for Straight Talk’s “unlimited” data plan. Through this  
 5 program, Defendants sell Straight Talk SIM cards to enable the “unlimited” plan on unlocked  
 6 AT&T or T-Mobile compatible GSM smartphones. In April 2013, Defendants expanded this  
 7 program such that unlocked Verizon compatible CDMA smartphones may be used with the  
 8 Straight Talk “unlimited” plan without a Straight Talk SIM card.

9 22. Defendants continue to aggressively and consistently promote the supposed  
 10 “unlimited” data plan in order to capture the burgeoning smartphone market. Defendants’  
 11 advertising and packaging of Straight Talk phones, SIM cards, and data plans feature the word  
 12 “unlimited” in prominent font. Below are examples of Defendants’ marketing for their Straight  
 13 Talk “unlimited” plan:

	Straight Talk	SERVICE CARRIERS
PLAN TYPE	Unlimited everything	Varies
YEARLY COST	\$540	\$1,490
YEARLY SAVINGS	\$950	\$0
CONTRACT	Nope	2-Year Commitment

1           23. Defendants' widespread marketing for Straight Talk's "unlimited" data plan  
2 induced millions of new smartphone users to subscribe to Straight Talk's "unlimited" plan.

3           24. Defendants' promise of "unlimited" data is material to consumers.

4           25. Upon information and belief, the networks accessed by Straight Talk's data plans  
5 (AT&T, Verizon, Sprint and T-Mobile) have complained to Defendants about the ever-increasing  
6 strain being placed on their respective networks by growing numbers of Straight Talk "unlimited"  
7 data plan subscribers.

8           **B. Defendants Regularly Throttle or Terminate "Unlimited" Subscribers'**  
9           **Access to Data.**

10          26. To control network data usage and costs, Defendants have implemented monthly  
11 data usage limits which they fail to disclose to their "unlimited" data plan subscribers. A former  
12 Straight Talk employee stated that the monthly data cap in 2012 was between 2GB – 3GB, having  
13 been reduced from a prior 5GB limit at the behest of Defendants' network carrier partners.<sup>1</sup> More  
14 recently, the lower bounds of the limit may have been reduced to 1.5GB, based on customer  
15 reports. Defendants actively conceal these limits from "unlimited" data customers.

16          27. Defendants throttle data speeds or terminate their "unlimited" customers' data,  
17 typically without any notice or warning, when those customers exceed Defendants' undisclosed  
18 data usage limits. At the direction of Defendants' wireless network partners, Defendants also  
19 regularly and arbitrarily throttle or terminate "unlimited" customers' data even when a customer's  
20 data usage is below Defendants' undisclosed limits.

21          28. Defendants publicly deny having any "fixed" limits on data usage and claim that  
22 "most customers who experience throttling" are engaged in "unauthorized uses" set forth in the  
23 Straight Talk "Terms and Conditions."<sup>2</sup> But these Terms and Conditions are not reasonably  
24 disclosed or agreed to by customers, and are also riddled with vague, confusing, contradictory,  
25 and unconscionable provisions.

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27 <sup>1</sup> Discussion on XDADEVELOPERS.COM, *Have questions for StraightTalk/Net10/Tracfone?*  
(available at <http://forum.xda-developers.com/showthread.php?t=1641966>).

28 <sup>2</sup> Sascha Segan, *Straight Talk Responds to "Unlimited" Complaints*, PCMAG.COM, January 28,  
2013 (available at <http://www.pcmag.com/article2/0,2817,2414768,00.asp>).

1           29. Defendants fail to disclose their data usage limits to customers or explain the  
2 reasons why their data was throttled or terminated. Customers contacting Defendants about their  
3 data being throttled or terminated are typically transferred to a recorded message on Defendants'  
4 "High Data Usage Hotline." The message recites to customers that their data service may have  
5 been suspended or reduced "due to violation of our Terms and Conditions" and that "our  
6 customer care representatives cannot override this policy to restore" data access. The message  
7 then suggests "tips" to reduce data usage such as syncing emails no more than once an hour,  
8 refraining from browsing regular internet websites (as opposed to "mobile friendly" websites),  
9 and downloading a data usage app to "better understand and manage your monthly data plan."<sup>3</sup>

10           30. Even in the few instances when a customer is fortunate enough to speak to or  
11 "chat" via the internet with a live customer service representative, Defendants refuse to provide a  
12 clear answer as to why they throttled or terminated any particular customer's data. One Straight  
13 Talk representative provided the following inscrutable "explanation" to a customer: "[P]lease be  
14 informed that, the magnitude of data transmitted from your phone is recorded by our system on a  
15 daily basis and the determination of its impact to the totality of our system's capacity is solely  
16 done by itself. If our system detects that your phone is transmitting abnormally excessive amount  
17 of data and is negatively impacting its capacity to provide service." When the customer asked  
18 what his data usage had been, and what Straight Talk's data limit is, the Straight Talk  
19 representative responded as follows: "We do not have the exact limitations for data usage  
20 especially if you are on the unlimited service. . . . We regret to inform you that, we are unable to  
21 provide you with the estimated threshold or limitation set by the company for your internet  
22 service usage."<sup>4</sup> When Plaintiff Christopher Valdez asked a Straight Talk representative how  
23 much data he had used before Defendants terminated his data, the representative claimed that he  
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26 <sup>3</sup> "High Data Usage Hotline" recorded message, reachable at 866.793.0474.

27 <sup>4</sup> Laura Northrup, *Straight Talk Cuts Off My Data, Will Only Explain Why In Confusing*  
28 *Doublespeak*, CONSUMERIST, March 20, 2013 (available at  
<http://consumerist.com/2013/03/20/straight-talk-cuts-off-my-data-will-only-explain-why-in-confusing-doublespeak/>).

1 was unable to provide that information because Straight Talk's systems do not show customer  
2 data usage information.

3 31. Straight Talk's refusal to explain under what circumstances it will throttle or  
4 terminate data make the practice all the more unclear and deceptive to consumers. As one  
5 disenchanted Walmart employee who had dealt with a number of customer complaints about  
6 Straight Talk put it, "The inconsistency is what gets me the most. You never know WHEN they  
7 are going to do it, you just have to go about your life with a huge data axe above your head. The  
8 next time you comment on your friends' picture could be the last."<sup>5</sup>

9 32. As Consumerist put it, Defendants' policy of throttling or terminating its  
10 "unlimited" subscribers' data boils down to the following: "[W]e will cut you off if you use too  
11 much data, but we won't tell you how much you used, and we can't tell you when you'll get cut  
12 off."<sup>6</sup>

13 33. Upon information and belief, Defendants terminate customers' data at the behest  
14 of their wireless network partners when a particular cell tower is at or near data capacity,  
15 regardless of whether that customer's data usage has exceeded Defendants' secret data usage  
16 limits. Upon information and belief, network partners such as AT&T are concerned that Straight  
17 Talk customers' data usage on their networks may negatively impact their ability to provide their  
18 own direct customers with service, and thus require Defendants to restrict the data usage of  
19 Straight Talk customers. TracFone Executive Resolution Specialist, Juanita Woodside, said the  
20 following to a customer in response to his FCC and BBB complaints: "Tracfone/straight talk  
21 doesn't track your usage, AT&T or T-Mobile does. When on a given cell phone tower (AT&T or  
22 T-Mobile), and you use a lot of data, this affects other subscribers."<sup>7</sup>

23 34. Defendants have terminated customers' data after they used as little as 30MB in a  
24 day. Defendants terminated Plaintiff Christopher Valdez's data after he used 700MB in a two-  
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26 <sup>5</sup> Comment by "jatwalmart" to article by Alex Kuklinski, *Straight Talk's 'Unlimited' Data Plan is*  
27 *Bullshit*, TECHNO FYI, May 13, 2013, (available at [http://technofyi.com/2013/05/13/straight-](http://technofyi.com/2013/05/13/straight-talks-unlimited-data-plan-is-bullshit/)  
28 [talks-unlimited-data-plan-is-bullshit/](http://technofyi.com/2013/05/13/straight-talks-unlimited-data-plan-is-bullshit/)).

