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**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

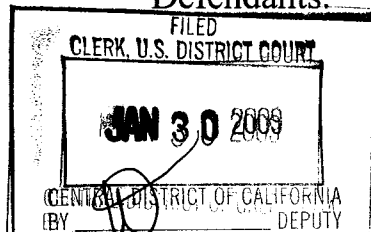
Wineesa Cole, individually and on  
behalf of all others similarly  
situated,

Plaintiff,

v.

Asurion Corporation a Delaware  
Corporation, Asurion Insurance  
Services, Inc. a Tennessee  
Corporation, and T-Mobile USA,  
Inc. a Delaware Corporation.

Defendants.



Case No. CV-06-6649-PSG (JTLx)

Honorable Philip Gutierrez

**THIRD AMENDED CLASS ACTION  
COMPLAINT FOR:**

1. Violations of California Business & Professions Code § 17200 et seq. (Misrepresentation of policy terms)
2. Violations of California Business & Professions Code § 17200 et seq. (Undisclosed kickbacks)
3. Violations of California Business & Professions Code § 17200 et seq. (Policy-switching)
4. Violations of California Business & Professions Code § 1750 et seq.
5. Common Law Fraud
6. Negligent Misrepresentation
7. Civil Conspiracy
8. Breach of Fiduciary Duty
9. Breach of An Express Contract
10. Unjust Enrichment

**JURY TRIAL DEMANDED**

**NATURE OF ACTION**

1. This is a consumer protection class action brought on behalf of consumers nationwide who purchased cell phone "insurance" offered by Asurion Corporation and Asurion Insurances Services, Inc. (collectively "Asurion"). This class action also contains a separate sub-class for California consumers only.

2. Asurion sells cell phone "insurance" to consumers through exclusive agreements with cell phone carriers including T-Mobile.

3. Cell phone "insurance" was initially offered by cell phone carriers as a means of assuring customer loyalty and not as a profit center. However, cell phone "insurance" has become an extremely profitable business in its own right. Plaintiff is informed and believes and thereon alleges that Asurion made in excess of \$400 million in revenue in 2005 from selling such supposed "insurance."

4. Consumers who purchase cell phone "insurance" from Asurion are led to believe that it operates just like any other insurance policy. Consumers pay a monthly premium, which appears on their cell phone bill. Consumers are informed that in the event of a loss there will be a "deductible" applied to their claim. Asurion used to apply a \$35 "deductible" to claims submitted by T-Mobile customers (\$75 if a claim was submitted in the first 30 days after the policy was entered into), but now applies a deductible of \$40, \$70 or \$110 depending upon the phone for which the claim is submitted.

5. Asurion's "deductible" is not a true deductible as that term is used in the insurance industry and understood by consumers. The common understanding and plain meaning of "deductible" is that it is a predetermined sum that is deducted from a loss payable amount. For example, in a fire insurance policy with a deductible of \$1000, the consumer understands that if they incur a loss which is less than \$ 1000, they will not be able to recover anything from the insurance company, and that the insurance company will simply deny the claim.

1 By contrast, Asurion's "deductible" is actually a processing fee charged to  
2 consumers who file a claim for a replacement cell phone, even when the  
3 replacement phone is worth less than the processing fee.

4 6. Even though Asurion's insurance policies represent to consumers that a lost  
5 phone will be replaced with a phone of "like kind, quality and value", Asurion  
6 routinely provides consumers with replacement cell phones that are "refurbished"  
7 and therefore worth substantially less than the lost phones. In many cases, the  
8 phones are worth less than the "deductible" or processing fee paid by consumers.  
9 This fact is not disclosed to the consumer. This leads to the anomalous situation  
10 where Asurion which is purportedly an insurance broker-agent can make a profit  
11 from processing claims for lost cell phones above and beyond the profit that  
12 legitimate insurance companies make from charging premiums to policy holders.  
13 Essentially, Asurion is pocketing what it is calling insurance premiums and  
14 deductible payments without actually providing real  
15 insurance.

16 7. In July 2005, Asurion and T-Mobile switched their customers from an  
17 insurance policy underwritten by Hartford Insurance, to a policy underwritten by  
18 Liberty Mutual Insurance. In switching their customers to a different insurance  
19 policy, Asurion and T-Mobile were acting as insurance brokers and not as  
20 insurance agents under California law. As such, Asurion and T-Mobile had a  
21 fiduciary duty to their customers to find the best available insurance at the  
22 best available price, but instead switched their customers from a policy with  
23 deductibles of \$35 to a policy with deductibles of \$40, \$70 and \$110, and with  
24 premiums that were either the same (\$3.99 monthly) or higher (\$5.99 monthly).

25 8. T-Mobile is a licensed communications equipment insurance agent pursuant  
26 to California Insurance Code section 1758.61. Pursuant to California insurance  
27 Code section 1758.62(a)(2), a licensed communications equipment insurance  
28 agent may not transact business on behalf of an insurer without first being

1 appointed with the Insurance Commission to act as the agent of that insurer.  
2 Mutual policy, T-Mobile had not been appointed as Liberty Mutual's agent, and  
3 could not lawfully sell insurance on behalf of Liberty Mutual in California.

4 **PARTIES**

5 9. Plaintiff Wineesa Cole, was at all times relevant herein, a resident of Los  
6 Angeles County, California. Plaintiff's allegations as to her own dealings with  
7 Asurion and T-Mobile are made from personal knowledge. All other allegations  
8 herein are made on information and belief, and either have evidentiary support, or  
9 are likely to have evidentiary support after discovery in this matter.<sup>1</sup>

10 10. Defendant Asurion Corporation is a Delaware corporation headquartered in  
11 Nashville Tennessee and San Mateo California. Asurion Corporation transacts  
12 substantial business in the State of California, County of Los Angeles.

