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7 UNITED STATES DISTRICT COURT
8 FOR THE WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 JOSEPH CALLOWAY, a resident of the
11 State of Washington, on behalf of himself
12 and all others similarly situated,

13 Plaintiff,

14 v.

15 T-MOBILE USA, INC., a Delaware
16 corporation,

17 Defendant.

Case No. C 08-_____

**CLASS ACTION COMPLAINT FOR:
(1) VIOLATION OF THE FEDERAL
COMMUNICATIONS ACT; (2)
VIOLATION OF THE WASHINGTON
CONSUMER PROTECTION ACT; (3)
DECLARATORY RELIEF UNDER THE
DECLARATORY JUDGMENT ACT**

DEMAND FOR JURY TRIAL

18 Plaintiff Joseph Calloway (“Plaintiff” or “Calloway”) makes all allegations in this
19 Complaint based upon information and belief, except those allegations which pertain to
20 Plaintiff, which are based on personal knowledge. Plaintiff’s information and belief are based
21 upon, *inter alia*, Plaintiff’s own investigation and the investigation conducted by Plaintiff’s
22 attorneys. Each allegation in this Complaint either has evidentiary support or, alternatively,
23 pursuant to Rules 8(e)(2) and 11(b)(3) of the Federal Rules of Civil Procedure, is likely to
24 have evidentiary support after a reasonable opportunity for further investigation or discovery.

25 **I. NATURE OF THE ACTION**

26 1.1. Defendant T-MOBILE USA, INC., a Delaware corporation (“T-MOBILE” or
27 “Defendant”) provides cellular telephone, messaging, and data services. Every customer who
contracts for a T-MOBILE cellular calling plan is also provided with the ability to send and/or

1 receive text messages and is, therefore, “text message enabled”. Customers of T-MOBILE
2 who would prefer not to be text message enabled nonetheless are required by T-MOBILE to be
3 text message enabled.

4 1.2. T-MOBILE does not allow its customers to avoid charges for unsolicited text
5 messages by offering them the opportunity to decline text message service. Instead, T-
6 MOBILE requires its customers to pay for each unsolicited text message received -- including
7 the unsolicited “Info Alerts” that T-MOBILE sends to its customers via text message. (See, T-
8 Mobile, Support, *Do T-Mobile Info Alerts Count Against My Monthly Message Limit*, available
9 at: <http://support.t-mobile.com/knowledgebase/root/public/tm20034.htm?A2L.SERVICE=>
10 (accessed July 26, 2007)).

11 1.3. Customers who subscribe to one or more of T-MOBILE’s Messaging Value
12 Bundles are charged according to their text message plan for each unsolicited text message
13 received in the United States. Customers who do not subscribe to one of T-MOBILE’s
14 Messaging Value Bundles are charged \$0.15 for each unsolicited text message received in the
15 United States. (See, T-Mobile, Services, *Important Information About New Messaging Rates*,
16 available at: <http://www.t-mobile.com/shop/addons/services/MessagingDisclaimer.aspx>
17 (accessed Aug. 6, 2007)).

18 1.4. T-MOBILE offers its Messaging Value Bundles to customers who sign up for
19 one of T-MOBILE’s “FamilyTime” plans. However, while T-MOBILE FamilyTime
20 customers share a “pool” of monthly minutes among two or more phones, “Messaging Value
21 Bundles are offered per line of service and [are] not shared among FamilyTime (or other
22 pooled) customers.” (See, T-Mobile, Packages, *FamilyTime Package*, available at:
23 http://www.t-mobile.com/Shop/Packages/detail.aspx?PAsset=Pac_Pac_FamilyTime (accessed
24 Aug. 2, 2007)).

25 1.5. T-MOBILE has failed to adequately disclose to Plaintiff and other T-
26 MOBILE customers its practices of: (a) requiring every one of its customers to be text
27 message enabled; (b) charging its customers for all unsolicited text messages; and (c) refusing

1 to permit its customers to avoid charges for unsolicited text messages by disabling their text
2 message service – despite the fact that T-MOBILE has the ability to do so. Plaintiff brings this
3 action on her own behalf and on behalf of a class of all other similarly situated consumers (the
4 “Class”).

