

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

CASE NO.: 1:09-CV-157

TRACFONE WIRELESS, INC., a Delaware  
Corporation,

Plaintiff,

v.

JEFFREY STABLEIN,  
individually, and d/b/a 1<sup>st</sup> PREMIER  
COMMUNICATIONS,  
JOHN DOES 1-50, and  
XYZ COMPANIES 1-50,

Defendants. /

**COMPLAINT FOR DAMAGES AND  
INJUNCTIVE RELIEF AND DEMAND FOR JURY TRIAL**

Plaintiff, TRACFONE WIRELESS, INC. ("TracFone"), a Delaware corporation, sues Defendants, JEFFREY STABLEIN, individually ("Stablein"), and 1st PREMIER COMMUNICATIONS, a Pennsylvania corporation ("1st Premier"), (collectively "Defendants"), and states:

1. This is an action for damages in excess of \$75,000.00, exclusive of interest, costs, and attorneys' fees, and injunctive relief arising out of Defendants' unlawful business enterprise that willfully infringes on TracFone's incontestable trademarks, copyrights and other rights related to TracFone's prepaid wireless service, NET10 prepaid wireless service ("NET10") and TracFone/NET10's specially manufactured wireless telephones ("TracFone/NET10 Prepaid Phones").

2. As set forth in greater detail below, Defendants are engaged in unlawful business practices involving the unauthorized and unlawful bulk purchase and resale of TracFone/NET10

Prepaid Phones, unauthorized and unlawful computer unlocking or reflashing of TracFone/NET10 Prepaid Phones, alteration of TracFone's copyrighted and proprietary software installed in the Phones, and trafficking of the Phones for profit (the "Bulk Resale Scheme").

3. TracFone is a Delaware corporation that maintains its principal place of business in Miami-Dade County, Florida.

4. 1st Premier is a Pennsylvania corporation that maintains its principal place of business in Erie, Pennsylvania.

5. Stablein is an individual who, upon information and belief, resides in Erie, Pennsylvania.

6. Stablein is the principal of 1st Premier.

7. Upon information and belief, yet to be identified John Does 1-50 and XYZ Companies 1-50 are present and/or doing business in Florida, Georgia, Texas, New York, California, Michigan, Honduras and Mexico, individually or through their agents, servants, and employees and are subject to the jurisdiction of this Court. The identities of the various John Doe and XYZ defendants are not presently known, and the Complaint herein will be amended to include the name or names of these individuals and/or entities when such information becomes available.

#### **PARTIES, JURISDICTION, AND VENUE**

8. Jurisdiction in this Court is proper pursuant to 28 U.S.C. §§ 1331, 1338, and 17 U.S.C. § 1203 because TracFone's claims for violations of the United States Trademark Act, Title 15 of the United States Code, and United States Copyright Act, Title 17 of the United States Code, arise under federal law. This Court has supplemental jurisdiction pursuant to 28 U.S.C. § 1367 over TracFone's state law claims because those claims are so related to the federal claims that they form part of the same case or controversy.

9. The Defendants are subject to the personal jurisdiction of this Court because the Defendants are residents of the State of Pennsylvania.

10. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1391(a) and (b), and 28 U.S.C. §1400, because a substantial part of the events or omissions giving rise to the claim occurred in this District, the impact of Defendants' misconduct occurred in this District, the Defendants reside in and are subject to personal jurisdiction in this District.

11. All conditions precedent to filing this action have been performed, waived or excused.

12. TracFone has retained the undersigned attorneys to represent it in this action and has agreed to pay its attorneys a reasonable fee for their services.

#### **BACKGROUND**

13. This is an action for damages and injunctive relief arising out of Defendants' unlawful business enterprises that willfully infringe on TracFone's incontestable trademarks, copyrights and other rights related to TracFone's prepaid wireless service, TracFone's NET10 ("NET10") branded prepaid wireless service, and TracFone's and NET10's specially manufactured wireless telephones ("TracFone/NET10 Prepaid Phones" or "Phones") designed for use exclusively in the United States, Puerto Rico, and U.S. Virgin Islands with TracFone's and NET10's prepaid wireless service.