13 11. Defendant Asurion Insurance Services, Inc. is a Tennessee corporation, and  
14 is a wholly owned subsidiary of Asurion Corporation. Plaintiff is informed and  
15 believes that Asurion Insurance Services Inc. is the alter ego of Asurion  
16 Corporation, and that Asurion Insurance Services Inc. is an instrumentality used  
17 by Asurion Corporation to transact its cell phone insurance business. Asurion  
18 Insurance Services Inc. transacts substantial business in the State of California,  
19 County of Los Angeles,

20 12. Defendant T-Mobile USA ("T-Mobile") is a Delaware corporation  
21 headquartered in Bellevue, Washington. T-Mobile transacts substantial business in  
22 the State of California, County of Los Angeles.

23

24 <sup>1</sup>Plaintiff incorporates by reference Paragraphs 63-69 (Third Cause of  
25 Action For Violations of California Civil Code § 1750 et seq (Fourth Cause of  
26 Action For Violation Of Other State Consumer Protection Laws), and 105-108  
27 (Tenth Cause Of Action For Insurance Bad Faith) of the First Amended Complaint  
28 in this action, and repleads and realleges them as if fully set forth herein in order  
that the claims and allegations made in those paragraphs not be waived for  
purposes of appeal.

13. At all material times herein, Asurion and T-Mobile each acted as the co-conspirator, agent, servant, employee, joint venturer or alter ego of the other with respect to the acts, violations, and common course of conduct alleged herein or is otherwise liable.

14. The acts of Defendants alleged herein were authorized, ordered, or done by their officers, agents, employees, or representatives, while actively engaged in the management of the Defendants' businesses or affairs.

### **JURISDICTION AND VENUE**

15. This Court has jurisdiction pursuant to the Class Action Fairness Act, 28 U.S.C. §1332(d). Jurisdiction is proper because (1) the claims of all plaintiffs, aggregated together, exceed \$5,000,000 and (2) the plaintiff and the defendants are citizens of different states. (28 U.S.C. §1332(d)(2) and (6).) Venue is proper in this court under 28 U.S.C. §1391(b)(1) because at the time of the transaction giving rise to this lawsuit, plaintiff was a resident of Los Angeles County, California and defendants transact substantial business in Los Angeles County, California.

### **FACTS**

#### **A. Background.**

16. Asurion, a privately held company with over 2500 employees worldwide, was founded in 1994. Asurion is headquartered in San Mateo, California and in Nashville Tennessee,

17. T-Mobile USA, a publicly owned company with over 25,000 employees is headquartered in Bellevue, Washington.

18. T-Mobile markets the cell phone "insurance" provided by Asurion to T-Mobile customers.

19. Approximately 17,000,000 people in the United States currently have cell phone insurance provided by Asurion.

20. Liberty Mutual is the underwriter of the insurance provided by Asurion to

1 T-Mobile's customers.

2 B. Defendant's Deceptive Marketing Practices

3 21. In the advertising and sale of its services, Asurion has represented,  
4 expressly or by implication, that consumers who purchase their cell phone  
5 "insurance" are purchasing a conventional insurance policy in which they will be  
6 compensated for the loss sustained less a deductible, up to the applicable policy  
7 limit. Asurion fails to adequately disclose that the "deductible" is actually a  
8 compulsory processing fee which will in many cases exceed the value of the  
9 replacement phone provided. Asurion also misleads consumers by representing  
10 that there is an applicable policy limit, but failing to disclose that rather than  
11 adjust the loss, and covering the value of the loss up to the policy limit, Asurion  
12 provides a replacement phone worth less than the policy limit without determining  
13 the value of the loss. Asurion also represents to consumers that they will receive  
14 a replacement phone of "like kind, quality, and value" but fails to disclose that  
15 most of the replacement phones provided by Asurion are in fact "refurbished"  
16 phones, which means that at one time they were returned as defective, whereas the  
17 phones being insured by Asurion's consumers were never purchased as  
18 "refurbished" or at one time returned as defective. Asurion also fails to disclose  
19 that many of the refurbished phones it provides as replacements to T-Mobile  
20 customers who make insurance claims can be purchased retail for as little as  
21 \$32.99 and wholesale for as little as \$10.00. Such facts would be material to  
22 consumers in their purchase or use of Asurion's services. The failure to  
23 adequately disclose these facts in light of the representations made was, and is, a  
24 deceptive practice. If Plaintiff and the Class Members had understood the true  
25 facts regarding Asurion's "insurance", they would not have purchased the  
26 insurance.

27 22. T-Mobile actively markets Asurion's cell phone "insurance" and makes the  
28 same representations as Asurion described in Paragraph 22 incorporated by this

1 reference. T-Mobile collects insurance premiums payable to Asurion from its  
2 customers.

3 23. The precise terms and conditions of Asurion's T-Mobile insurance policy  
4 are not made available to consumers on Asurion's website, but rather on a website  
5 called "PhoneClaim.com" which consumers would ordinarily visit only after  
6 losing a phone.

7 24. T-Mobile profits from the unlawful scheme alleged herein because  
8 T-Mobile's representations regarding the "insurance" are designed to induce  
9 consumers to purchase T-Mobile's products and services. T-Mobile markets the  
10 "insurance" as a benefit to its customers, and a feature of its phones and services,  
11 so as to enhance its sales and profits. If Plaintiff and Class Members had known  
12 the true facts, they either would not have purchased T-Mobile's phones and  
13 services, or they would have paid less for them.

14 25. Asurion's website actively promotes the cell phone "insurance" to bell  
15 phone carriers as a source of revenue. A former version of Asurion's web site  
16 informed cell phone carriers that: "Carriers get the added benefit of a new  
17 recurring, revenue stream from the monthly billing and collection of the handset  
18 insurance premium." In other words, T-Mobile and other carriers receive a defacto  
19 kickback from Asurion from the insurance premium proceeds. T-Mobile  
20 does not disclose to consumers that it profits from the "insurance" program by  
21 retaining a share of the premiums. Sometime after this lawsuit was filed, Asurion  
22 removed this language from its website. The Asurion website now tells carriers  
23 that they can "add revenue" by offering the cell phone insurance.