5 **II. JURISDICTION AND VENUE**

6 2.1. Jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1331 because this
7 matter involves a federal question—namely, a violation of 47 U.S.C. § 201. In addition, under
8 28 U.S.C. § 1367, this Court may exercise supplemental jurisdiction over the state law claims
9 because all of the claims are derived from a common nucleus of operative facts and are such
10 that Plaintiff would ordinarily expect to try them in one judicial proceeding.

11 2.2. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(b)(2)
12 and 1446(a) because Plaintiff resides within this District, and Defendant transacts substantial
13 business within, and is subject to personal jurisdiction in, this judicial district, and because a
14 substantial part of the events giving rise to the claims asserted herein took place in this judicial
15 district.

16 **III. PARTIES**

17 3.1. T-MOBILE is, and at all times relevant hereto was, a Delaware corporation
18 with its principal place of business in Bellevue, Washington.

19 3.2. Calloway is a resident of Seattle, Washington, and entered into a contract for
20 services with, and receives cellular service from, T-MOBILE.

21 **IV. FACTUAL BACKGROUND**

22 4.1. Every T-MOBILE cellular telephone customer has the ability to send and
23 receive text messages, regardless of whether the customer desires to have access to T-
24 MOBILE’s text messaging services.

25 4.2. T-MOBILE offers its cellular telephone customers several “Messaging Value
26 Bundles.” T-MOBILE customers who subscribe to one or more of T-MOBILE’s Messaging
27 Value Bundles can send and receive a limited number of text messages per month for an

1 additional, pre-determined monthly fee. The monthly text messaging limit and associated
2 monthly fee vary according to the Messaging Value Bundle selected.

3 4.3. T-MOBILE FamilyTime customers may choose to subscribe to one of T-
4 MOBILE's Messaging Value Bundles. However, T-MOBILE's Messaging Value Bundles are
5 offered per line of service covered under the T-MOBILE FamilyTime plan. In other words, a
6 separate Messaging Value Bundle must be purchased for each separate telephone line included
7 in the FamilyTime plan, because T-MOBILE FamilyTime customers cannot share the "pool"
8 of allotted text messages available under Messaging Value Bundles.

9 4.4. T-MOBILE customers who do not subscribe to one of T-MOBILE's
10 Messaging Value Bundles are charged \$0.15 for each text message sent or received in the
11 United States. (See, T-Mobile, Services, *T-Zones: Text Messaging*, available at:
12 [http://www.tmobile.com/shop/addons/services/TzonesDetail.aspx?tp=Svc_Tab_TZones&tsp=](http://www.tmobile.com/shop/addons/services/TzonesDetail.aspx?tp=Svc_Tab_TZones&tsp=Svc_Sub_Messaging&tssp=Svc_Sub_TextMessaging&oscid=4CD51BA7-B5AF-4AB2-85E0-50EC0AF141F9)
13 [Svc_Sub_Messaging&tssp=Svc_Sub_TextMessaging&oscid=4CD51BA7-B5AF-4AB2-85E0-](http://www.tmobile.com/shop/addons/services/TzonesDetail.aspx?tp=Svc_Tab_TZones&tsp=Svc_Sub_Messaging&tssp=Svc_Sub_TextMessaging&oscid=4CD51BA7-B5AF-4AB2-85E0-50EC0AF141F9)
14 [50EC0AF141F9](http://www.tmobile.com/shop/addons/services/TzonesDetail.aspx?tp=Svc_Tab_TZones&tsp=Svc_Sub_Messaging&tssp=Svc_Sub_TextMessaging&oscid=4CD51BA7-B5AF-4AB2-85E0-50EC0AF141F9) (accessed July 26, 2007)).

15 4.5. T-MOBILE refuses to disable the text messaging feature on its customers'
16 accounts, even when the customer has no interest in sending or, more importantly, receiving
17 text messages. Moreover, T-MOBILE requires each of its customers who have not subscribed
18 to one of T-MOBILE's Messaging Value Bundles to pay for each and every unsolicited text
19 message they receive.

