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**UNITED STATES DISTRICT COURT**  
**IN AND FOR THE DISTRICT OF IDAHO**

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ROBERT J. SERAPHIN, on behalf of himself  
and all others similarly situated,

Plaintiff,

vs.

SBC INTERNET SERVICES, INC., d/b/a  
AT&T INTERNET SERVICES, INC.; and  
YAHOO! INC., a Delaware Corporation.

Defendants.

Case No. 1:09-cv-00131 REB

**FIRST AMENDED COMPLAINT -  
CLASS ACTION**

- (1) Violation of California Civil Code § 1671;
- (2) Violation of California Business and Professions Code § 17200;
- (3) Declaratory Judgment Act, 28 U.S.C. § 2201;
- (4) State Consumer Protection Acts;
- (5) Unjust Enrichment.

**JURY TRIAL DEMANDED**

**INTRODUCTION**

1. Plaintiff brings this multi-state consumer class action on behalf of AT&T internet service consumers that paid \$20 a month or less for internet service and were assessed an Early

Termination Fee (“ETF”) when they cancelled service. Defendants impose this fee on consumers that cancel internet service before the end of a purported contractual commitment to subscribe for a defined period of time, usually one year.

2. The ETF imposed by Defendants is not prorated and bears no relation to any costs Defendants may incur when a consumer cancels service. Defendants impose their \$200 ETF on consumers regardless of the time remaining on the alleged term commitment. For example, consumers that pay only \$14.95 a month will be assessed a \$200 ETF by Defendants even if there is only two months remaining on their contract when they cancel service. This sort of grossly disproportionate penalty is routinely assessed pursuant to the Defendants’ standard company policies, and consumers that do not pay the ETF face collections and damage to their credit rating.

3. Rather than compensating Defendants for costs associated with the cancellation of service, the ETF undermines free market competition by making it cost-prohibitive for consumers to switch to competing service providers and punishing those that do. Moreover, Defendants impose this \$200 fee on their internet consumers even if the consumer cancels because service is inadequate or the consumer moves to a location where service is not available.

4. Defendants’ ETF violates the laws of the State of California and of the other states where Defendants do business, and is unenforceable pursuant to the common law of contracts. Plaintiffs seek both damages and injunctive relief.

#### **PARTIES**

5. Plaintiff Robert J. Seraphin is a citizen of the State of Idaho, residing in Garden City, Idaho. Mr. Seraphin was assessed and paid the ETF at issue in this action.

6. Defendant SBC Internet Services, Inc. ("SBC Internet") is a wholly-owned subsidiary of AT&T, Inc. and does business as AT&T Internet Services. SBC Internet is a California corporation and does business in the State of Idaho.

7. Defendant Yahoo! Inc. ("Yahoo!") is a Delaware corporation doing business in the State of Idaho with corporate headquarters in Sunnyvale, California.

8. SBC Internet and Yahoo have formed a partnership or joint venture to provide residential internet services under the name "AT&T Yahoo!."

9. As used herein, the term "Defendants" refers collectively to SBC Internet and Yahoo!.

10. In this Complaint, reference to any act or conduct of Defendants means that Defendants engaged in the act or conduct by or through one or more of their officers, directors, agents, employees or representatives.

#### **JURISDICTION AND VENUE**

11. This Court has jurisdiction pursuant to 28 U.S.C. § 1332(d). The case is filed as a class action, the matter in controversy exceeds the value of \$5,000,000, exclusive of interest and costs, and more than two-thirds of the members of the proposed class are citizens of a state different than that of Defendants.

12. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(c) because Defendants regularly transact business and are subject to personal jurisdiction in the State of Idaho.

#### **FACTS**

13. In or around September 2005, Plaintiff entered into a service agreement with Defendants for high speed internet service for his home in Placentia, California. Mr. Seraphin

was charged \$14.95 a month for this service in exchange for his commitment to subscribe for a 12-month term.

14. Approximately 10 months later, in or around June 2006, Plaintiff contacted Defendants to inform them that he was moving to Garden City, Idaho and that he wanted to transfer his internet service to his new residence.

15. Defendants informed him that their internet service was not available at his new residence. Defendants then informed Plaintiff that if he moved, he would be charged a \$200 ETF for terminating his service before the expiration of 12 months.

16. Defendants charged the \$200 ETF even though his monthly charges for the final two months of service would have been only \$29.90. While Plaintiff repeatedly protested this charge, pursuant to company policy Defendants refused to waive the ETF.