24 26. T-Mobile also receives other disguised kickbacks from Asurion for steering  
25 its customers to the "insurance" program. Asurion purchases phones from  
26 T-Mobile that customers have returned as defective, and then after a replacement  
27 phone. Plaintiff is informed and believes that Asurion pays T-Mobile more for the  
28 defective phones than their fair market value, and then recoups this cost from

1 policyholders who are required to pay a set "deductible" regardless of the value of  
2 the phone.

3 27. Plaintiff is informed and believes and thereon alleges that Asurion, and  
4 T-Mobile are joint venturers with regard to the sale of cell phone insurance; that  
5 each has control over the joint venture; that each has an ownership interest in the  
6 joint venture and that each shares in the profits thereof.

7  
8 D. Plaintiffs Experience With Asurion.

9 28. In April 2004, Plaintiff became a T-Mobile subscriber, and purchased a  
10 T-Mobile phone. Plaintiff purchased Asurion's "insurance" which was marketed  
11 by T-Mobile.

12 29. Plaintiff purchased a T-Mobile phone, and phone service, with the  
13 "insurance" from M8 Wireless on 2390 Crenshaw Blvd, Suite F, in Torrance,  
14 California 90501, on April 19, 2004. M8 Wireless acts as an agent for T-Mobile in  
15 the sale of cell phones and phone service. Plaintiff dealt with a sales representative  
16 who was identified as "Ricky ". The sales representative informed Plaintiff of the  
17 basic terms of the "insurance" in a manner which suggested that it  
18 was a conventional insurance policy, i.e. that there was a premium of \$3.99 a  
19 month, a "deductible" of \$35.00, and that there was a policy limit of \$1000. The  
20 sales representative did not make the disclosures that would have been necessary a  
21 make those representations non-misleading, including that the "deductible" was  
22 not a deductible as that term is commonly understood, but a fee to acquire a  
23 replacement phone, and that Asurion often profits from processing insurance  
24 claims by providing replacement phones that are worth less than the "deductible"  
25 barged for the replacement phone. The sales representative did not provide  
26 Plaintiff with a copy of the insurance policy. Plaintiff is informed and believes that  
27 it was the uniform practice of T-Mobile and its agents including M8 Wireless to  
28 only tell customers the basic terms of the insurance without explanation, and not

1 to provide a copy of the insurance policy at the point of sale.

2 30. Plaintiff was billed for the "insurance" on a monthly basis by T-Mobile,  
3 with the insurance premium listed as a separate line item, with no disclosure by  
4 T-Mobile that it retains a portion of the insurance premium as an incentive to steer  
5 consumers to Asurion's insurance.

6 31. In or around August 2005, Plaintiff lost her cell phone and submitted a  
7 claim to Asurion. Asurion's representative told her that in order to receive a  
8 replacement phone she would have to pay a deductible of \$110.00. When Plaintiff  
9 told Asurion's representative that her deductible was \$35.00, Asurion's  
10 representative told her that she should have received a letter informing her that her  
11 deductible had been raised. Plaintiff, in fact, never received such a letter. When  
12 Plaintiff complained to Asurion and T-Mobile, her insurance was cancelled, but  
13 her payments were not refunded.

14 32. Plaintiff spoke to other T-Mobile customers she knows who also  
15 believed that their deductible was \$35 but later learned it was \$110.00. Those  
16 customers also did not receive a letter informing them that the deductible had been  
17 raised to \$110.00. If Plaintiff had known that the deductible would be \$110.00,  
18 she either would not have purchased the insurance or she would have paid much  
19 less for it. Similarly, if Plaintiff had known that the insurance program offered to  
20 her by T-Mobile required a \$110.00 deductible, she either would not have  
21 purchased T-Mobile's products and services, or she would have paid much less for  
22 them.

### 23 CLASS ACTION ALLEGATIONS

24 33. Plaintiff seeks to bring this case as a class action on behalf of herself and all  
25 others similarly situated as members of a proposed Class, defined as:

26 National Class:

27 All individuals or entities throughout the United States and its territories who  
28 purchased cell phone insurance from Asurion through T-Mobile USA.

1 California Class:

2 All individuals or entities in the State of California who purchased cell phone  
3 insurance from Asurion through T-Mobile USA (or non-California residents who  
4 purchased the insurance in California).

5 National Subclass One:

6 All individuals or entities throughout the United States and its territories who  
7 purchased cell phone insurance from Asurion through T-Mobile USA and who  
8 were switched to a policy with a higher deductible.

9 California Subclass One:

10 All individuals or entities in California who purchased cell phone insurance from  
11 Asurion through T-Mobile USA (or non California residents who purchased the  
12 insurance in California) who were switched from a Hartford policy to a Liberty  
13 Mutual policy.

14 34. Plaintiff seeks class certification under Federal Rules of Civil Procedure,  
15 Rules 23(a) and 23(b)(1),(2) and/or (3).

16 35. The members of the Class are so numerous that a joinder of all members  
17 would be impracticable. While the exact number of the members of the Class is  
18 unknown to Plaintiff at this time and can be determined only by appropriate  
19 discovery, Plaintiff believes that the Class is likely to include thousands of  
20 members.

21 36. Membership in the Class is ascertainable. The Class definition identifies a  
22 group of unnamed plaintiffs by describing a set of common characteristics  
23 sufficient to allow a member of that group to identify himself or herself as having  
24 a right to recover based on the description. Specifically, the Class members'  
25 contact and billing information is in the possession of Asurion and T-Mobile. The  
26 nature of notice to the Class is contemplated to include notice by e-mail, by text  
27 messaging, by a notice accompanying the cell phone bills of Class members, and  
28 notice in regional publications as approved by the Court. Additionally, the

1 acquisition cost of the phones by Asurion is also readily ascertainable, and upon  
2 information and belief, actually maintained by Asurion.