20 **V. ALLEGATIONS PERTAINING TO THE NAMED PLAINTIFF**

21 5. 1. In or about October 2005, Calloway contracted with T-MOBILE for the
22 provision of cellular telephone service. During most or all of the relevant time period,
23 Calloway has contracted with T-MOBILE for one of T-MOBILE's "FamilyTime" plans
24 ("Calloway's Plan"), which includes calling services for two cellular telephones—one used by
25 Calloway and the other used by his wife. At no time during the relevant time period have the
26 phone lines utilized by Calloway been signed up for one of T-MOBILE's Messaging Value
27 Bundles.

1 on their cellular telephone, who were charged and who paid T-MOBILE's text messaging fee
2 for the unsolicited text message.”

3 6.2. This action is brought and properly may be certified as a class action pursuant
4 to Rule 23(a)(1)–(4), and Rule 23(b)(1), (b)(2) or (b)(3).

5 6.3. T-MOBILE purports to bind Plaintiff and members of the Class to certain
6 terms and conditions contained in a so-called Welcome Guide which includes a non-severable
7 “mandatory arbitration” and “class action waiver” clause. T-MOBILE's arbitration and class
8 action waiver clause is unconscionable and unenforceable because its enforcement would ban
9 any class action, in arbitration or without, and would function to exculpate T-MOBILE for its
10 wrongful conduct and from liability for individually small claims.

11 6.4. While the exact number of class members is unknown at this time and can
12 only be determined through appropriate discovery, membership in the Class is ascertainable
13 based upon the billing records maintained by T-MOBILE. At this time, Plaintiff is informed
14 and believes that the Class likely includes hundreds of thousands of members. Therefore, the
15 Class is sufficiently numerous that joinder of all members of the Class in a single action is
16 impracticable under Rule 23(a)(1), and the resolution of their claims through a class action
17 proceeding will benefit the parties and the Court.

18 6.5. Plaintiff will fairly and adequately represent and protect the interests of the
19 members of the Class (“Class member(s)”), as required by Rule 23(a)(4). Plaintiff is an
20 adequate representative of the Class, as he has no interests which are adverse to other Class
21 members' interests. Plaintiff is committed to the vigorous prosecution of this action and, to
22 that end, Plaintiff has retained counsels who are competent and experienced in handling class
23 action litigation on behalf of consumers.

24 6.6. Plaintiff's claims are typical of the claims of the other Class members, as
25 required by Rule 23(a)(3), because Plaintiff and each Class member were charged for the
26 receipt of one or more unsolicited text messages.
27

1 6.7. Common questions of law and fact exist as to all Class members, as required
2 by Rule 23(a)(2), and predominate over any individual questions.

3 6.8. The common questions of fact include, but are not limited to, the following:

4 6.8.1. Whether T-MOBILE requires all of its customers to be text message
5 enabled;

6 6.8.2. Whether T-MOBILE assesses and collects fees for unsolicited text
7 messages received by T-MOBILE customers without offering its customers the opportunity to
8 avoid such charges by opting out of text messaging; and

9 6.8.3. Whether T-MOBILE refuses to disable the text messaging feature on
10 its customers' accounts.

11 6.9. The common questions of law include, but are not limited to, the following:

12 6.9.1. Whether T-MOBILE's practice of assessing and collecting fees for
13 unsolicited text messages received by its customers without offering its customers the
14 opportunity to avoid such charges by opting out of text messaging, constitutes an unjust and
15 unreasonable charge in violation of the Federal Communications Act ("FCA");

16 6.9.2. Whether T-MOBILE's practice of assessing and collecting fees for
17 unsolicited text messages received by its customers without offering its customers the
18 opportunity to avoid such charges by opting out of text messaging, violates the Washington
19 Consumer Protection—Unfair Business Practices Act ("WCPA"), RCW 19.86.020;

20 6.9.3. Whether T-MOBILE's practice of refusing to allow its customers to
21 disable the text messaging service, violates the WCPA;

22 6.9.4. Whether mandatory injunctive and/or declaratory relief is necessary
23 and appropriate in order to correct T-MOBILE's practice of assessing and collecting fees for
24 unsolicited text messages received by its customers without offering its customers the
25 opportunity to avoid such charges by opting out of text messaging; and
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27

1 6.9.5. Whether mandatory injunctive and/or declaratory relief is necessary
2 and appropriate in order to correct T-MOBILE’s practice of refusing to allow its customers to
3 disable the text messaging service.