17. Defendants charged and attempted to collect the \$200 ETF from Plaintiff upon his move to Garden City, Idaho. Although Plaintiff believed that the ETF was improper, he ultimately paid the \$200 ETF under protest.

18. The amount of the ETF Defendants charge customers does not vary depending on the monthly charge for services. It also does not vary during the service term. Defendants impose the full penalty regardless of when a customer cancels service.

19. The termination fee is not designed to compensate Defendants for any losses arising from a customer's termination of internet service within the service term. Rather, Defendants intend the ETF to be punitive and to discourage consumers from switching to competing internet service providers.

### CLASS ACTION ALLEGATIONS

20. Plaintiff brings this action on behalf of himself and all others similarly situated pursuant to Rule 23 of the Federal Rules of Civil Procedure. He seeks to represent a Class defined as follows:

All residents and former residents of the states of Alabama, Arkansas, California, Connecticut, Florida, Georgia, Illinois, Indiana, Kansas, Kentucky, Louisiana, Michigan, Missouri, Mississippi, Nevada, North Carolina, Ohio, Oklahoma, South Carolina, Tennessee, Texas and Wisconsin who: (a) subscribed to DSL service with Defendants and were charged \$20 a month or less for service; and (b) cancelled their DSL service before the expiration of their service agreement with Defendants; and (c) paid or are subject to a \$200 ETF for cancellation of their service before the end of the service term.

Excluded from the Class are the Defendants, any entity in which any Defendant has a controlling interest or which has a controlling interest in any Defendant, any member of any Defendant's control group, and any member of any Defendant's general counsel office or outside legal counsel involved in defending this lawsuit, and their legal representatives, assignees, and successors. Also excluded are the judge to whom this case is assigned and any member of the judge's immediate family, as well as Plaintiff's counsel. Plaintiffs reserve the right to modify the class definition or to propose one or more appropriate subclasses based on information revealed through discovery or otherwise.

21. This action is brought and may be maintained as a class action pursuant to the provisions of Federal Rules of Civil Procedure 23(a)(1)-(4) and 23 (b)(2) or (b)(3).

22. While the exact number of Class members is unknown at this time, Plaintiff believes that the Class members number in the thousands and are geographically disbursed throughout the United States. Therefore, the Class is sufficiently numerous that joinder of all Class members in a single action is impracticable under Fed. R. Civ. P. 23(a)(1).

23. Common questions of law and fact exist as to the Class members, as required by Fed. R. Civ. P. 23(a)(2), and predominate over any questions which affect only individual Class members within the meaning of Fed. R. Civ. P. 23(b)(3).

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

- a. whether Defendants impose a \$200 ETF upon cancellation of customers' service agreements before expiration, without regard to the remaining time in the service term or the reason for cancellation;
- b. whether Defendants' ETF is a reasonable approximation of the damages, if any, incurred by cancellation of their service agreement;
- c. whether it would be impracticable to set an ETF to approximate the damages, if any, incurred by cancellation of the service agreement;
- d. whether Class members have sustained damages as a result of Defendants' practice of imposing and collecting a fixed ETF and, if so, the proper measure to determine such damages.

25. The questions of law that are common to the members of the Class include, but are not limited to, the following:

- a. whether the ETF imposed by Defendants is an unlawful penalty clause provision under California Civil Code § 1671;
- b. whether the ETF imposed by Defendants is an unfair, unlawful or fraudulent business practice under California Business and Professions Code § 17200, *et seq.*;
- c. whether the ETF imposed by Defendants on their customers is an unfair and/or deceptive trade practice;
- d. whether Defendant's practice of charging and collecting ETFs from the class has unjustly enriched them; and
- d. whether the Class members are entitled to injunctive and declaratory relief.

26. Plaintiff's claims are typical of the claims of the other Class members whom he seeks to represent under Fed. R. Civ. P. 23(a)(3) because Plaintiff and each of the Class members have been subjected to the same improper practice and have been damaged in the same manner.

27. Plaintiff will fairly and adequately represent and protect the interests of the Class members as required by Fed. R. Civ. P. 23(a)(4). Plaintiff has no interest which is adverse to the

interests of the Class. He is committed to the vigorous prosecution of this action and has retained counsel experienced in multistate consumer class action litigation.