<sup>6</sup> *Id.*

<sup>7</sup> <http://www.howardforums.com/showthread.php/1765893-A-limit-according-to-Tracfone>

1 week period, which is equal to the average data Verizon iPhone customers used in the same two-  
2 week period.<sup>8</sup>

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4 **C. Defendants Unfairly and Unlawfully Blame Customers for Purportedly**  
5 **Violating Never-Disclosed and Unconscionable “Terms and Conditions.”**

6 35. Defendants often tell customers that their “unlimited” data has been throttled or  
7 terminated because they allegedly violated the Straight Talk “Terms and Conditions” that  
8 Defendants purport to apply to Straight Talk phones, SIM cards, and service plans. But these  
9 terms are never adequately disclosed to consumers and contradict Defendants’ prominent and  
10 consistent advertisements that Straight Talk plans are “no contract” plans.

11 36. Defendants do not require consumers who purchase Straight Talk phones, SIM  
12 cards, or service plan cards to view the Terms and Conditions before making their purchase.

13 37. The Terms and Conditions are not referred to and are not available anywhere on  
14 Walmart.com’s website. On StraightTalk.com, the Terms and Conditions are hidden in tiny text  
15 in a link at the footer of the website’s home page, which a consumer must click to have the Terms  
16 and Conditions open in a small window. This small window allows a customer to view in  
17 miniscule text, but not to print, the Terms and Conditions.

18 38. The Terms and Conditions are not provided with the Straight Talk service plan  
19 cards purchased at Walmart stores. The front of the service card, in very large white text on black  
20 background, features the word “UNLIMITED” next to “Minutes, Texts & Data.” Hidden on the  
21 back of the card, in tiny text, is a statement that use of the service card is subject to unspecified  
22 “Terms and Conditions of Service at StraightTalk.com, which are subject to change without prior  
23 notice.” Below are photographs of the front and back of the service card:

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27 <sup>8</sup> Dan Graziano, *Study Finds iPhone Owners to be More Data Hungry than Android Users*, BGR,  
28 March 20, 2013 (available at <http://bgr.com/2013/03/20/iphone-android-data-usage-study-387882/>).

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\*Certain limitations apply. Please refer to Terms and Conditions of Service. Purchase and use of this Service Card is subject to the Terms and Conditions of Service at StraightTalk.com, which are subject to change without prior notice. Straight Talk reserves the right to terminate your service for unauthorized or abnormal usage. ©2013 TracFone Wireless, Inc. All rights reserved. The stylized spiral logo and Straight Talk are registered trademarks of TracFone Wireless, Inc.

39. Defendants do not mention the Terms and Conditions when a customer purchases or activates a Straight Talk service plan, smartphone, or SIM card over the telephone.

40. Inside the packaging of Straight Talk phones and SIM cards, Defendants hide the Terms and Conditions in a shrink-wrapped "Services Guide" booklet. The cover of the booklet directs customers to "Use the Activation Card First." It does not mention the existence of the Terms and Conditions, which are buried in the middle of the booklet in tiny text. Below is a photo of the Services Guide booklet to Plaintiff David Hansell's Samsung Galaxy S II:



1           41.     The Terms and Conditions claim that, by purchasing or activating Straight Talk  
2 phones, SIM cards, or data plans, customers agree to them, despite that fact that consumers  
3 purchase and activate their phones, SIM cards, or data plans *prior* to even having an opportunity  
4 to view the Terms and Conditions. Moreover, Straight Talk and Walmart do not allow returns of  
5 service cards, service plans, or SIM cards, such that a consumer who reads and decides to reject  
6 the Terms and Conditions is unable to do so.

7           42.     The Terms and Conditions are illusory in that they purport to allow Straight Talk  
8 to change any of the terms at any time without notice to or consent from its customers: “Straight  
9 Talk reserves the right to change or modify any of these Terms and Conditions of Service at any  
10 time and in its sole discretion. Any changes or modifications in these Terms and Conditions of  
11 Service will be binding upon you once posted on the Straight Talk website found at  
12 [www.StraightTalk.com](http://www.StraightTalk.com).”

13           43.     Defendants typically point to Sections 6 and 7 of the Terms and Conditions as the  
14 reason for throttling or terminating customers’ data. Defendants wrote in an email to Plaintiff  
15 David Hansell that “[m]ost customers who experience throttling of their data service are engaged  
16 (knowingly or unknowingly) in one or more unauthorized uses that are described in greater detail  
17 in our terms and conditions of service” in Sections 6 and 7.

18           44.     Sections 6 and 7 of the Terms and Conditions are vague, confusing, and likely to  
19 mislead consumers.

20           45.     Up until approximately January 30, 2013, Section 7 of the Terms and Conditions  
21 ambiguously prohibited “access to the Internet, intranets, or other data networks except as the  
22 device’s native applications and capabilities permit.” This poorly written provision could  
23 arguably be read to encompass the installation and use of any smartphone application not  
24 preinstalled on the phone, but such a reading would be extreme and contrary to consumers’  
25 reasonable expectations. Section 7 also prohibits “tethering”; *i.e.* connecting one’s phone to a  
26 computer to share Straight Talk’s data connection.

1           46.     Up until approximately January 30, 2013, Section 6 provided that Straight Talk  
2 service plans may only be used for “Internet browsing through the Straight Talk Mobile Web  
3 Service” and “Authorized Content Downloads from the Straight Talk Mobile Web Store.”  
4 Section 6 explicitly prohibited “uploading, downloading or streaming of audio or video  
5 programming or games.” But, contradictorily and confusingly, the same section later provided  
6 that “downloading legally acquired songs” is an example of a permitted use.

7           47.     On or about January 30, 2013, Defendants modified Section 6, which now  
8 provides that Straight Talk data plans may only be used for “Internet browsing and ordinary  
9 content Downloads.” Section 6 no longer provides that “uploading, downloading, or streaming of  
10 audio or video programming or games” are prohibited uses, but instead forbids “uploading,  
11 downloading, or streaming uninterrupted continuous video.”

12           48.     Despite Section 6 purporting to prohibit at least some types of video and music  
13 uploading, downloading, or streaming, Defendants publicly promote and encourage consumers to  
14 use their Straight Talk phones and data plans to download and stream music and videos. Straight  
15 Talk television commercials, marketing materials, and advertisements feature consumers using  
16 Straight Talk smartphones to play videos on YouTube and Netflix and stream music on Pandora.  
17 Defendants also preload streaming video apps, such as YouTube, on Straight Talk smartphones.  
18 In a post on Straight Talk’s blog dated May 17, 2013, Straight Talk promoted a new Samsung  
19 phone as being able to “[d]o two things at once: watch a video as you email or text.”<sup>9</sup>

20           49.     After PCMag published an article titled “How Straight Talk’s TOS Makes Most  
21 iPhone Users Criminals” noting that Straight Talk’s terms, while contradictory and confusing,  
22 could be read to be more restrictive than those of any other wireless phone carrier and to prohibit  
23 basic smartphone functions,<sup>10</sup> Defendants publicly responded as follows: “[T]here is no  
24 prohibition against downloading movies, watching live TV or other live video.”<sup>11</sup>

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26 <sup>9</sup> *The Next Big Thing Has Arrived: The Samsung Galaxy S III*, STRAIGHT TALK BLOG, May 17,  
2013 (available at <http://www.straighttalkblog.com/>).

27 <sup>10</sup> Sascha Segan, *How Straight Talk’s TOS Make Most iPhone Users Criminals*, PCMAG.COM,  
January 17, 2013 (available at <http://www.pcmag.com/article2/0,2817,2414418,00.asp>).

28 <sup>11</sup> Sascha Segan, *Straight Talk Responds to “Unlimited” Complaints*, PCMAG.COM, January 28,  
2013 (available at <http://www.pcmag.com/article2/0,2817,2414768,00.asp>).