14. As set forth in greater detail below, Defendants are engaged in, and knowingly facilitate and encourage others to engage in, unlawful business practices involving the unauthorized and unlawful bulk purchase and resale of TracFone/NET10 Prepaid Phones, unauthorized and unlawful computer unlocking or reflashing of TracFone/NET10 Prepaid Phones, alteration of TracFone's copyrighted and proprietary software computer code installed in the Phones, and trafficking of the Phones for profit (the "Bulk Resale Scheme").

15. Defendants perpetrate their Bulk Resale Scheme by acquiring bulk quantities of TracFone/NET10 Prepaid Phones from internet sites and retail stores such as Wal-Mart, Target or Sam's Club, and by soliciting others ("Runners") to purchase TracFone/NET10 Prepaid Phones in bulk for the benefit of Defendants. Defendants then remove the TracFone/NET10 Prepaid Phones' original packaging and ship them overseas.

16. Defendants acquire the TracFone/NET10 Prepaid Phones with the knowledge and intent that the Phones will not be activated for use on the TracFone/NET10 prepaid wireless networks. Instead, the Phones are computer-hacked. The purpose of this hacking, known as "reflashing" or "unlocking," is to erase, remove and/or disable TracFone's copyrighted and proprietary software installed in the Phones, which enables the use of the TracFone/NET10 Prepaid Phones exclusively on TracFone's prepaid wireless system. The reflashed Phones are then trafficked and resold, at a premium, as new, under TracFone's trademarks. Defendants are not, and have never been, authorized retailers or distributors of TracFone or NET10 products.

17. In an effort to prevent these unlawful business practices, TracFone retailers have implemented policies limiting the number of TracFone/NET10 Prepaid Phones an individual may purchase on a daily basis. Defendants hire Runners and take other steps to circumvent these policies in perpetrating their Bulk Resale Scheme.

18. Defendants' conduct, together with that of currently unknown civil and criminal co-conspirators, is causing TracFone to suffer millions of dollars in losses and has caused immediate and irreparable injury to TracFone.

#### **TRACFONE'S BUSINESS MODEL**

19. TracFone is the largest provider of prepaid wireless telephone service in the United States, and markets its service under both the TracFone and NET10 brands. TracFone's service enables its customers to prepay for their wireless service by purchasing TracFone airtime

cards and specially manufactured wireless Phones. Customers load airtime into their TracFone/NET10 Prepaid Phones using codes generated from PIN numbers found on the airtime cards, or via TracFone's website. TracFone/NET10 Prepaid Phones and airtime cards are sold through major national retailers such as Wal-Mart, Target, and Sam's Club.

20. TracFone is considered a "Mobile Virtual Network Operator" or "MVNO" in the wireless industry. The company is not a facilities-based wireless provider like AT&T, Verizon, T-Mobile or Sprint/Nextel. Rather, TracFone contracts with facilities-based wireless providers to purchase airtime on their networks for use by TracFone's customers.

21. TracFone's business model is based upon TracFone's ability to deliver an affordable product to its consumers. Therefore, TracFone subsidizes its customers' acquisition of the TracFone/NET10 Prepaid Phones ("Phones") by selling its Phones for substantially less than the Phones cost TracFone. TracFone recoups this subsidy through profits earned on the sale of the TracFone prepaid airtime cards that are required to make and receive calls on the TracFone/NET10 Prepaid Phones. TracFone is able to offer its Phones at affordable prices only if the Phones are used as intended on the TracFone prepaid wireless network.