3 37. A well-defined community of interest in the questions of law or fact  
4 involving and affecting all members of the Class exists, and common questions of  
5 law or fact are substantially similar and predominate over questions that may  
6 affect only individual Class members. The questions of law and/or fact common to  
7 Plaintiff and the Class members, inter alia, include:

8 (I) Whether Defendants' alleged acts and practices were unlawful and therefore  
9 violated California Business & Professions Code § 17200;

10 (ii) Whether Defendants alleged acts and practices were unfair and therefore  
11 violated Business & Professions Code § 17200;

12 (iii) Whether Defendants' alleged acts and practices were fraudulent and  
13 therefore violated Business & Professions Code § 17200;

14 (iv) Whether Defendants' misrepresentations, omissions and concealment  
15 violated Business & Professions Code § 17500;

16 (v) Whether Defendants' misrepresentations, omissions, and concealment  
17 constitute common law fraud;

18 (vi) Whether Defendants' misrepresentations, omissions, and concealment  
19 constitute negligent misrepresentation;

20 (vii) Whether Defendants conspired to defraud consumers;

21 (viii) Whether Defendants owed a fiduciary duty to consumers and breached that  
22 duty;

23 (x) Whether Defendants were unjustly enriched at the expense of Plaintiff and  
24 Class Members

25 38. Plaintiffs claims are typical of all of the members of the Class.

26 Plaintiff and the Class members are all purchasers of Asurion's cell phone  
27 "insurance". The evidence and the legal theories regarding Defendants' alleged  
28 wrongful conduct are identical for Plaintiff and all Class members. Plaintiff will

1 fairly and adequately protect the interests of the Class members. Plaintiff has  
2 retained competent counsel experienced in Class action litigation to ensure such  
3 protection. Plaintiff and her counsel intend to prosecute this action vigorously.

4 39. The prosecution of separate actions by individual members of the Class  
5 would create a risk of inconsistent or varying adjudications with respect to  
6 individual members of the Class which would establish incompatible standards of  
7 conduct for Defendants within the meaning of Fed. R. Civ. P., Rule 23(b)(1)(A).

8 40. Defendants have acted or refused to act on grounds generally applicable to  
9 the Class, thereby making appropriate final injunctive relief or corresponding  
10 declaratory relief with respect to the Class as a whole within the meaning of Rule  
11 23(b)(2).

12 41. Questions of law or fact common to the members of the Class predominate  
13 over any questions affecting only individual members within the meaning of  
14 Rule 23(b)(3).

15 42. The class action is superior to all other available methods for the fair and  
16 efficient adjudication of this case or controversy. Because the injury suffered by  
17 the Class members may be relatively small, the expense and burden of individual  
18 litigation make it virtually impossible for Plaintiff and Class members individually  
19 to seek redress for the alleged wrongful conduct. Even if any individual Class  
20 members could afford individual litigation, it would be unduly burdensome to the  
21 courts in which the individual litigation(s) would proceed. The Class action device  
22 is preferable to individual litigation(s) because it provides the benefits of unitary  
23 adjudication, economies of scale, and comprehensive adjudication by a single  
24 court. In contrast, the prosecution of separate actions by individual Class members  
25 would create a risk of inconsistent or varying adjudications with respect to  
26 individual Class members that would establish incompatible standards of conduct  
27 for the party (or parties) opposing the Class and would lead to repetitious trials of  
28 the numerous common questions of fact and law. Plaintiff knows of no difficulty

1 that will be encountered in the management of this litigation that would preclude  
 2 its maintenance as a class action. As a result, a class action is superior to other  
 3 available methods for the fair and efficient adjudication of this controversy.  
 4 Absent a class action, Plaintiff and Class members will continue to suffer losses,  
 5 thereby allowing these violations to proceed without remedy and allowing  
 6 Defendants to retain the proceeds of their ill-gotten gains.

### 7 **FIRST CAUSE OF ACTION**

#### 8 **For Violations of California Business & Professions Code § 17200, et seq.**

#### 9 **(Misrepresenting policy terms) (Against All Defendants)**

10 43. Plaintiff repeats, realleges, and incorporates by reference each and every  
 11 allegation contained in each of the preceding paragraphs and in each of the  
 12 succeeding paragraphs, as though fully incorporated herein, made a part hereof,  
 13 and set forth herein.

14 44. California's Unfair Competition Law (UUCI") defines unfair business  
 15 competition to include any "unlawful," "unfair," or "fraudulent" business act or  
 16 practice. (Cal Bus. & Prof Code §17200, et seq.)

17 45. Defendants' acts and practices, as alleged herein, violate the UCL. By  
 18 engaging in the above-described acts and practices, including the actions and  
 19 omissions herein alleged, Defendants have committed one or more acts of unfair  
 20 competition within the meaning of Business & Professions Code § 17200.  
 21 Defendants' acts and practices constitute unlawful, unfair, and fraudulent business  
 22 acts and practices within the meaning of the UCL.

23 46. As alleged herein, Defendants have made misrepresentations about  
 24 ("insurance" program that Defendants market to consumers. Defendants represent  
 25 their "insurance" program as akin to a traditional insurance policy with a  
 26 deductible, and a policy limit. Defendants fail to disclose inter alia that the  
 27 "deductible" is actually a compulsory processing fee, which the policyholder must  
 28 pay before their claim will be processed; that the replacement phones provided are

1 often worth less than the deductible that must be paid in order to obtain them; that  
 2 Defendants can profit from processing claims because they provide phones that  
 3 cost less than the "deductible"; and that Defendants do not adjust the loss to ensure  
 4 that the replacement phone provided is equivalent in value to the phone that was  
 5 insured and worth more than the "deductible". Defendants additionally fail to  
 6 disclose that due to the unusual nature of the "insurance" program, the "policy  
 7 limit" represented to the consumer is essentially meaningless, because Defendants  
 8 do not adjust the loss and then provide coverage for the loss up to the  
 9 policy limit, but provide a replacement phone worth less than the policy limit,  
 10 without regard to the value of the loss.