1           50.     Despite this proclamation, Straight Talk representatives continue to tell customers  
2 that their data was terminated for reasons Defendants have publicly claimed to not be prohibited  
3 uses. As recently as June 13, 2013, a Straight Talk representative posted on Straight Talk's  
4 Facebook page, in response to a customer asking why his data was terminated, that "unlimited"  
5 data is "not for audio/video streaming."

6           51.     Section 6 also discusses Straight Talk's discretion to throttle or terminate data.  
7 Section 6 purports to allow Straight Talk to throttle or terminate data service "in order to protect  
8 the Carrier's network from harm due to any cause including, without limitation, the excessive  
9 and/or improper use of Straight Talk service" or where Straight Talk believes a customer "is  
10 using the Straight Talk Unlimited Talk, Text and Mobile Web Access Plan in any manner  
11 prohibited above or whose usage, in Straight Talk's sole discretion, adversely impacts the  
12 Carrier's network or customer service levels." Despite seemingly putting some limits on its  
13 discretion in the above provisions, Section 6 concludes by purporting to allow Straight Talk to  
14 terminate data to anyone, at any time, with no notice, and for any reason or no reason at all:  
15 "Straight Talk may modify or cancel any Service or take corrective action at any time without  
16 prior notice and for any reason, including but not limited to your violation of this agreement." Up  
17 until approximately May 2013, Section 6 also provided as follows: "Notwithstanding the  
18 foregoing, Straight Talk reserves the right to deny service, deactivate or cancel existing service,  
19 terminate data connections and/or reduce data throughput speeds, to anyone for any reason at any  
20 time, in Straight Talk's sole discretion."

21           52.     Nowhere in Sections 6 or 7, or anywhere else in the Terms and Conditions, do  
22 Defendants state a specific data usage cap or limit.

23           **D.     Defendants Refuse To Restore Subscribers' Data, if Ever, Unless and Until**  
24           **Their Current Data Plans Expire and They Purchase New Data Plans.**

25           53.     Once Defendants throttle or terminate a customer's data, Defendants will not  
26 restore that customer's data until the customer's current data plan expires and the customer  
27 purchases a new data plan. This is true even if the customer has subscribed to the longer 6-month  
28 or 1-year data plan, as did Plaintiff David Hansell, and the expiration date of the plan is several

1 months away. Defendants explain to customers that “customer care representatives cannot  
2 override this policy to restore your service to its original data speed. Adding a plan prior to your  
3 service end date also will not restore your original data speed.”<sup>12</sup>

4 54. Even after waiting until their plan has expired and paying for a new data plan,  
5 some customers find that their data remains restricted in the new data plan period. One Straight  
6 Talk customer service representative admitted that Defendants maintain a secret “blacklist” of  
7 subscribers whose data will never be restored to full speed, even if they pay for a new data plan.  
8 Defendants provided the following after-the-fact response to one such customer’s complaint:  
9 “Unfortunately, you will no longer be able to go back to your previous data speed. Your data  
10 service will be restored but in a reduced speed.”<sup>13</sup>

11 **E. Defendants’ Practices are Unfair and Likely to Mislead Consumers.**

12 55. Reasonable consumers are likely to be misled by Defendants’ promise of  
13 “unlimited” data, particularly in combination with Defendants’ advertisements that encourage  
14 customers to use Straight Talk smartphones and data plans in typical ways such as browsing the  
15 internet, streaming or downloading music and videos, running apps, and using GPS navigation.  
16 As one article critiquing Defendants’ practices explains: “Consumers have to be able to quickly  
17 and easily compare competing mobile plans in order to make informed decisions. It should not  
18 require wading through paragraphs of terms and conditions just to discover that a huge selling  
19 point – unlimited – does not really mean what you might think.”<sup>14</sup>

20 56. Once customers discover the truth about Defendants’ “unlimited” plans, customers  
21 are outraged by Defendants’ lies and bad faith practices. Angry customers have flooded Straight  
22 Talk’s Facebook page, turning it into a virtual complaint board. Straight Talk’s official online  
23 forum, Straighttalkwirelessforum.com, is also full of complaints from frustrated customers whose  
24 data has been throttled or terminated. Many more customers have posted complaints on  
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26 <sup>12</sup> “High Data Usage Hotline” recorded message, reachable at 866.793.0474.

27 <sup>13</sup> Kuklinski, *supra*.

28 <sup>14</sup> Weinberg, Michael, *How Can “Unlimited Data” From a Company Called Straight Talk be Ambiguous?*, Public Knowledge, October 19, 2009 (available at <http://www.publicknowledge.org/node/2705>).

1 consumer websites such as Consumeraffairs.com, Boycottowl.com, Howardforums.com,  
2 Pissedconsumer.com, and Ripoffreport.com. The following are examples of typical complaints:

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4 "I bought a Straight Talk phone and the service. The service card you buy for the phone  
5 says unlimited data, unlimited talk text and web, which is all a lie. My internet on my  
6 phone keeps getting suspended to what they say is over usage of data. How can it be over  
7 usage of data if it's supposed to be unlimited? They won't help me and every time I call, I  
8 get hung up on when they transfer me to a recording. I will never deal with this company  
9 ever again. They are ripoffs, telling me the only way I can get my internet back is to go  
10 buy another card that I have already paid for that doesn't expire until the 21st of the  
11 month. So why would I go buy another card, when in a week they can do the same thing.  
12 Someone needs to look into their fraudulent service."<sup>15</sup>

13  
14 "I have never written a complaint before but straight talks lack of customer service got me  
15 so mad that I'm gonna write my first. We switched my daughters phone from at&t to  
16 straight talks 'unlimited' plan to save money. For the first 9 months all was well then 20  
17 days into the month they shut the internet off, no warning calls, texts, nothing so I called  
18 there so called customer service. First you can barely understand any of them but what I  
19 finally did get out of them is that unlimited is really 1.5 gigabytes. Supervisor said she  
20 needs to use wifi and that we have to buy another card to get internet back on before  
21 transferring me to the bogus recording others have referred to. They should be sued for  
22 false advertising."<sup>16</sup>

23  
24 "Straight Talk customer for just over a year. Apparently unlimited data doesn't mean  
25 unlimited anymore. They turned my data off and there is nothing I can do about it. They  
26 accused me of tethering my phone. I wouldn't have a clue how to do that. I have used a  
27 total of 10.9GB of data since I got my phone on Christmas Day 2012, which is about 2GB  
28 of data per month. Straight Talk hides their 'Terms and Conditions of Service' in a link at  
the bottom of their page. It is not a printable document like every other Straight Talk  
website page. It is a pop up that cannot be printed. The kicker is I JUST got a 'courtesy'  
text message from Straight Talk today saying, 'Your Straight Talk service expires soon'  
on May 17, 2013, so I went and refilled my service plan. They turned my data off within  
an hour of me paying. I am filing a complaint with the Better Business Bureau as well as  
contacting the California Public Utilities Commission. Please join me in reporting Straight  
Talk for their false advertising."<sup>17</sup>

"I have continually had my data shut off... Then one day it got shut off and I called in and  
asked why they keep shutting it off and the very rude agent said it's because I violated the  
user agreement? I asked how and she said it is because I am not supposed to be using  
data? I asked how am I not supposed to be using data when they sold me and I pay for the  
most expensive plan with "unlimited data"? She then said that we advertise it as unlimited  
data but you aren't allowed to use it, so you do have access to the data but if you use it, it

<sup>15</sup> [http://www.consumeraffairs.com/cell\\_phones/straight\\_talk\\_wireless.html](http://www.consumeraffairs.com/cell_phones/straight_talk_wireless.html)

<sup>16</sup> <http://www.pissedconsumer.com/reviews-by-company/straight-talk-wireless/dont-be-fooled-20130609416124.html>

<sup>17</sup> <http://www.straighttalkwirelessforum.com/viewtopic.php?f=6808&t=56981>

1 is violating the user agreement! WHAT?! That is the most illegal scam I have ever heard  
2 of!”<sup>18</sup>