22. Manufacturers that produce wireless phones for TracFone install special proprietary prepaid software, developed, copyrighted, and owned by TracFone ("TracFone Prepaid Software"), into the TracFone/NET10 Prepaid Phones. The TracFone Prepaid Software prevents TracFone/NET10 Prepaid Phones from being used without loading airtime minutes from a TracFone/NET10 prepaid airtime card.

#### **TRACFONE'S FEDERALLY PROTECTED RIGHTS**

23. TracFone is one of the oldest and leading providers of prepaid wireless telecommunications services in the United States. TracFone has used, and continues to use,

trademarks in commerce including the marks TracFone and NET10. In particular, TracFone owns and has also used the registered trademarks identified below:

a. Incontestable United States Trademark Registration No. 2,114,692 for TracFone, used in connection with: (1) electronic communications equipment, namely, cellular telephones, prepaid airtime cellular telephones and cellular telephone accessories, namely, prepaid airtime debit cards, battery chargers, stands, antennae, voice amplifiers and microphones; computer programs for use in controlling and monitoring prepaid airtime cellular telephone service, in International Class 9; (2) providing cellular telephone services and providing monitoring and control services for use in conjunction with prepaid airtime cellular phones and debit cards, in International Class 38; and (3) wholesale distributorship featuring of cellular telephones, prepaid airtime cellular telephones and prepaid airtime debit cards, and software for controlling and monitoring prepaid airtime cellular service, in International Class 42, issued on November 18, 1997 and based on a first use date of June 30, 1996;

b. United States Trademark Registration No. 2,761,017 for TracFone and Design, used in connection with: (1) electronic communications equipment, namely, cellular telephones; prepaid air time cellular telephones; cellular telephone accessories, namely, battery chargers, stands, antennae, headset kits comprised of hands free electronic earpiece with microphone and holster, hands free headsets, cases with flaps, power adapters, batteries, carry sleeves, face plates, belt clips, holsters, mounting attachments, in International Class 9; (2) on-line retail store services featuring cellular telephones, prepaid wireless air time cards, cellular telephone accessories and wireless services, in International Class 35; and (3) providing cellular telephone services and providing monitoring and control services for use in conjunction

with prepaid air time cellular phones and debit cards, in International Class 38, issued on September 9, 2003 and based on a first use date of December 2000;

c. United States Trademark Registration No. 3,224,929 for TracFone Nationwide Prepaid Wireless and Design, used in connection with electronic communications equipment, namely, cellular telephones; prepaid air time cellular telephones; cellular telephone accessories, namely, battery chargers, stands, antennae, headset kits comprised of hands free electronic earpiece with microphone and holster, hands free headsets, cases with flaps, power adapters, batteries, carry sleeves, face plates, belt clips, holsters, mounting attachments, in International Class 9, issued on April 3, 2007 and based on a first use date of December 31, 2005;

d. United States Trademark Registration No. 3,222,623 for TracFone Nationwide Prepaid Wireless and Design, used in connection with distributorship services featuring cellular telephones, prepaid air time cellular telephone and prepaid air time debit cards, and software for controlling and monitoring prepaid air time cellular service, in International Class 35, issued on March 27, 2007 and based on a first use date of December 31, 2005;

e. United States Trademark Registration No. 3,118,250 for NET10, used in connection with: (1) monitoring the use of debit cards, in International Class 36; and (2) providing monitoring and control services for use in conjunction with prepaid air time cellular and mobile phones, in International Class 38, issued on July 18, 2006 and based on a first use date of March 1, 2005;

f. United States Trademark Registration No. 3,255,754 for NET10 Pay As You Go Made Simple and Design, used in connection with cellular telephone communications services provided via prepaid air time cellular telephones and prepaid air time cellular calling

card services, in International Class 38, issued on June 26, 2007 and based on a first use of December 31, 2005;