4 6.10. A class action is superior to other available methods for the fair and efficient
5 adjudication of the claims asserted in this action under Rule 23(b)(3) because:

6 6.10.1. The expense and burden of individual litigation make it economically
7 unfeasible for Class members to seek redress for their “negative value” claims other than
8 through the procedure of a class action;

9 6.10.2. If separate actions were to be brought individually by each Class
10 member, the resulting duplicity of lawsuits would cause undue hardship and expense to the
11 Court and the litigants by necessitating multiple trials of similar factual issues;

12 6.10.3. The prosecution of separate individual actions would create a risk of
13 inconsistent adjudications of similar factual issues; and

14 6.10.4. Absent a class action, T-MOBILE likely would retain the benefits of
15 its wrongdoing, and there would be a failure of justice.

16 6.11. In the alternative, this action is certifiable under the provisions of
17 Rules 23(b)(1) and/or 23(b)(2) because:

18 6.11.1. The prosecution of separate actions by individual Class members
19 would create a risk of inconsistent or varying adjudications with respect to individual class
20 members that would establish incompatible standards of conduct for Defendant;

21 6.11.2. The prosecution of separate actions by individual Class members
22 would create a risk of adjudications with respect to them that would, as a practical matter, be
23 dispositive of the interests of the other Class members not parties to the adjudications, or
24 substantially impair or impede their ability to protect their interests; and

25 6.11.3. Defendant has acted or refused to act on grounds generally applicable
26 to the Class, thereby making appropriate final injunctive relief or corresponding declaratory
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1 relief with respect to the Class, and necessitating that any such relief be extended to Class
2 members on a mandatory, class-wide basis.

3 6.12. Plaintiff is aware of no difficulty which will be encountered in the
4 management of this litigation which should preclude its certification as a class action.

5 6.13. Class members' names and addresses are available from Defendant's records.
6 Notice can be provided to Class members via first class mail or otherwise, using techniques
7 and a form of notice similar to those customarily used in class actions arising under federal
8 law.

9 **VII. FIRST CLAIM FOR RELIEF**
10 **(Violation of the Federal Communications Act, 47 U.S.C. § 201)**

11 7.1. Plaintiff repeats and incorporates herein by reference each and every previous
12 allegation in this Complaint as though fully set forth herein.

13 7.2. Defendant is a common carrier engaged in interstate communication by wire
14 for the purpose of furnishing communication services within the meaning of § 201(a) of the
15 FCA.

16 7.3. Defendant's actions and conduct, as alleged herein, constitute an unjust and
17 unreasonable charge and practice in connection with communication services and, therefore,
18 violate § 201(b) of the FCA.

19 7.4. As a direct and proximate result of Defendant's violation of § 201(b) of the
20 FCA, Plaintiff and each Class member have been damaged in an amount according to proof at
21 trial.

22 7.5. Pursuant to 47 U.S.C. § 206, Plaintiff and the Class are entitled to recover
23 their reasonable attorneys' fees.

24 **VIII. SECOND CLAIM FOR RELIEF**
25 **(Violation of Washington Consumer Protection—Unfair Business Practices Act)**

26 8.1. Plaintiff repeats and incorporates herein by reference each and every previous
27 allegation in this Complaint as though fully set forth herein.

1 11.5. Constructive Trust. For the establishment of a constructive trust against
2 Defendant to allow full restitution to Plaintiff and the Class for all text message fees
3 wrongfully collected by Defendant for unsolicited text messages received by Plaintiff and the
4 Class;

5 11.6. Attorneys' Fees and Other Costs. For an award of reasonable attorneys' fees
6 and other costs, as provided by law;

7 11.7. Interest. For an award of pre-judgment and post-judgment interest, as
8 provided by law;

9 11.8. Leave to Amend. For leave to amend these pleadings, as may be necessary,
10 to conform to the evidence presented at trial; and

11 11.9. Other Relief. For such other relief as this Court deems just and equitable.
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13 Dated this 9th day of May, 2008.

14
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16
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