3 57. Walmart has received thousands of complaints from angry customers who have  
4 purchased Straight Talk phones or service plan cards at their stores. One Walmart employee  
5 expressed his frustration and guilt for having sold Straight Talk phones and service to customers:

6 “I’ve been working at walmart for the last 3 years selling these phones and dealing with  
7 [Straight Talk’s] customer service. Within the last 6 months straight talk really started  
8 penalizing their customers... Now its almost everyday I see a customer come in who had  
9 just renewed their service less than a week ago and had their internet service throttled or  
10 otherwise inoperable. I used to talk straight talk up to customers left and right for their  
11 ‘unlimited’ plan. I have sold and activated dozens of iPhones on their plan just for then to  
12 get screwed over and you know who gets blamed for this? We do, the walmart  
13 representatives that talked them into spending \$650 to have an iPhone 5 for \$45 a month.  
14 I like helping customers not screwing them over.”<sup>19</sup>

15 58. Defendants benefit from their practices of falsely advertising that their Straight  
16 Talk data plans are “unlimited,” throttling or terminating customers’ data to cut costs or to keep  
17 their wireless network carrier partners happy, and relying on confusing and unconscionable  
18 Terms and Conditions that Defendants ensure customers will never see or read to justify their  
19 unfair and misleading practices.

20 59. Defendants’ misrepresentations regarding their “unlimited” data plans are material  
21 to reasonable consumers.

22 60. Defendants’ practice of throttling or terminating customers’ data pursuant to secret  
23 data usage caps, or for any other reason, is unfair and is done in bad faith.

24 61. Defendants’ misrepresentations and practices injured and caused Plaintiffs and  
25 Class members to lose money or property in that they purchased expensive smartphones, Straight  
26 Talk SIM cards, and Straight Talk “unlimited” data plans, but Defendants throttled or terminated  
27 the promised “unlimited” data rendering Plaintiffs’ and Class members’ smartphones essentially  
28 useless for their intended purposes.

<sup>18</sup> <http://www.pissedconsumer.com/reviews-by-company/straight-talk-wireless/straight-talk-shut-off-data-on-unlimited-data-plan-20130302389374.html>

<sup>19</sup> Comment by “jatwalmart” to article by Alex Kuklinski, *supra*.

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**PLAINTIFFS' FACTUAL ALLEGATIONS**

**Plaintiff Edward Tooley**

62. Prior to February 2013, Plaintiff Edward Tooley IV had wireless phone service through Boost Mobile. Boost Mobile did not offer unlimited data. Instead, Boost's advertising and materials expressly provided that Mr. Tooley's plan was limited to 2.5GB of high speed data, after which the data speed would be throttled.

63. Defendants' marketing and advertisements promising "unlimited" data induced Mr. Tooley to switch to Straight Talk. Relying on Defendants' promises, on or about January 2013, Mr. Tooley purchased an unlocked Samsung Galaxy S III smartphone from an acquaintance for \$350 for use with Straight Talk's "Bring Your Own Phone" program. Mr. Tooley also purchased a compatible Straight Talk SIM card from Walmart.com for approximately \$15 and a Straight Talk "unlimited" 30-day service plan card for \$45 from his local Walmart store.

64. On or about February 6, 2013, Defendants delivered the Straight Talk SIM card to Mr. Tooley. Mr. Tooley opened the package and followed the activation instructions by inserting the SIM card into his phone and calling customer service to activate his phone and Straight Talk's "unlimited" 30-day data plan.

65. Defendants did not adequately disclose Straight Talk's Terms and Conditions during these purchases and activation, and Mr. Tooley was at all times unaware of any such terms.

66. Mr. Tooley used his smartphone and Straight Talk data plan to access email, browse websites, navigate via Google Maps, occasionally stream music using the Pandora app, and occasionally watch videos on YouTube. While at home, Mr. Tooley typically accessed the internet on his phone via WiFi. Mr. Tooley never tethered his phone to a computer to access Straight Talk's data and he never used his phone as a WiFi hotspot.

67. Within only a few days after activating his Straight Talk "unlimited" data plan, Defendants throttled Mr. Tooley's data to extremely slow speeds without warning. Mr. Tooley

1 called Straight Talk's customer service, and the representative told him that his data would not be  
2 restored to full speed until his new billing cycle began on March 6, 2013.

3 68. Defendants restored Mr. Tooley's data speed on March 6 upon his payment. But,  
4 only ten days later on March 16, Defendants terminated Mr. Tooley's data altogether without  
5 warning. Mr. Tooley could no longer browse websites, use Google Maps or other smartphone  
6 apps, or even send an MMS message.

7 69. Despite spending hours on the telephone with Straight Talk's customer service,  
8 Mr. Tooley was unable to get a straight answer from Defendants regarding why they terminated  
9 his data. Instead, Defendants repeatedly transferred him to Straight Talk's "High Data Usage  
10 Hotline" recorded message.

11 70. After multiple phone calls, a customer service representative promised Mr. Tooley  
12 that his data would be restored right away if he paid for another month of service. In reliance on  
13 this promise, Mr. Tooley authorized the representative to charge him for another month. But his  
14 data was not immediately restored as promised, and he thus paid twice as much for his  
15 "unlimited" data plan for the period March 16 through April 6 without actually receiving *any*  
16 access to data.

17 71. In mid-June, Mr. Tooley switched his phone service to Sprint and purchased a  
18 Sprint Samsung Galaxy S III smartphone.

19 72. Mr. Tooley reasonably relied upon Defendants' material misrepresentations and  
20 omissions, which, in conjunction with Defendants' acts and practices alleged herein caused Mr.  
21 Tooley to suffer harm, injury in fact, and lost money or property. Had Mr. Tooley known that  
22 Straight Talk's purportedly "unlimited" plan was in fact limited, and that Defendants would  
23 throttle or terminate his data at any time without notice, he would not have paid for the SIM card,  
24 the unlocked smartphone, or the Straight Talk data plan.

25 **Plaintiff Christopher Valdez**

26 73. Prior to January 9, 2013, Plaintiff Christopher Valdez had a limited voice and data  
27 plan with T-Mobile.  
28

1           74. Defendants' marketing and advertisements for "unlimited data" displayed in Mr.  
2 Valdez's local Walmart store and on StraightTalk.com induced Mr. Valdez to switch to Straight  
3 Talk. Relying on Defendants' promises, on or about January 9, 2013, Mr. Valdez purchased a  
4 Straight Talk SIM card and Straight Talk's "unlimited" 30-day service plan from  
5 StraightTalk.com for approximately \$60 total.

6           75. On or about January 14, 2013, Defendants delivered the Straight Talk SIM card to  
7 Mr. Valdez. Mr. Valdez opened the package and followed the activation instructions by inserting  
8 the SIM card into his smartphone and going to Straighttalksim.com to activate his phone and  
9 Straight Talk's "unlimited" 30-day data plan.

10           76. Defendants did not adequately disclose Straight Talk's Terms and Conditions  
11 during these purchases and activation, and Mr. Valdez was at all times unaware of any such  
12 terms.

13           77. Mr. Valdez used his smartphone and Straight Talk data plan to access email,  
14 navigate via Google Maps, browse websites, and occasionally listen to streaming music. While at  
15 home and at work, Mr. Valdez typically accessed the internet on his phone via WiFi. He  
16 primarily used Straight Talk's cellular data during his commute to work. Mr. Valdez never  
17 tethered his phone to a computer to access Straight Talk's data and he never used his phone as a  
18 WiFi hotspot.

19           78. On January 30, 2013, only sixteen days after activating his Straight Talk data plan,  
20 Straight Talk throttled Mr. Valdez's data service to extremely slow speeds without warning. Mr.  
21 Valdez thereafter tested his data download speed and found that it was less than 128Kbps, similar  
22 to dial-up speeds.