g. United States Trademark Registration No. 3,253,506 for NET10 Pay As You Go Made Simple and Design, used in connection with electronic communications equipment, namely, cellular telephones; prepaid air time cellular telephones; cellular telephone accessories, namely, telephone battery chargers, telephone battery charger stands, telephone antennae, headset kits comprised of hands free electronic earpiece with microphone and holster specially adapted for cell phones, hands free headsets comprising head-phones and a microphone, cases with flaps specially adapted for cell phones, power adapters, batteries, carry sleeves specially adapted for cell phones, decorative cell phone face plates, belt clips, holsters, and mounting attachments specially adapted for carrying cell phones, in International Class 9, issued on June 19, 2007 and based on a first use date of December 31, 2005; and,

h. United States Trademark Registration No. 3,251,389 for NET10 Pay As You Go Made Simple and Design, used in connection with distributorship services featuring cellular telephones, prepaid air time cellular telephones and prepaid air time debit cards, and software for controlling and monitoring prepaid air time cellular service, in International Class 35, issued on June 12, 2007 and based on a first use date of December 31, 2005.

i. United States Trademark Application Serial No. 77,506,332 for SafeLink Wireless and Design, used in connection with cellular telephone communications services, cellular telephone telecommunications services provided via prepaid air time cellular telephones and prepaid air time cellular telephone calling card services, in International Class 38, application filed on June 24, 2008.



24. TracFone's aforementioned marks (the "Marks") constitute the lawful, valued, subsisting and exclusive property of TracFone, and as a result of the high quality of TracFone's products, services, sales, promotion and advertising thereof, the marks have become an intrinsic and essential part of the valuable goodwill and property of TracFone, and are well known and established to customers and the trade as symbols identifying and distinguishing TracFone's products and services, and signifying distinctive services of exceptional quality. True and correct copies of the certificates of registration issued by the United States Patent and Trademark Office for the Marks are attached as **Exhibit A**.

25. TracFone also holds a valid copyright registration, TX 6-515-894, on the TracFone Prepaid Software. A true and correct copy of the certificate of registration is attached as **Exhibit B**.

**TERMS AND CONDITIONS REGARDING THE  
USE OF TRACFONE/NET 10 PREPAID PHONES**

26. TracFone/NET10 Prepaid Phones are sold subject to terms and conditions ("Terms and Conditions") which conspicuously restrict and limit the sale and use of the Phones. These Terms and Conditions are set forth in printed inserts that are included in the packaging with every TracFone Phone, and are also available to the public on TracFone's website. They are also referenced in printed warnings that are placed on the outside of the retail packaging of the Phones. The Terms and Conditions and language on the packaging constitute a valid binding contract.

27. The retail packaging in which new TracFone/NET10 Prepaid Phones are sold contains the following language that is conspicuously printed in all capital letters in a red banner on the outside of the package for TracFone handsets:

THIS TRACFONE HANDSET IS SOLD EXCLUSIVELY FOR USE WITH TRACFONE PREPAID WIRELESS SERVICE. YOU AGREE NOT TO TAMPER WITH OR ALTER THE SOFTWARE OR HARDWARE IN THIS PHONE, OR ASSIST OTHERS IN SUCH ACTS, OR TO EXPORT TRACFONE HANDSETS OUTSIDE OF THE UNITED STATES. THESE ACTS VIOLATE TRACFONE'S RIGHTS AND COULD VIOLATE STATE AND FEDERAL LAWS. TRACFONE WILL PROSECUTE VIOLATORS TO THE FULL EXTENT OF THE LAW. BY PURCHASING OR OPENING THIS PACKAGE, YOU ARE AGREEING TO THESE TERMS AND THE TERMS AND CONDITIONS OF SERVICE IN THE ENCLOSED USER GUIDE (AND AVAILABLE AT WWW.TRACFONE.COM).