28. A class action is superior to other available methods for the fair and efficient adjudication of the claims asserted in this action under Fed. R. Civ. P. 23(b)(3) because the expense and burden of individual litigation make it economically unfeasible for Class members to seek redress other than through the procedure of a class action and if separate actions were brought by individual Class members, the resulting individual actions would lead to judicial inefficiency. Moreover, monetary relief is manageable because it can be allocated among Class members by a formula.

29. In the alternative, this action is certifiable under the provisions of Fed. R. Civ. P. 23(b)(2) because Defendants have acted or refused to act on grounds generally applicable to the Class members, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the Class as a whole, and necessitating that any such relief be extended to the Class on a mandatory, class-wide basis.

30. Plaintiff is not aware of any difficulty likely to be encountered in the management of this litigation that would preclude its maintenance as a class action.

**FIRST CLAIM FOR RELIEF  
(Violation of California Civil Code §1671)**

31. Plaintiff re-alleges the prior paragraphs as if fully set forth herein.

32. Defendants have engaged in and continue to engage in an unfair and unlawful practice of charging their customers a \$200 ETF that substantially exceeds the damages Defendants may suffer, if any, when Class members cancel service before the expiration of their service term.

33. Under California Civil Code § 1671, a liquidated damage provision in a consumer contract for the breach of the contract is void except “when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage” at the time of the breach. Cal. Civ. Code § 1671(d).

34. The provision assessing an ETF in Defendants’ form consumer contracts constitutes an unlawful liquidated damages provision under California Civil Code § 1671 because Defendants charge any customer who cancels services before the expiration of their service agreement a fixed ETF that does not take into account relevant factors, such as the amount owed each month, the time remaining under the customer's service term or the reason for the customer's cancellation of service. Defendants charge an ETF when it is possible to determine the actual damage from any purported breach of the contract.

35. Defendants’ ETF provision also constitutes an unlawful liquidated damages provision under California Civil Code § 1671 because the ETF charged does not represent a reasonable estimate by the parties of fair compensation for the loss, if any, Defendants sustain by a customer’s termination of service. Instead, Defendants’ ETF acts primarily to coerce customers into maintaining their internet service with the Defendants. Defendants' practice violates California Civil Code § 1671.

36. Unless Defendants are enjoined from charging the punitive ETF, Class members will continue to be injured by Defendants’ actions and conduct.

**SECOND CLAIM FOR RELIEF**  
**(Violation of California Business and Professions Code § 17200, et seq.)**

37. Plaintiff re-alleges the prior paragraphs as if fully set forth herein.

38. Defendants have engaged in and continue to engage in an unfair and unlawful business practice of charging their customers a fixed ETF that substantially exceeds the damages

Defendants may suffer, if any, when customers cancel Defendants' service before the expiration of their service term.

39. By engaging in the above-described business practice, Defendants have committed one or more acts of unfair competition within the meaning of California Business and Professions Code § 17200.

40. Defendants' practice is unfair because Defendants charge their customers the same ETF regardless of the amount of their monthly payments, the date of cancellation, the reason for cancellation, or the Defendants' inability to provide internet service in certain areas. Thus, the ETF allows Defendants, among other things, to realize an unfair benefit from their own inability to provide service to a particular area. As such, Defendants' practice is oppressive and unfair to Plaintiff and the members of the Class.

41. Defendants' practice is unlawful because it violates California Business and Professions Code § 17200.

42. Unless Defendants are enjoined from continuing to engage in this unfair and unlawful business practice, Class members will continue to be injured by Defendants' actions and conduct.

**THIRD CLAIM FOR RELIEF  
(Declaratory Relief)**

43. Plaintiff re-alleges the prior paragraphs as if fully set forth herein.

44. An actual controversy has arisen between Plaintiff, along with the Class members, and Defendants concerning their respective rights and duties under the service agreement.

45. Plaintiff and the Class members contend that Defendants are engaging in and continue to engage in an improper practice of charging and collecting an ETF that exceeds the damages Defendants may suffer, if any, when customers cancel Defendants' service before the

expiration of their service term. Defendants contend that their actions and conduct are lawful and proper.

46. Therefore, a judicial declaration is necessary and appropriate at this time, under the circumstances presented, in order that Plaintiff and the Class members may ascertain their rights and duties with respect to Defendants' practice of charging an ETF.