23           79. Straight Talk's customer service informed Mr. Valdez that Defendants throttled his  
24 data because he had allegedly violated Sections 6 and 7 of the Straight Talk Terms and  
25 Conditions. Having never seen the Terms and Conditions, Mr. Valdez asked the representative  
26 where he could find them. She directed him to the StraightTalk.com website, and then to the  
27 footer at the bottom of the page containing the link to a small pop-up window with the Terms and  
28

1 Conditions. Mr. Valdez read Sections 6 and 7 and asked the customer service representative to  
2 explain how he violated Sections 6 and 7. She responded that she did not know.

3 80. During this call, Mr. Valdez checked the data usage meter on his Nexus 4  
4 smartphone, which showed he had used only 700MB of data since he had activated his Straight  
5 Talk data plan. Mr. Valdez asked the customer service representative whether Straight Talk had a  
6 data usage limit and, if so, what it was. Straight Talk's customer service representative refused to  
7 answer this question.

8 81. The customer service representative also refused to issue Mr. Valdez a refund  
9 upon request and informed him that Straight Talk would not lift his data restriction before the  
10 start of his next month of service on February 14, which was over two weeks away. The  
11 representative then urged Mr. Valdez to pay for another month of service, claiming that if he did  
12 so, his data would be restored on February 14.

13 82. Mr. Valdez asked to speak to and was transferred to a supervisor. The supervisor  
14 told Mr. Valdez that he had "misused" his data, but when pressed the supervisor admitted that he  
15 did not know how or in what manner Mr. Valdez had purportedly misused his data. The  
16 supervisor further stated that Straight Talk's systems do not contain any information on customer  
17 data usage, and that there was no way to determine how much data Mr. Valdez had used or in  
18 what manner the data was used before Defendants throttled his data speeds. The supervisor also  
19 told Mr. Valdez that Straight Talk did not need to notify customers before throttling or  
20 terminating their data service. The supervisor then urged Mr. Valdez to transmit payment for  
21 another month of service, even though his current plan did not expire for another two weeks.

22 83. One day later, Defendants terminated Mr. Valdez's data altogether.

23 84. Mr. Valdez immediately began researching other carrier options, and decided to  
24 transfer his service to Solavei wireless.

25 85. Mr. Valdez filed a complaint against Defendant TracFone with the Southeast  
26 Florida Better Business Bureau ("BBB"). Mr. Valdez requested a refund in his complaint.  
27  
28

1 TracFone responded that “No Refunds will be issued for this SIM Card or Service Card.” Mr.  
2 Valdez’s complaint was then “administratively closed.”

3 86. Mr. Valdez reasonably relied upon Defendants’ material misrepresentations and  
4 omissions, which, in conjunction with Defendants’ acts and practices alleged herein caused Mr.  
5 Valdez to suffer harm, injury in fact, and lost money or property. Had Mr. Valdez known that  
6 Straight Talk's purportedly “unlimited” plan was in fact limited, and that Defendants would  
7 throttle or terminate his data at any time without notice, he would not have paid for the Straight  
8 Talk SIM card or data plan.

9 **Plaintiff David Hansell**

10 87. Prior to July 2012, Plaintiff David Hansell had cellular service with Verizon  
11 Wireless.

12 88. Defendants’ marketing and advertisements for the Straight Talk “unlimited” data  
13 plan induced Mr. Hansell to switch to Straight Talk. Relying on Defendants’ promises, Mr.  
14 Hansell purchased an unlocked Samsung Galaxy Exhibit 4G smartphone from Walmart.com for  
15 approximately \$174, along with a Straight Talk SIM card and an “unlimited” 30-day service plan  
16 from StraightTalk.com for \$60 total.

17 89. On July 14, 2012, Mr. Hansell purchased an “Unlimited 1 Year” plan from  
18 StraightTalk.com for \$495.00 plus tax.

19 90. On February 27, 2013, Mr. Hansell purchased a Straight Talk branded and locked  
20 Samsung Galaxy S II smartphone for \$322.92 from a Walmart store.

21 91. Defendants did not adequately disclose the existence of Straight Talk’s Terms and  
22 Conditions during these purchases and transactions, and Mr. Hansell at all times was unaware of  
23 any such Terms and Conditions.

24 92. Due to difficulty transferring Mr. Hansell's phone number from his Straight Talk  
25 SIM card to his new phone, Straight Talk agreed to extend the expiration date of his 1 Year Plan  
26 from July 14, 2013, to August 20, 2013.

1           93.     Mr. Hansell primarily used his Straight Talk data to access Google Maps GPS  
2 navigation and occasionally stream Google Music during his commute to and from work. While  
3 at home and at work, Mr. Hansell typically accessed the internet on his phone via WiFi. Mr.  
4 Hansell never tethered his phone to a computer to access Straight Talk's data and he never used  
5 his phone as a WiFi hotspot.

6           94.     On June 7, 2013, Defendants terminated Mr. Hansell's data without warning. Mr.  
7 Hansell was consequently unable to use his smartphone for its intended purpose of sending or  
8 receiving email, sending MMS messages, browsing the web, or using smartphone apps.

9           95.     The same day, Mr. Hansell sent an email to Straight Talk customer service asking  
10 why his data was not working. A Straight Talk representative provided the following email  
11 response: "We regret to inform you that your account has been reviewed and the data service of  
12 your phone has been suspended. If you wish to better understand why your data is not working,  
13 please call 1-866-793-0474." The phone number the representative provided is to the "High Data  
14 Usage Hotline" recorded message.

15           96.     Mr. Hansell sent a reply email asking when his data service would be restored.  
16 Three days later, on June 10, Mr. Hansell received the following email response: "Please be  
17 informed that your service end date will be on August 20. Your data will be restored 24 hours  
18 after the renewal of your service."

19           97.     As Mr. Hansell could not afford to go without cellular data for two months, he  
20 signed up for service with Virgin Mobile on June 13, 2013. Because his existing Samsung  
21 Galaxy S II was locked to Straight Talk's network, he purchased a new Samsung Galaxy S II  
22 smartphone for use on Virgin Mobile.

23           98.     Mr. Hansell requested via email that Straight Talk refund him the over two months  
24 of service remaining on his data plan, but received no response.

25           99.     Mr. Hansell reasonably relied upon Defendants' material misrepresentations and  
26 omissions, which, in conjunction with Defendants' acts and practices alleged herein caused Mr.  
27 Hansell to suffer harm, injury in fact, and lost money or property. Had Mr. Hansell known that  
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1 Straight Talk's purportedly "unlimited" plan was in fact limited, and that Defendants would  
2 throttle or terminate his data at any time without notice, he would not have purchased his Straight  
3 Talk smartphone or Straight Talk's "Unlimited 1 Year" data plan.

4 **CLASS ACTION ALLEGATIONS**

5 100. Plaintiffs bring this class-action lawsuit on behalf of themselves and the proposed  
6 Class members under Rule 23(b)(3) of the Federal Rules of Civil Procedure.

7 101. Plaintiffs seek certification of the following Class:

8 All persons in the United States who purchased an "unlimited" Straight Talk wireless  
9 service plan and whose data was throttled or terminated prior to the expiration of the  
10 service plan.

11 Specifically excluded from the Class are Defendants and any entities in which Defendants have a  
12 controlling interest, Defendants' agents and employees, the judge to whom this action is assigned,  
13 members of the judge's staff, and the judge's immediate family.

14 102. **Numerosity.** Plaintiffs do not know the exact number of Class members but  
15 believe that the Class comprises tens of thousands, if not hundreds of thousands, of consumers  
16 throughout the United States. As such, Class members are so numerous that joinder of all  
17 members is impracticable.