28. NET10 handsets have similar language on the packaging, also on a red background in bold letters, as follows:

**This NET10 handset is sold exclusively for use with NET10 prepaid wireless service. By purchasing or opening this package, you are agreeing to these terms and the terms and conditions of service enclosed (and available at [www.net10.com](http://www.net10.com)). You agree not to tamper with or alter the software or hardware in this phone, or assist others in such acts, or to export NET10 handsets outside of the United States. These acts violate TracFone's rights and could violate state and federal laws. TracFone will prosecute violators to the full extent of the law.**

29. The Terms and Conditions included in the TracFone handset packaging also provide, in pertinent part, as follows:

**UNAUTHORIZED USAGE.** The TRACFONE handset is sold exclusively for use with the TRACFONE prepaid wireless Service. You agree not to tamper with or alter your TRACFONE or its software, enter unauthorized PIN numbers, engage in any other unauthorized

or illegal use of your TRACFONE or the Service, or assist others in such acts, or to export TRACFONE handsets outside of the United States. Improper, illegal or unauthorized use of your TRACFONE may result in immediate discontinuance of Service. These acts violate TRACFONE's rights and could violate state and federal laws. TRACFONE will prosecute violators to the full extent of the law.

30. Similarly, the Terms and Conditions that are included in the packaging for the NET10 handsets provide, in pertinent part, as follows:

**UNAUTHORIZED USAGE.** The NET10 handset is sold exclusively for use with the NET10 Prepaid Wireless Service. You agree not to tamper with or alter your NET10 or its software, enter unauthorized PIN numbers, engage in any other unauthorized or illegal use of your NET10 or the Service, or assist others in such acts, or export NET10 handsets outside of the United States. Improper, illegal or unauthorized use of your NET10 may result in immediate discontinuance of Service. These acts violate NET10's rights and could violate state and federal laws. NET10 will prosecute violators to the full extent of the law.

31. The restrictions and limitations in the Terms and Conditions and on the packaging are intended to restrict the use of TracFone/NET10 Prepaid Phones solely to TracFone's wireless virtual prepaid network.

32. TracFone/NET10 Prepaid Phones may access TracFone's wireless virtual prepaid network only within the United States, the U.S. Virgin Islands and Puerto Rico (the "Coverage Area").

33. TracFone/NET10 Prepaid Phones cannot access any wireless network outside of the Coverage Area unless the TracFone Prepaid Software is unlawfully removed or altered.

### DEFENDANTS' MISCONDUCT

34. TracFone has discovered that, although large quantities of its Phones are being purchased at retailers throughout the United States, a significant number of these Phones are not being activated for use on the TracFone network.

35. Instead, entities and individuals such as Defendants are purchasing and selling TracFone/NET10 Prepaid Phones in bulk quantities for use outside of the TracFone network and Coverage Area. The Phones are removed from their original packaging, shipped overseas, and "unlocked" or "reflashed." Defendants' actions are not for the sole purpose of lawfully connecting to a wireless telephone communication network.

36. The process of unlocking or reflashing TracFone/NET10 Prepaid Phones involves circumventing the electronic protections installed in the handset, and then erasing, removing and/or disabling the TracFone Prepaid Software.

37. Once a TracFone Prepaid Phone has been unlocked or reflashed, it is no longer operable within TracFone's prepaid wireless virtual network, and could be further modified so as to become operable on other cellular networks. Once this occurs, TracFone no longer has a revenue source to recoup the invested subsidy on that Phone.

38. Defendants are knowingly and willfully engaged in an enterprise that traffics in and resells unlocked or reflashed TracFone/NET10 Prepaid Phones, or TracFone/NET10 Prepaid Phones that they know, or reasonably should know, will be subsequently unlocked or reflashed and then resold under the Marks outside the Coverage Area as new for a substantial profit.

39. Unless unlocked or reflashed, the TracFone/NET10 Prepaid Phones are inoperable as wireless telecommunications devices outside the Coverage Area.

40. The Coverage Area is plainly disclosed in TracFone's packaging and in the Terms and Conditions. There would be no reason to ship TracFone/NET10 Prepaid Phones overseas unless they were intended to be unlawfully unlocked or reflashed.