11 47. Defendants' acts and practices are "unlawful," within the meaning of the  
 12 UCL, because they, inter alia, violate Business & Professions Code §17500, et  
 13 seq., California Insurance Code §§ 780-781, Section 5(a) of the Federal Trade  
 14 Commission Act, various state and federal insurance regulations, federal mail and  
 15 wire fraud statutes, common law prohibitions against fraud, and trade association  
 16 ethical rules and guidelines.

17 48. Defendants' act and practices are "unfair," within the meaning of the UCL,  
 18 because they are immoral, unethical, oppressive, unscrupulous, and substantially  
 19 injurious to consumers. And, the gravity of the harm to consumers from  
 20 Defendants' acts and practices outweigh any utility of the acts and practices.

21 49. Defendants' acts and practices are "fraudulent," within the meaning of the  
 22 UCL, because their misrepresentations are likely to deceive the public lost money  
 23 or property as a result of Defendants' violations of the UCL.

24 50. Such conduct is ongoing and continues to this date. Plaintiff and the Class  
 25 members are therefore entitled to the relief described below.

## 26 **SECOND CAUSE OF ACTION**

27 **For Violations Of California Business & Professions Code section 17200**

28 **(Undisclosed Kickbacks) (Against T-Mobile)**

1 51. Plaintiff repeats, realleges, and incorporates by reference each and every  
2 allegation contained in each of the preceding paragraphs and in each of the  
3 succeeding paragraphs, as though fully incorporated herein, made a part hereof,  
4 and set forth herein.

5 52. California's Unfair Competition Law ("UCL") defines unfair business  
6 competition to include any "unlawful," "unfair," or "fraudulent" business act or  
7 practice. (Cal. Bus. & Prof Code §17200, et seq.)

8 53. Defendants' acts and practices, as alleged herein, violate the UCL. By  
9 engaging in the above-described acts and practices, including the actions and  
10 omissions herein alleged, Defendants have committed one or more acts of unfair  
11 competition within the meaning of Business & Professions Code § 17200.  
12 Defendants' acts and practices constitute unlawful, unfair, and fraudulent business  
13 acts and practices within the meaning of the UCL.

14 54. T-Mobile includes the insurance premium as a line item on the cell phone  
15 bill of consumers. T-Mobile represents to consumers that the insurance premium is  
16 paid over to Liberty Mutual, with Asurion retaining a portion as an administrative  
17 fee. This is misleading, because it leads consumers to believe that T-Mobile is  
18 simply passing on the cost of the insurance, when in fact, undisclosed to  
19 consumers, T-Mobile receives a portion of every premium paid as an  
20 inducement to offer the insurance.

21 55. Asurion purchases phones from T-Mobile that consumers have returned as  
22 defective, and pays T-Mobile a price in excess pf the fair value. This is also an  
23 inducement for T-Mobile to steer its customers toward Asurion's insurance.

24 56. Consumers are entitled to the honest services of T-Mobile in recommending  
25 cell-phone insurance. T-Mobile, by recommending that consumers purchase  
26 Asurion's cell-phone insurance, without disclosing that it has received  
27 inducements to recommend the insurance, deprives consumers of its honest  
28 services.

1 57. T-Mobile's actions in billing the insurance premium as though it were  
2 simply passing on the cost even though it receives a portion of the premium is  
3 both an unfair and deceptive business practice.

4 58. Defendants' acts and practices are "unlawful," within the meaning of the  
5 UCL, because they, inter alia, violate Business & Professions Code § 17500, et  
6 seq., California Insurance Code §§ 780-781, Section 5(a) of the Federal Trade  
7 Commission Act, various state and federal insurance regulations, federal mail and  
8 'wire fraud statutes including the prohibition against "honest services" fraud,  
9 common law prohibitions against fraud, and trade association ethical rules and  
10 guidelines.

11 59. Defendants' act and practices are "unfair," within the meaning of the UCL,  
12 because they are immoral, unethical, oppressive, unscrupulous, and substantially  
13 injurious to consumers. And, the gravity of the harm to consumers from  
14 Defendants' acts and practices outweigh any utility of the acts and practices.

15 60. Defendants' acts and practices are "fraudulent," within the meaning of the  
16 UCL, because their misrepresentations are likely to deceive the public.

17 61. Plaintiff and the members of the Class have suffered injury and have lost  
18 money or property as a result of Defendants' violations of the UCL.

19 62. Such conduct is ongoing and continues to this date. Plaintiff and the Class  
20 members are therefore entitled to the relief described below.

### 21 **THIRD CAUSE OF ACTION**

#### 22 **(Policy Switching) (Against all Defendants)**

23 63. Plaintiff repeats, realleges, and incorporates by reference each and every  
24 allegation contained in each of the preceding paragraphs as though fully  
25 incorporated herein, made a part hereof, and set forth herein.

26 64. In or around July, 2005, Defendants Asurion and T-Mobile switched their  
27 customers without their consent from a Hartford Insurance policy with a \$35  
28 deductible, to a Liberty Mutual policy with deductibles of \$40, \$70, or \$110. For

1 some consumers, including Plaintiff, their premium was also raised.

2 65. Defendant T-Mobile is a licensed wireless equipment insurance agent  
3 pursuant to California Insurance Code section 1758.61. Pursuant to California  
4 Insurance Code section 1758.62(a)(2), a license wireless equipment insurance  
5 agent may not transact business on behalf of an insurer without being appointed to  
6 act for that insurer. When Defendant T-Mobile switched its customers from  
7 Hartford to Liberty Mutual, and began collecting premiums for Liberty Mutual,  
8 T-Mobile had not been appointed as required by California Insurance Code section  
9 1758.62(a)(2).

10 66. The actions of Defendants T-Mobile, Asurion and Liberty Mutual not only  
11 violated California law, but also violated the public policy of California intended  
12 to protect policyholders. Plaintiff is informed and believes and thereon alleges that  
13 Defendants T-Mobile and Asurion, desiring to increase the profits that each would  
14 make from the sale of cell phone insurance, entered into a scheme whereby the  
15 insurer would get higher premiums and deductibles, which T-Mobile and Asurion  
16 would share in. Defendants, knowing that an insurance regulator  
17 would never approve the tripling of deductibles (such as from \$35 to \$110) on  
18 existing policyholders, enlisted Liberty Mutual to apply for approval of a "new  
19 program" with the California Insurance Commission. Then, T-Mobile and Asurion  
20 switched their pre-existing customers from the Hartford program to the Liberty  
21 program without their consent.