18 103. **Commonality and predominance.** Well-defined, nearly identical legal or factual  
19 questions affect all Class members. These questions predominate over questions that might affect  
20 individual Class members. These common questions include, but are not limited to, the  
21 following:

22 a. Whether Defendants offered to Plaintiffs and Class members "unlimited"  
23 data plans;

24 b. Whether Plaintiffs and Class members accepted Defendants' offer for  
25 "unlimited" data plans;

26 c. Whether the Straight Talk Terms and Conditions were adequately disclosed  
27 to and were consented to by Plaintiffs and Class members;

28 d. Whether the Straight Talk Terms and Conditions contain illusory terms;

- 1 e. Whether the Straight Talk Terms and Conditions contain unconscionable  
2 terms;
- 3 f. Whether Defendants breached their contracts with Plaintiffs and Class  
4 members by throttling or terminating their data prior to the expiration of their data plans;
- 5 g. Whether Defendants acted in bad faith or abused their discretion in  
6 throttling or terminating Plaintiffs' and Class members' data prior to the expiration of their data  
7 plans;
- 8 h. Whether Defendants' practice of throttling or terminating Plaintiffs' and  
9 Class members' data went against Plaintiffs' and Class members' objectively reasonable  
10 expectations;
- 11 i. Whether Defendants' promise of "unlimited" data was likely to mislead  
12 objectively reasonable consumers;
- 13 j. Whether Defendants engaged in deceptive and unfair business and trade  
14 practices under Florida or California law;
- 15 k. Whether Plaintiffs and Class members are entitled to restitution and other  
16 equitable relief;
- 17 l. Whether Plaintiffs and Class members are entitled to damages; and
- 18 m. Whether Defendants should be enjoined from engaging in this type of  
19 conduct.

20 104. **Typicality.** Plaintiffs' claims are typical of Class members' claims. Plaintiffs and  
21 the Class members all sustained injury as a direct result of Defendants' practice of throttling or  
22 terminating data prior to the expiration of their "unlimited" data plans.

23 105. **Adequacy.** Plaintiffs will fairly and adequately protect Class members' interests.  
24 Plaintiffs have no interests antagonistic to Class members' interests, and Plaintiffs have retained  
25 counsel that has considerable experience and success in prosecuting complex class-action and  
26 consumer-protection cases.

1  
2 106. *Superiority.* A class action is the superior method for fairly and efficiently  
3 adjudicating this controversy for the following reasons without limitation:

4 a. Class members' claims are relatively small compared to the burden and  
5 expense required to litigate their claims individually, so it would be impracticable for Class  
6 members to seek individual redress for Defendants' illegal and deceptive conduct;

7 b. Even if Class members could afford individual litigation, the court system  
8 could not. Individual litigation creates the potential for inconsistent or contradictory judgments  
9 and increases the delay and expense to all parties and to the court system. By contrast, a class  
10 action presents far fewer management difficulties and provides the benefits of single adjudication,  
11 economy of scale, and comprehensive supervision by a single court; and

12 c. Plaintiffs anticipate no unusual difficulties in managing this class action.

13 **INAPPLICABLE OR UNENFORCEABLE ARBITRATION CLAUSE**

14 107. Section 15 of the Straight Talk Terms and Conditions purports to require that  
15 certain disputes be individually arbitrated. Section 15 is unenforceable because it is  
16 unconscionable and/or is against public policy. Section 15 is substantively unconscionable  
17 because, among other reasons, it lacks mutuality in that it purports to require consumers to  
18 arbitrate all claims while explicitly permitting Defendants to bring state or federal lawsuits for  
19 certain types of claims important to Defendants; it requires consumers to bear their own  
20 attorneys' fees and costs, even where, as here, the law allows for the prevailing party to be  
21 awarded such fees and costs; it requires arbitrations to occur in Miami, Florida regardless of the  
22 consumer's state of residence; it prohibits certain types of damages; and it provides that  
23 consumers must pay a minimum claim filing fee of \$200 per AAA rules effective March 1, 2013.  
24 Section 15 is procedurally unconscionable because it is presented to consumers, if at all, on a  
25 take-it-or-leave-it basis and is not conspicuous.

26 108. Section 15 is not enforceable as to any of Plaintiffs' and Class members' claims  
27 because it is illusory, in that Defendants reserve the right to modify or change it at any time  
28 without notice to or consent from consumers.



1 disclose the existence of such terms to Plaintiffs or Class members prior to or at the time of the  
2 purchase and activation of their Straight Talk data plans; (b) require Plaintiffs or Class members  
3 to acknowledge or assent to the Terms and Conditions; or (c) provide an opportunity for Plaintiffs  
4 or Class members to reject the terms in the event that they discover the terms subsequent to the  
5 purchase and activation of their data plans. Defendants also do not provide any new  
6 consideration in exchange for any subsequent agreement to the Terms and Conditions.

7 119. The Straight Talk Terms and Conditions do not form a contract and are not a part  
8 of the above-described bargain because the terms described therein are illusory. Specifically, the  
9 Terms and Conditions provide that Straight Talk may change or modify the terms at any time, in  
10 its sole discretion, and without notice to or consent from Plaintiffs or Class members, rendering  
11 all of the terms therein illusory.

12 120. In the alternative, assuming that the Straight Talk Terms and Conditions do form  
13 part of the basis of the bargain, Sections 6, 7, and 15 of the Terms and Conditions are  
14 unconscionable and, therefore, unenforceable.

15 121. In the alternative, assuming that the Straight Talk Terms and Conditions do form  
16 part of the basis of the bargain, Sections 6 and 7 of the Terms and Conditions are so  
17 contradictory, vague, and ambiguous as to render them meaningless and unenforceable.

18 122. Defendants directly benefitted from, and are being unjustly enriched by, their  
19 breach of their promise to provide “unlimited” data.

20 123. As a result of Defendants’ breach of their promise to provide “unlimited” data,  
21 Plaintiffs and Class members have been harmed and have suffered damages in an amount to be  
22 determined by this Court, including interest on all liquidated sums.

## 23 **COUNT II**

### 24 **Breach of the Covenant of Good Faith and Fair Dealing**

25 124. Plaintiffs reallege and incorporate by reference every allegation set forth in the  
26 preceding paragraphs as though alleged in this Count.

27 125. Plaintiffs and Class members bring this claim in the alternative to their Breach of  
28 Contract claim.



1 “unlimited” data plans, phones, and SIM cards, from Defendants’ conduct in misrepresenting that  
2 their data plans were “unlimited” and regularly throttling or terminating “unlimited” customers’  
3 data access.

4 135. Plaintiffs’ and Class members’ detriment and Defendants’ enrichment are  
5 traceable to, and resulted directly and proximately from, the conduct challenged in this  
6 Complaint.

7 136. It would be inequitable for Defendants to retain the benefits they received and  
8 continue to receive from Plaintiffs’ and Class members without payment to Plaintiffs and Class  
9 members.

10 137. Plaintiffs and the Class have no adequate remedy at law.

11 138. Plaintiffs seek disgorgement of and/or a constructive trust on all of the inequitable  
12 payments and profits Defendants retained from Plaintiffs and Class members.

13  
14 **COUNT IV**  
15 **Violations of Florida’s Deceptive and Unfair Trade Practices Act**  
16 **Florida Statutes § 501.201, et seq.**

17 139. Plaintiffs reallege and incorporate by reference every allegation set forth in the  
18 preceding paragraphs as though alleged in this Count.

19 140. Section 501.204 of the Florida Statutes prohibits “unfair,” “deceptive,” or  
20 “unconscionable” acts or practices.

21 141. Defendants’ acts and practices of regularly throttling or terminating “unlimited”  
22 customers’ data, often without notice, were “unfair” because they offend established public policy  
23 and are immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers.

24 142. Defendants’ material misrepresentations that their data plans were “unlimited”  
25 when they were not, and Defendants’ failure to disclose and/or active concealment of material  
26 information regarding their practice of regularly throttling or terminating customers’ data, were  
27 “deceptive” in that they were likely to deceive consumers acting reasonably in the same  
28 circumstances.





1           158. Plaintiffs' and Class members' purchases of Straight Talk service plans,  
2 compatible phones, and SIM cards constitute "transactions," as defined by Cal. Civ. Code §  
3 1761(e).

4           159. Plaintiffs and Class members purchased Straight Talk service plans, compatible  
5 phones, and SIM cards for personal, family, and household purposes as meant by Cal. Civ. Code  
6 § 1761(d).

7           160. Venue is proper under Cal. Civil Code § 1780(d) because a substantial portion of  
8 the transactions at issue occurred in this county. Plaintiffs' declarations establishing that this  
9 Court has proper venue for this action are attached as Exhibit A.