41. Defendants have purchased and sold thousands of TracFone/NET10 Prepaid handsets Phones from and to several known bulk resellers of TracFone and NET10 products

42. Upon information and belief, Defendants' active solicitation of Runners includes contacting Runners and requesting that they obtain specific brands and models of prepaid phones, including TracFone and NET10.

43. To further the Bulk Resale Scheme, Defendants and Runners, among other things, conspire and work in concert to circumvent retailers' policies limiting the number of TracFone/NET10 Prepaid Phones an individual may purchase.

44. Defendants and Runners are often able to buy the Phones without paying State or other taxes associated with the purchase because of the large volume of Phones they purchase.

45. An agreement and conspiracy existed and continues to exist between and among the Defendants and other co-conspirators, to unlawfully bulk purchase, traffic and resell unlawfully reflashed and counterfeit TracFone/NET10 Prepaid Phones under the Marks.

46. Defendants each knowingly agreed to engage, and did engage, in one or more overt acts in furtherance of the conspiracy as set forth with more particularity in this complaint.

47. TracFone has been proximately damaged by the conspiracy and Defendants' actions in furtherance of the conspiracy.

#### **SUBSTANTIAL HARM CAUSED BY DEFENDANTS' MISCONDUCT**

48. Defendants' actions substantially harm TracFone by depriving TracFone of the opportunity to recoup its losses on the sale of its TracFone/ NET10 Prepaid Phones and to earn profits by providing wireless service to legitimate TracFone consumers.

49. Since the Defendants often remove the Phones from their original packaging and/or ship the Phones outside the United States, they do not carry TracFone's manufacturer's warranty. Accordingly, TracFone/NET10 Prepaid Phones differ materially from the genuine TracFone/NET10 Prepaid Phones sold by authorized TracFone retailers, all of which carry a manufacturer's warranty.

50. In addition, removing the Phones from the original packaging and altering the software irreparably harms TracFone because it deprives TracFone of the means to control the quality of its product.

51. The conduct of Defendants, their unknown co-conspirators, and others who engage in the unlawful bulk purchasing, reflashing, and sale of reflashed and altered TracFone/NET10 Prepaid Phones has also resulted in a shortage of available TracFone/NET10 Prepaid Phones, thereby substantially harming TracFone and its relationship with retailers and consumers because TracFone is not able to supply retailers with sufficient handsets to satisfy the demand from legitimate consumers. As a result, TracFone is losing potential customers to other wireless competitors.

52. Defendants' actions substantially harm TracFone and consumers who ultimately purchase TracFone handsets that have been improperly reflashed. These reflashed TracFone/NET10 Prepaid Phones will not work as intended. Purchasers of these reflashed phones are unable to access TracFone's prepaid wireless service. Consumers of the reflashed phones are misled as to the source, sponsorship and origin of their reflashed wireless phone.

53. The process of reflashing or unlocking a TracFone/NET10 Prepaid Phone voids the manufacturer's warranty on the device. In addition, the sale of a TracFone/NET10 Prepaid Phone outside of the United States also voids the manufacturer's warranty. Both consumers and

TracFone are harmed when a TracFone/NET10 Prepaid Phone that has been altered or sold outside of this country by Defendants or their co-conspirators is submitted for warranty repair. Because the warranty is voided on reflashed Phones or Phones sold abroad, consumers who purchase Phones from Defendants or their co-conspirators are unable to obtain warranty service in the event they experience problems with their Phones. As a result, TracFone's reputation suffers further.

54. Defendants' conduct has also resulted in the dilution of TracFone's trademarks, substantial harm to TracFone's business reputation and goodwill and a greater likelihood of confusion, mistake and deception as to the source of origin of TracFone products unlawfully sold by the Defendants and as to the relationship between TracFone and Defendants.