22 67. Defendants' acts and practices are "unlawful," within the meaning of the  
23 UCL, because they violate inter alia, California Insurance Code § 1758.62(a)(2).

24 68. Defendants' act and practices are "unfair," within the meaning of the UCL,  
25 because they are immoral, unethical, oppressive, unscrupulous, and substantially  
26 injurious to consumers. And, the gravity of the harm to consumers from  
27 Defendants' acts and practices outweigh any utility of the acts and practices.

28 69. Plaintiff and the members of the Class have suffered injury and have lost

1 money or property as a result of Defendants' violations of the UCL.

2 70. Such conduct is ongoing and continues to this date. Plaintiff and the Class  
3 members are therefore entitled to the relief described below.

4  
5 **FOURTH CAUSE OF ACTION**

6 **For Violations of California Business & Professions Code § 17500, et seq.**

7 **(Against all Defendants)**

8 71. Plaintiff repeats, realleges, and incorporates by reference each and very  
9 allegation contained in each of the preceding paragraphs as though fully  
10 incorporated herein, made a part hereof, and set forth herein.

11 72. As alleged herein, in the advertising and sale of its services, Asurion has  
12 represented, expressly or by implication, that consumers who purchase its cell  
13 shone "insurance" are buying a conventional insurance policy in which they will  
14 be compensated for the loss sustained less a deductible. Asurion fails to  
15 adequately disclose that the "deductible" is actually a compulsory processing fee  
16 which will in many cases exceed the value of the replacement phone provided.  
17 Asurion also fails to disclose that Asurion often changes the deductible after the  
18 policy has been purchased, so that the consumer ends up being charged a  
19 deductible which is higher than the one that they thought they had agreed to.  
20 Asurion also represents to consumers that they will receive a replacement phone of  
21 like kind, quality, and value" but fails to disclose that many of the replacement  
22 were returned by consumers as previously defective. Such facts would be material  
23 to consumers in their purchase or use of Asurion's services. The failure to  
24 adequately disclose these facts in light of the representations made was, and is, a  
25 deceptive practice.

26 73. T-Mobile makes the misrepresentations and failures to disclose described in  
27 Paragraph 53 incorporated herein by this reference. T-Mobile further fails to  
28 disclose that it retains a share of the insurance premium as an inducement to steer

its customers toward Asurion's "insurance". Such facts would be material to consumers in their purchase or use of Defendants' services. The failure to adequately disclose these facts in light of the representations made was, and is, a deceptive practice.

74. This advertising is by its nature, unfair competition and unfair, deceptive, untrue, or misleading advertising within the meaning of California Business & Professions Code § 17500 et seq. Such advertisements are likely to have deceived, did deceive, and continue to deceive the intended audience.

75. The above-described false, misleading, and deceptive advertising conducted by Defendants continues to have a tendency to deceive the intended audience in that Defendants have failed to cease such advertising.

76. The misrepresentations and non-disclosures by Defendants of the material facts detailed above constitute false and misleading advertising and therefore constitute a violation of, Business & Professions Code § 17500 et seq.

77. Plaintiff and the members of the Class have suffered injury and have lost money or property as a result of Defendants' violations of Business & Professions Code § 17500 et seq.

78. Such conduct is ongoing and continues to this date. Plaintiff and the Class Members are therefore entitled to the relief described below.

### **FIFTH CAUSE OF ACTION**

#### **For Common Law Fraud (Against all Defendants)**

79. Plaintiff repeats, realleges, and incorporates by reference each and every allegation contained in each of the preceding paragraphs as though fully incorporated herein, made a part hereof, and set forth herein.

80. Defendants represented to Plaintiff and Class Members, expressly or by implication that the insurance policy purchased was a conventional insurance policy, that the "deductible" was a predetermined sum deductible from a loss payable amount, that the loss would be adjusted and that a lost cell phone would

1 be replaced with a phone of "like kind, quality and value".

2 81. The representations set forth above were in fact false, and were made by  
3 Defendants with knowledge of their falsity.

4 82. Plaintiff and Class Members could not in the exercise of reasonable  
5 diligence have discovered the falsity of the representations set forth above.

6 83. Plaintiff and Class Members relied upon the representations set forth above  
7 in their decision to purchase cell phone "insurance" and T-Mobile's products and  
8 services.

9 84. As a proximate result of Defendants' misrepresentations, Plaintiff and the  
10 Class Members were damaged in an amount to be proven at trial.

11 **SIXTH CAUSE OF ACTION**

12 **For Negligent Misrepresentation**

13 **(Against all Defendants)**

14 85. Plaintiff repeats, realleges, and incorporates by reference each and every  
15 allegation contained in each of the preceding paragraphs as though fully  
16 incorporated herein, made a part hereof, and set forth herein.

17 86. Defendants represented to Plaintiff and Class Members, expressly or by  
18 implication that the insurance policy purchased was a conventional insurance lost  
19 cell phone would be replaced with a phone of "like kind, quality and value".

20 87. The representations set forth above were in fact false, and at the time that  
21 Defendants made them, they knew or should have known that the representations  
22 were false.

23 88. Plaintiff and Class Members could not in the exercise of reasonable  
24 diligence have discovered the falsity of the representations set forth above.

25 89. Plaintiff and Class Members relied upon the representations set forth above  
26 in their decision to purchase cell phone insurance".

27 90. As a proximate result of Defendants' misrepresentations, Plaintiff and the  
28 Class Members were damaged in an amount to be proven at trial.

**SEVENTH CAUSE OF ACTION**

**Civil Conspiracy (Against all Defendants)**

91. Plaintiff repeats, realleges, and incorporates by reference each and every allegation contained in Paragraphs 1-83 and 88-113 as though fully incorporated herein, made a part hereof, and set forth herein.