10           161. Defendants deceived consumers in that they misrepresented that Straight Talk  
11 service plans offered "unlimited" data and also failed to disclose or actively concealed that they  
12 would regularly throttle or terminate customers' data.

13           162. Defendants' misrepresentations, active concealment, and failures to disclose  
14 violated the CLRA in the following manner:

15           a. Defendants misrepresented that their Straight Talk service plans, phones,  
16 and SIM cards had characteristics, benefits, or uses that they did not have (Cal. Civ. Code  
17 § 1770(a)(5));

18           b. Defendants misrepresented that their Straight Talk service plans, phones,  
19 and SIM cards were of a particular standard, quality, and/or grade when they were of another  
20 (Cal. Civ. Code § 1770(a)(7));

21           c. Defendants advertised their Straight Talk service plans, phones, and SIM  
22 cards with an intent not to sell them as advertised (Cal. Civ. Code § 1770(a)(9));

23           d. Defendants misrepresented that their Straight Talk service plans, phones,  
24 and SIM cards conferred or involved rights, remedies, or obligations that they did not have (Cal.  
25 Civ. Code § 1770(a)(14));

1 e. Defendants misrepresented that their Straight Talk service plans, phones,  
2 and SIM cards were supplied in accordance with previous representations when they were not  
3 (Cal. Civ. Code § 1770(a)(16));

4 f. Defendants inserted unconscionable provisions in the Straight Talk Terms  
5 and Conditions, including Sections 6, 7, and 15 (Cal. Civ. Code § 1770(a)(19)).

6 163. Defendants' misrepresentations and nondisclosures regarding Straight Talk  
7 "unlimited" data plans and their practice of regularly throttling and terminating customers' data  
8 were material to Plaintiffs and Class members because a reasonable person would have  
9 considered them important in deciding whether or not to purchase the Straight Talk service plans,  
10 phones, and SIM cards, and because Defendants had a duty to disclose the truth.

11 164. Plaintiffs and Class members relied upon Defendants' material misrepresentations  
12 and nondisclosures, and had Plaintiffs and Class members known the truth, they would have acted  
13 differently.

14 165. As a direct and proximate result of Defendants' material misrepresentations and  
15 nondisclosures, Plaintiffs and the Class have been irreparably harmed.

16 166. On behalf of the Class, Plaintiffs seek injunctive relief in the form of an order  
17 enjoining Defendants from making such material misrepresentations and failing to disclose or  
18 actively concealing their practice of throttling or terminating data. Plaintiffs also seek attorneys'  
19 fees and costs.

20 167. In accordance with Cal. Civ. Code § 1782(a), on July 24, 2013, Plaintiffs' counsel  
21 served Defendants with notice of their CLRA violations by certified mail, return receipt  
22 requested. A true and correct copy of that notice is attached as Exhibit B.

23 168. If Defendants fail to provide appropriate relief for their CLRA violations within 30  
24 days of Plaintiffs' July 24, 2013, notification letter, Plaintiffs will amend this complaint to seek  
25 compensatory and exemplary damages as permitted by Cal. Civ. Code §§ 1780 and 1782(b).  
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**COUNT VII**  
**Unconscionability**

169. Plaintiffs reallege and incorporate by reference every allegation set forth in the preceding paragraphs as though alleged in this Count.

170. Defendants' practice of offering "unlimited" data plans while simultaneously purporting to retain the right to arbitrarily and unilaterally throttle or terminate data at any time and for any reason, with or without warning, is unfair and unconscionable.

171. Plaintiffs and Class members have no meaningful choice with respect to the Straight Talk Terms and Conditions or Defendants' unilateral and arbitrary practice of throttling and terminating data. The Terms and Conditions were not adequately disclosed, if at all, to Plaintiffs and Class members before or during their purchases and activations of Straight Talk's service plans, phones, and SIM cards, and are in any event offered on a take-it-or-leave-it basis. Defendants do not offer Plaintiffs or Class members an opportunity to reject the terms, and Straight Talk data plans and SIM cards are non-refundable.

172. Defendants' purported discretion to throttle or terminate data is unreasonably favorable to Defendants and unduly harsh with respect to Plaintiffs and the Class, and is therefore substantively unconscionable.

173. Defendants' enforcement of such unconscionable terms have harmed Plaintiffs and Class members and have caused them to suffer damages in an amount to be determined by this Court, including interest on all liquidated sums.

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**PRAYER FOR RELIEF**

1. On behalf of themselves and the Class, Plaintiffs request that the Court order relief and enter judgment against Defendants as follows:

2. An order certifying Plaintiffs' proposed Class and appointing Plaintiffs and their counsel to represent the Class;

3. An order that Defendants are permanently enjoined from their improper conduct and practices as alleged;



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*Attorneys for Plaintiffs*

# **EXHIBIT A**

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6 Telephone: (415) 956-1000  
7 E-mail: msobol@lchb.com  
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9 Daniel Hattis (State Bar No. 232141)  
10 HATTIS LAW  
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12 Menlo Park, CA 94025  
13 Telephone: (650) 980-1990  
14 E-mail: dan@hattislaw.com

15 Attorneys for Plaintiff

16 UNITED STATES DISTRICT COURT  
17 NORTHERN DISTRICT OF CALIFORNIA  
18 SAN FRANCISCO DIVISION

19 GABRIEL CHARLES, MICHAEL  
20 FREELAND, , BRIAN GERVAIS,  
21 EDWIN GLÓVER, DAVID HANSEL,  
22 EDWARD TOOLEY, and  
23 CHRISTOPHER VALDEZ, individually  
24 and on behalf of all others similarly  
25 situated,

26 Plaintiffs,

27 v.

28 TRACFONE WIRELESS, INC., d.b.a.  
STRAIGHT TALK WIRELESS and  
WAL-MART STORES, INC.,

Defendants.

Case No. \_\_\_\_\_

**CLASS ACTION COMPLAINT**

**DECLARATION OF DAVID HANSELL**

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I, David Hansell, hereby declare and state as follows:

1. I am over the age of 18, and a Plaintiff in this action. The facts contained in this declaration are based on my personal knowledge, and if called upon to do so, I could and would testify competently hereto.

2. The complaint in this action, filed concurrently with this declaration, is filed in the proper place for trial under California Civil Code § 1780(d), because this is a county in which the Defendants do business and where a substantial portion of the transactions occurred.

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

Executed on July 11, 2013, in Redondo Beach California.

  
\_\_\_\_\_  
David Hansell

1 Michael W. Sobol (State Bar No. 194857)  
2 Nicole D. Reynolds (State Bar No. 246255)  
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15 Attorneys for Plaintiff

16 UNITED STATES DISTRICT COURT  
17 NORTHERN DISTRICT OF CALIFORNIA  
18 SAN FRANCISCO DIVISION

19 GABRIEL CHARLES, MICHAEL  
20 FREELAND, , BRIAN GERVAIS,  
21 EDWIN GLOVER, DAVID HANSEL,  
22 EDWARD TOOLEY, and  
23 CHRISTOPHER VALDEZ, individually  
24 and on behalf of all others similarly  
25 situated,

26 Plaintiffs,

27 v.

28 TRACFONE WIRELESS, INC., d.b.a.  
STRAIGHT TALK WIRELESS and  
WAL-MART STORES, INC.,

Defendants.

Case No. \_\_\_\_\_

**CLASS ACTION COMPLAINT**

**DECLARATION OF EDWARD TOOLEY**

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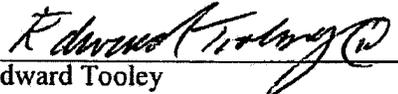
I, Edward Tooley, hereby declare and state as follows:

1. I am over the age of 18, and a Plaintiff in this action. The facts contained in this declaration are based on my personal knowledge, and if called upon to do so, I could and would testify competently hereto.

2. The complaint in this action, filed concurrently with this declaration, is filed in the proper place for trial under California Civil Code § 1780(d), because this is a county in which the Defendants do business and where a substantial portion of the transactions occurred.