**FOURTH CLAIM FOR RELIEF  
(Violation of State Consumer Protection Laws)**

47. Plaintiff re-alleges the prior paragraphs as if fully set forth herein.

48. Defendants' conduct described herein constitutes unfair and/or deceptive trade practices pursuant to the trade practices and consumer protection statutes of the following jurisdictions, wherein Defendants conduct significant business:

- a. Arkansas: The Arkansas Deceptive Trade Practices Act, Ark. Code § 4-88-101, *et seq.*;
- b. Connecticut: The Connecticut Unfair Trade Practices Act, Conn. Gen. Stat § 42-110a, *et seq.*;
- c. Florida: The Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. Ann. § 501.201, *et seq.*;
- d. Illinois: The Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS § 505/1, *et seq.*;
- e. Kansas: The Kansas Consumer Protection Act, Kan. Stat. Ann § 50-626, *et seq.*;
- f. Kentucky: The Kentucky Consumer Protection Act, Ky. Rev. Stat. Ann. § 367.110, *et seq.*, and the Kentucky Unfair Trade Practices Act, Ky. Rev. Stat. Ann § 365.020, *et seq.*;
- g. Michigan: The Michigan Consumer Protection Act, § 445.901, *et seq.*;

h. Missouri: The Missouri Merchandising Practices Act, Mo. Rev. Stat. § 407.010, *et seq.*;

i. Nevada: The Nevada Trade Regulation and Practices Act, Nev. Rev. Stat. § 598.0903, *et seq.*;

j. Ohio: The Ohio Sales Practices Act, Ohio Rev. Code Ann. §1345.01, *et seq.*);

k. Oklahoma: The Oklahoma Consumer Protection Act, Okla. Stat. 15 § 751, *et seq.*;

l. South Carolina: The South Carolina Unfair Trade Practices Act, S.C. Code Laws § 39-5-10, *et seq.*;

m. Tennessee: The Tennessee Consumer Protection Act, Tenn. Code Ann §47-18-101, *et seq.* (2002)

n. Texas: The Texas Deceptive Trade Practices-Consumer Protection Act, TEX. BUS. & COM. CODE § 17.46;

o. Wisconsin: The Wisconsin Deceptive Trade Practices Act, Wis. Stat. § 100.18, *et seq.*

49. Pursuant to the statutes cited above, Plaintiffs and Class members are consumers subject to protection under such legislation.

50. Pursuant to the statutes cited above, the Defendants are subject to liability for deceptive and unfair consumer sales practices in that Defendants engage in an improper practice of charging and collecting an ETF that exceeds the damages Defendants may suffer, if any, when customers cancel Defendants' service before the expiration of their service term.

51. As a direct result of the Defendants' violations of the statutes enacted in the foregoing jurisdictions to protect consumers against unfair, deceptive, fraudulent and

unconscionable trade and business practices, Plaintiffs and members of the Class have been damaged.

52. Plaintiffs and members of the Class are therefore entitled to and hereby seek compensatory damages, multiple damages, and equitable and declaratory relief and any and all other available remedies according to proof.

**Fifth Claim for Relief  
(Unjust Enrichment)**

53. Plaintiff re-alleges the prior paragraphs as if fully set forth herein.

54. Plaintiffs and other members of the Class that have paid the ETF have conferred a benefit on Defendants.

55. Defendants appreciated or knew of the above-described benefit.

56. Defendants accepted or retained the benefit under circumstances that make it inequitable for them to retain said benefit.

57. As a direct and proximate result of the foregoing, Plaintiffs and other members of the Class have been damaged in an amount to be determined at trial.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiff prays for judgment as follows:

A. For certification of the class, designation of Plaintiff as class representative, and appointment of plaintiff's counsel as class counsel.

B. For an order enjoining Defendants from engaging in the unlawful acts and practices alleged herein;

C. For payment, whether as damages or as disgorgement and restitution, to Plaintiff and the Class members of all monies wrongfully obtained and retained by Defendants, as well as punitive and statutory damages;

D. For prejudgment interest commencing on the date of payment of the ETFs and continuing through the date of entry of judgment in this action;

E. For an order from this Court declaring unlawful Defendants' acts and practices alleged herein;

F. For all attorneys' fees, expenses and recoverable costs reasonably incurred in connection with the commencement and prosecution of this action; and

G. For such other and further relief as the Court deems just and proper.

**JURY TRIAL DEMANDED**

Plaintiff demands a trial by jury for all claims so triable.

Dated this 22<sup>nd</sup> day of July, 2009.

/s/

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