92. On information and belief, Defendants entered into an agreement to defraud consumers in violation of state consumer protection laws, common law, and federal laws against mail and wire fraud by selling "insurance" that was in fact illusory and provided no real benefit to policyholders. The conspiracy to defraud consumers is ongoing.

93. On information and belief, Defendants consciously conspired and deliberately pursued a common plan to commit tortious acts, subjecting each to joint and several liability.

94. Defendants each committed unlawful or wrongful acts in furtherance of the alleged conspiracy including:

- a) Issuing false advertising and marketing materials that misrepresented the materials terms of the insurance policies;
- b) Drafting insurance policies in a manner calculated to deceive consumers;
- c) Manufacturing refurbished replacement phones, and representing expressly or by implication to consumers that said phones were of "like kind, quality and value" as the insured phones;
- d) Receipt of money including premiums and deductibles through the U.S. mail and wires.

**EIGHTH CAUSE OF ACTION**

**(Breach of Fiduciary Duty) (Against all Defendants)**

95. Plaintiff repeats, realleges, and incorporates by reference each and every allegation contained in each of the preceding paragraphs as though fully incorporated herein, made a part hereof, and set forth herein.

1 96. When Asurion and T-Mobile switched their customers from a Hartford  
2 Insurance policy to a Liberty Mutual policy, T-Mobile was not an appointed agent  
3 of Liberty Mutual as required by California Insurance Code § 758.62(a)(2).  
4 Asurion, however, was a licensed insurance broker in California.

5 97. Asurion acts as an insurance broker pursuant to applicable law in that it does  
6 not act on behalf of a single insurer, but rather in conjunction with the cell phone  
7 carrier, it picks the insurance company who will underwrite the policy, or  
8 example, the insurance company for Sprint and Cingular subscribers is Continental  
9 Insurance, not Liberty Mutual or Hartford.

10 98. Asurion also acts as an insurance broker pursuant to applicable law in that it  
11 works with the cell phone carrier and the insurance company to procure different  
12 insurance plans for each carrier. For example, customers of Verizon Cingular and  
13 Sprint have a uniform \$50 deductible, and customers of Amp'd Mobile have  
14 deductibles of \$50 or \$70 depending upon the phone.

15 99. T-Mobile is an insurance broker pursuant to applicable law in that it picked  
16 the insurance plan that would be offered to T-Mobile subscribers.

17 100. Both Asurion and T-Mobile were in fact acting as insurance brokers  
18 pursuant to applicable law, when they switched their customers from the Hartford  
19 policy to the Liberty Mutual policy.

20 101. By acting as insurance brokers, Asurion and T-Mobile assumed a fiduciary  
21 duty to Plaintiff and the Class members to act in the best interests of Plaintiff and  
22 the Class members, and to find the best available coverage at the best available  
23 price, exercising good faith and fair dealing, full disclosure of material facts, and  
24 had a duty of loyalty to Plaintiff and the Class members.

25 102. Asurion and T-Mobile breached their fiduciary duties to Plaintiff and the  
26 Class members by switching them to an insurance policy that was far less  
27 favorable than the Hartford Insurance policy. The policy was less favorable  
28 because the deductibles were higher, and the deductibles were therefore more

likely to exceed the cost of replacement phones provided by Asurion.

103. Asurion and T-Mobile breached their fiduciary duties to Plaintiff and the Class members by procuring insurance that is illusory in that the so called deductible is actually a compulsory processing fee, and in that the processing fee often exceeds the cost of a replacement phone, particularly for T-Mobile customers who have higher deductibles than Verizon, Amp'd and Sprint customers.

104. Asurion and T-Mobile breached their fiduciary duties to Plaintiff and the Class members by procuring insurance which is less favorable than the insurance it has procured for customers of other cell phone carriers such as Verizon, Cingular, Sprint and Amp'd. The insurance is less favorable because most T-Mobile subscribers have higher premiums and deductibles than they would have if they were enrolled in the other plans.

105. Plaintiff and the Class members have been damaged as a result of Asurion and T-Mobile's breach of fiduciary duty.

### **NINTH CAUSE OF ACTION**

#### **Breach of An Express Contract (Implied Covenant of Good Faith and Fair Dealing)**

#### **(Against Asurion and T-Mobile)**

106. Plaintiff repeats, realleges, and incorporates by reference each and every allegation contained in each of the preceding paragraphs as though fully incorporated herein, made a part hereof, and set forth herein.

109. Defendants Asurion and T-Mobile have identified two contracts which they contend are express contracts governing the relationship between Plaintiff and Defendants at the time Plaintiff was switched from the Hartford policy to the Liberty Mutual policy. Those contracts are the Hartford Insurance policy, and the Service Agreement between T-Mobile and Plaintiff.

111. Those contracts like all contracts contain an implied covenant of good faith

1 and fair dealing. The meaning of the covenant of good faith and fair dealing  
 2 depends upon the express terms of the contract, and the legitimate expectations of  
 3 the parties arising from those terms.

4 112. While the two contracts identified by Asurion and T-Mobile purport to state  
 5 that they had the right to the right to unilaterally change the terms of the cell-  
 6 phone insurance, at a minimum, any such decision pursuant to the implied  
 7 covenant had to be a reasonable one.

8 113. Plaintiff had a legitimate expectation that any change in the terms of  
 9 insurance would be reasonable.

10 114. Asurion and T-Mobile abused their power to specify terms by switching  
 11 consumers to an insurance policy with deductibles of \$40, \$70 or \$110, which had  
 12 higher premiums, which did not offer materially greater coverage, and which were  
 13 inferior to the policies obtained by Asurion for other cell-phone subscribers (such  
 14 as Verizon customers) who were also switched from Hartford to Liberty Mutual.  
 15 This was a breach of the implied covenant of good faith and fair dealing.

16 115. Plaintiff and the Class members have been damaged as a result of Asurion  
 17 and T-Mobile's breach of the implied covenant of good faith and fair dealing.