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

Executed on July 11, 2013, in Alameda, California.

  
Edward Tooley JUL 11 2013

1 Michael W. Sobol (State Bar No. 194857)  
2 Nicole D. Reynolds (State Bar No. 246255)  
3 LIEFF CABRASER HEIMANN & BERNSTEIN LLP  
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15 Attorneys for Plaintiff

16 UNITED STATES DISTRICT COURT  
17 NORTHERN DISTRICT OF CALIFORNIA  
18 SAN FRANCISCO DIVISION

19 GABRIEL CHARLES, MICHAEL  
20 FREELAND, , BRIAN GERVAIS,  
21 EDWIN GLOVER, DAVID HANSEL,  
22 EDWARD TOOLEY, and  
23 CHRISTOPHER VALDEZ, individually  
24 and on behalf of all others similarly  
25 situated,

26 Plaintiffs,

27 v.

28 TRACFONE WIRELESS, INC., d.b.a.  
STRAIGHT TALK WIRELESS and  
WAL-MART STORES, INC.,

Defendants.

Case No. \_\_\_\_\_

**CLASS ACTION COMPLAINT**

**DECLARATION OF CHRISTOPHER  
VALDEZ**

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I, Christopher Valdez, hereby declare and state as follows:

1. I am over the age of 18, and a Plaintiff in this action. The facts contained in this declaration are based on my personal knowledge, and if called upon to do so, I could and would testify competently hereto.

2. The complaint in this action, filed concurrently with this declaration, is filed in the proper place for trial under California Civil Code § 1780(d), because this is a county in which the Defendants do business and where a substantial portion of the transactions occurred.

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

Executed on July 11, 2013, in San Diego California.

  
\_\_\_\_\_  
Christopher Valdez

# **EXHIBIT B**

July 24, 2013

**VIA CERTIFIED MAIL RETURN RECEIPT REQUESTED**

Frederick J. Pollak, President and CEO  
TracFone Wireless, Inc.  
9700 NW 112 Ave.  
Miami, FL 33178

Mike Duke, President and CEO  
Wal-Mart Stores, Inc.  
702 SW 8<sup>th</sup> Street  
Bentonville, AR 72716

Registered Agent for Service of Process  
Corporate Creations Network, Inc.  
131-A Stoney Circle, Suite 500  
Santa Rosa, CA 95401

Registered Agent for Service of Process  
C.T. Corporation System  
818 W. Seventh Street  
Los Angeles, CA 90017

Re: Notice of Violation of California Consumer Legal Remedies Act

Dear Mr. Pollak and Mr. Duke:

We represent Edward Tooley, David Hansel, and Christopher Valdez, who purchased Straight Talk “unlimited” wireless phone plans. We send this letter under the California Consumers Legal Remedies Act, California Civil Code Section 1750 *et seq.* (“CLRA”), to notify TracFone Wireless, Inc. (“TracFone”) and Wal-Mart Stores, Inc. (“Walmart”) that their practice of advertising Straight Talk plans as providing “unlimited” data, while also regularly throttling or terminating subscribers’ data, often without notice, when their data usage exceeds certain undisclosed limits or arbitrarily at the direction of network carrier partners, violates the CLRA. We demand that TracFone and Walmart rectify their violations within 30 days of receipt of this letter.

TracFone and Walmart misrepresent to consumers that their Straight Talk wireless phone plans offer “unlimited” web and data access and that consumers may use the data access to operate their smartphones as virtual PCs by browsing the internet, streaming music and videos, or playing video games. In reality, TracFone and Walmart, through their joint venture Straight Talk, regularly throttle subscribers’ data speeds or terminate data altogether without notice. TracFone and Walmart refuse to disclose their data usage caps or explain under what circumstances they might throttle or terminate data, making the practice all the more unclear and deceptive to consumers. Moreover, TracFone and Walmart purport to rely on the Straight Talk Terms and Conditions of Service when throttling or terminating subscribers’ data, but

these terms are never given to or seen by customers and are riddled with vague, contradictory, unconscionable, and illusory terms.

Relying on TracFone's and Walmart's promise of "unlimited" data, on or about January 2013, Edward Tooley purchased an unlocked Samsung Galaxy S III smartphone from an acquaintance for \$350 for use with Straight Talk's "Bring Your Own Phone" program. Mr. Tooley also purchased a compatible Straight Talk SIM card from Walmart.com for approximately \$15 and Straight Talk's "unlimited" 30-day service plan for \$45 from his local Walmart store. In February, within only a few days after activating his Straight Talk "unlimited" data plan, Straight Talk throttled Mr. Tooley's data to extremely slow speeds without warning. Straight Talk restored Mr. Tooley's data speed on March 6 upon his payment. But, only ten days later on March 16, Straight Talk terminated Mr. Tooley's data access altogether without warning. After multiple phone calls, a customer service representative promised Mr. Tooley that his data would be restored right away if he paid for another month of service. In reliance on this promise, Mr. Tooley authorized the representative to charge him for another month. But his data was not immediately restored as promised.

Similarly, advertisements for the Straight Talk "unlimited" data plan induced David Hansell to purchase a 1-year plan from StraightTalk.com for \$495.00. Mr. Hansell also purchased a Straight Talk branded and locked Samsung Galaxy S II smartphone from a Walmart store for \$322.92. On June 7, 2013, Defendants terminated Mr. Hansell's data without warning. Straight Talk informed him that his data would not be restored until his current plan expired on August 20, 2013 and he paid for a new plan.

Advertisements for Straight Talk's "unlimited" data plan likewise induced Christopher Valdez to purchase a Straight Talk SIM card and data plan on StraightTalk.com for his unlocked smartphone. On January 30, 2013, only sixteen days after he activated his plan and after using only 700MB of data, Straight Talk throttled Mr. Valdez's data speed without warning. Straight Talk terminated Mr. Valdez's data altogether the next day. Straight Talk informed Mr. Valdez his data would not be restored until his current plan expired on February 14.

TracFone's and Walmart's material misrepresentations, active concealment, and failures to disclose violated the CLRA in the following manner:

1. TracFone and Walmart misrepresented that their Straight Talk phones, SIM cards, and data plans had characteristics, benefits, or uses that they did not have (Cal. Civ. Code § 1770(a)(5));
2. TracFone and Walmart misrepresented that their Straight Talk phones, SIM cards, and data plans were of a particular standard, quality, and/or grade when they were of another (Cal. Civ. Code § 1770(a)(7));

3. TracFone and Walmart advertised their Straight Talk phones, SIM cards, and data plans with an intent not to sell them as advertised (Cal. Civ. Code § 1770(a)(9));
4. TracFone and Walmart misrepresented that their Straight Talk phones, SIM cards, and data plans conferred or involved rights, remedies, or obligations that they did not have (Cal. Civ. Code § 1770(a)(14));
5. TracFone and Walmart misrepresented that their Straight Talk phones, SIM cards, and data plans were supplied in accordance with previous representations when they were not (Cal. Civ. Code § 1770(a)(16));
6. TracFone and Walmart inserted unconscionable provisions in the Straight Talk Terms and Conditions (Cal. Civ. Code § 1770(a)(19)).

We demand that within thirty (30) days of receiving this letter, TracFone and Walmart agree to (1) refrain from engaging in the deceptive practices described above at any time in the future; and (2) return all money that Straight Talk “unlimited” subscribers—whose data Straight Talk throttled or terminated—paid for Straight Talk phones, SIM cards, and/or “unlimited” plans. If TracFone and Walmart refuse to provide the demanded relief within thirty (30) days, we will seek compensatory and punitive damages, restitution, and any other appropriate equitable relief.

We sincerely hope to confer with you to resolve these violations without the need for litigation. I invite you to contact me to discuss this demand at any time. I can be reached at (415) 956-1000 ext. 2230 or [nreynolds@lchb.com](mailto:nreynolds@lchb.com). I look forward to hearing from you.

Very truly yours,



Nicole D. Reynolds