#### **CIVIL PROCEEDINGS IN OTHER FEDERAL COURTS**

55. Federal courts have recognized that conduct similar or identical to Defendants' violates existing civil laws.

56. TracFone has filed various independent lawsuits in the United States District Courts for the Southern District of Florida, the Middle District of Florida, the Northern District of Texas, the Southern District of Texas, the Eastern District of New York and the Central District of California against other defendants similarly engaged in the practice of defrauding legitimate consumers and TracFone, by bulk purchasing prepaid wireless telephones and reflashing, repackaging, and reselling the counterfeit prepaid wireless phones for profit. Other wireless service providers, including AT&T, T-Mobile USA, and Virgin Mobile have also filed similar lawsuits, as has wireless handset manufacturer Nokia.

57. TracFone, AT&T, T-Mobile, Virgin Mobile and Nokia have all obtained Final Judgments and Permanent Injunctions in these cases, sample copies of which are attached as **Composite Exhibit C.**

**COUNT ONE**  
**FEDERAL TRADEMARK INFRINGEMENT IN VIOLATION OF**  
**15 U.S.C. § 1114 (THE LANHAM ACT)**  
**(Against all Defendants)**

TracFone incorporates by reference each and every allegation set forth in paragraphs 1 through 57, as though fully set forth herein.

58. Defendants' and/or their co-conspirators' aforementioned conduct constitutes use of the Marks without authorization in connection with their conspiracy to sell and offer for sale reflashed and counterfeit TracFone/NET10 Prepaid Phones, which downstream customers will discover are not capable for use with the TracFone prepaid wireless service.

59. Defendants' and/or their co-conspirators' use of the Marks in connection with the sale of reflashed and counterfeit TracFone/NET10 Phones has caused, and will further cause, a likelihood of confusion, mistake and deception as to the source of origin of Defendants' counterfeit products, and the relationship between TracFone and Defendants.

60. Defendants' and/or their co-conspirators' unauthorized use of the Marks is likely to continue in the future, all to the great and irreparable damage to the business, reputation and goodwill of TracFone.

61. Defendants' and/or their co-conspirators' use and sale of the Marks in connection with the reflashed and counterfeit TracFone/NET10 Phones, which are no longer capable of use with the TracFone prepaid wireless service constitutes a misappropriation of TracFone's distinguishing and identifying Marks that were created as a result of effort and expense by TracFone over a long period of time. Defendants' and/or their co-conspirators' use of the Marks evokes an immediate, favorable impression or association and constitutes a false representation that the products and business of Defendants have some connection, association, or affiliation with TracFone, and thus constitutes false designation of origin.



62. Defendants, in committing the foregoing acts in commerce, have damaged, and will continue to damage, TracFone and the reputation and goodwill of TracFone, and each has unjustly enriched and will continue to unjustly enrich his, herself or itself at the expense of TracFone. TracFone is without an adequate remedy at law to redress such acts, and will be irreparably damaged unless Defendants are enjoined from committing and continuing to commit such acts.

63. Defendants' aforesaid acts constitute willful infringement of TracFone's federally registered trademarks in violation of 15 U.S.C. § 1114.

**COUNT TWO**  
**FEDERAL UNFAIR COMPETITION IN VIOLATION OF**  
**15 U.S.C. § 1125(A) (THE LANHAM ACT)**  
**(Against all Defendants)**

TracFone incorporates by reference each and every allegation set forth in paragraphs 1 through 57, as though fully set forth herein.

64. Defendants have and are engaged in acts of unfair competition through the use of false designations of origin and false advertising in violation of Section 43(a) of the Trademark Act of 1946, 15 U.S.C. § 1125(a).

65. Defendants have used and are using the TracFone Marks in relation to their Bulk Resale Scheme. Accordingly, Defendants have made and are making false express and implied representations that the Phones originate with, are associated with, and/or are endorsed by TracFone in such a manner as to create a likelihood of confusion among Defendants' customers and potential customers.