## 18 **TENTH CAUSE OF ACTION**

### 19 **Unjust Enrichment (Against all Defendants)**

20 116. Plaintiff repeats, realleges, and incorporates by reference each and every  
 21 allegation contained in each of the preceding paragraphs as though fully  
 22 incorporated herein, made a part hereof, and set forth herein.

23 117. To the detriment of Plaintiff and Class Members, Defendants have and  
 24 continue to be unjustly enriched by, inter alia, receiving insurance premiums,  
 25 collecting deductibles, and making money by selling phones and cell phone  
 26 service.

27 118. To the detriment of Plaintiff and Class Members, Defendants have and  
 28 continue to receive benefits by, inter alia, receiving insurance premiums,

1 collecting deductibles, and making money by selling phones and cell phone  
2 service.

3 119. Accordingly, Plaintiff and Class Members seek full restitution of  
4 Defendants' enrichment, benefits, and ill-gotten gains acquired as a result of the  
5 unlawful and/or wrongful conduct alleged herein.

### 6 **TOLLING OF STATUTES OF LIMITATION**

7 120. Defendants took affirmative steps to conceal the fraudulent scheme alleged  
8 herein, and accordingly, all applicable statutes of limitations are thereby tolled.

### 9 **PRAYER FOR RELIEF**

10  
11 WHEREFORE, Plaintiff, individually and on behalf of the Class members defined  
12 herein, pray for judgment and relief on all Causes of Action as follows:

- 13 1. Certification of the Class as a class action, appointment of Plaintiff as a  
14 Class representative and Plaintiffs counsel of record as Class Counsel, and a  
15 declaration of financial responsibility on the part of Defendants for the costs of  
16 Class notification;
- 17 2. Full restitution to Plaintiff and each member of the Class;
- 18 3. Disgorgement to Plaintiff and each member of the Class, including  
19 disgorgement of all revenues, earnings, profits, compensation, and benefits which  
20 Defendants obtained as a result of the conduct alleged in this Complaint;
- 21 4. A temporary, preliminary and/or permanent order for injunctive relief  
22 enjoining Defendants from pursuing the policies, acts and practices alleged herein;
- 23 5. Additional equitable relief, including an order imposing a constructive trust  
24 upon Defendants' profits from recurring subscription charges and requiring  
25 Defendants to pay Plaintiff and all members of the Class for any act or practice  
26 declared by this Court to be unlawful;
- 27 6. Additional equitable relief, including cy pres (fluid recovery) relief, in the  
28 event that a residue exists in the common fund created for the Class, in order to

1 ensure that Defendants do not retain any illicit profit;

2 7. An award of compensatory and exemplary damages including but not  
3 limited to treble damages, as allowed by applicable law ;

4 8. Attorneys' fees, as allowed by applicable law;

5 9. Costs, as allowed by law;

6 10. Pre- and post- judgment interest at the maximum legal rate; and

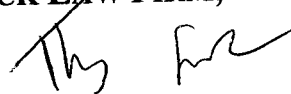
7 11. Such other and further relief as the Court deems proper.

8  
9 Respectfully submitted,

10  
11  
12 Dated: January 30, 2009

**THE KICK LAW FIRM, APC**

13 By:

  
\_\_\_\_\_  
Taras P. Kick  
Graig R. Woodburn  
G. James Strenio  
Thomas A. Segal  
Counsel for Plaintiff

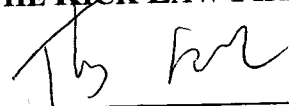
**DEMAND FOR JURY TRIAL**

Plaintiff, individually and on behalf of all others similarly situated, hereby  
demands a trial by jury.

Dated: January 30, 2009

**THE KICK LAW FIRM, APC**

By:

  
\_\_\_\_\_  
Taras P. Kick, Esq.  
Graig Woodburn, Esq.  
G. James Strenio, Esq.  
Thomas A. Segal, Esq.  
Attorneys for Plaintiff,  
Wineesa Cole

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES  
**Wineesa Cole v. Asurion Corporation; T-Mobile USA, Inc.**  
**CASE NO. CV-06-6649-PSG (JTLx)**

I am employed by the Kick Law Firm, APC, in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 900 Wilshire Blvd., Suite 230, Los Angeles, California 90017.

On January 30, 2009, I served the foregoing document described as **THIRD AMENDED CLASS ACTION COMPLAINT** on the parties indicated below:

David M. Walsh  
Jason M. Frank  
Geoffrey T. Stover  
**PAUL, HASTINGS, JANOFSKY  
& WALKER, LLP**  
515 South Flower Street  
Twenty-Fifth Floor  
Los Angeles, CA 90071-2228  
Phone: (213) 683-6000  
Fax: (213) 627-0705  
*Attorney For Defendants Asurion  
Corporation, T-Mobile USA, Inc, and  
Liberty Mutual*

Alan K. Steinbrecher  
**LAW OFFICES OF ALAN K.  
STEINBRECHER, P.C.**  
515 South Flower Street, 17<sup>th</sup> Floor  
Los Angeles, CA 90071-2228  
Tel: (213) 891-1400  
Fax: (213) 891-1470  
*Attorneys For Defendants Liberty*

**BY OVERNIGHT DELIVERY SERVICE** - I caused such envelope to be deposited with an overnight delivery service (Overnight Express/Federal Express) for delivery the next court day, or at most, within two court days of the above date.

X **BY UNITED STATES MAIL** - I deposited the sealed envelope with postage thereon fully prepaid in the United States mail at Los Angeles, California.

**FACSIMILE** - I transmitted it to a facsimile machine maintained by the person on whom it is served at the facsimile machine telephone number as last given by that person on any document which he or she has filed in the cause and served on the party making the service, as indicated below. The facsimile was transmitted from my business address, using the fax machine whose number is 213-624-1589, at approximately \_\_\_\_\_ am/pm The document was transmitted by facsimile transmission and that the transmission was reported as complete and without error.

I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this January 30, 2009.

  
Manuel D. Garcia