66. Defendants' acts have damaged, impaired and diluted that part of TracFone's goodwill and good name symbolized by the TracFone name to TracFone's immediate and irreparable damage.

67. Defendants' use of TracFone Marks in connection with their illegal acts constitutes use of a false designation of origin, and Defendants' representations that their Phones originate with or are endorsed by TracFone constitute a use of false descriptions or representations of fact, within the meaning of Section 43(a) of the Trademark Act of 1946, 15 U.S.C. § 1125(a). Further, Defendants' use of TracFone's Marks constitutes unfair competition entitling TracFone to remedies afforded pursuant to Section 43(a) of the Trademark Act of 1946, 15 U.S.C. § 1125(a).

68. As a result of Defendants' acts, TracFone has suffered and continues to suffer and incur irreparable injury, loss of reputation, and pecuniary damages to be proved at trial, in excess of the jurisdictional amount-in-controversy requirements of this Court. Unless enjoined by this Court, Defendants will continue these acts, thereby causing TracFone further irreparable damage.

**COUNT THREE**  
**CONTRIBUTORY TRADEMARK INFRINGEMENT**  
**(Against all Defendants)**

TracFone incorporates by reference each and every allegation set forth in paragraphs 1 through 57, as though fully set forth herein.

69. By misappropriating and using the Marks in connection with the Bulk Resale Scheme, Defendants knowingly aided and enabled distributors and/or sellers of its products to market them to members of the general public in a way that infringes the Marks by placing in the hands of distributors and/or sellers an instrument of consumer deception.

70. Defendants' unlawful, unauthorized, and unlicensed sale of the reflashed or unlocked TracFone/NET10 Prepaid Phones has thus contributed to the creation of express and implied misrepresentations that the TracFone/NET10 Prepaid Phones, as sold by Defendants, were created, authorized, or approved by TracFone, and may be used with TracFone's prepaid wireless service.

71. Upon information and belief, Defendants' conduct has led to post-sale confusion by causing consumers who purchase TracFone/NET10 Prepaid Phones altered by Defendants to believe that they are purchasing handsets with software licensed or approved by TracFone.

72. Defendants' conduct constitutes contributory infringement in violation of the Trademark Act. Defendants' conduct is intentional, malicious and willful.

73. TracFone has suffered substantial damages as a result of **Defendants'** contributory infringement.

**COUNT FOUR**  
**FEDERAL COPYRIGHT INFRINGEMENT OF THE PREPAID SOFTWARE**  
**(Against all Defendants)**

TracFone incorporates by reference each and every allegation set forth in paragraphs 1 through 57, as though fully set forth herein.

74. TracFone has the exclusive right to reproduce and prepare derivative works of its federally copyrighted TracFone Prepaid Software pursuant to 17 U.S.C. § 106.

75. Defendants' and/or its co-conspirators' actions in reflashing or otherwise modifying the federally copyrighted TracFone Prepaid Software, without TracFone's authority or consent, creates an unauthorized derivative work of the TracFone Prepaid Software.

76. Defendants' and/or its co-conspirators' actions in improperly reflashing the federally copyrighted TracFone Prepaid Software, without TracFone's authority or consent, creates an unauthorized reproduction of the TracFone Prepaid Software.

77. Defendants know or should know their conduct constitutes copyright infringement under Title 17 of the United States Code.

78. Defendants' actions have damaged and will continue to irreparably injure TracFone unless Defendants' conduct is enjoined by this Court.

**COUNT FIVE**  
**CIRCUMVENTION OF COPYRIGHTED SOFTWARE PROTECTION SYSTEM**  
**(Against all Defendants)**

TracFone incorporates by reference each and every allegation set forth in paragraphs 1 through 57, as though fully set forth herein.

79. The TracFone Prepaid Software contains technological measures that in the ordinary course of the measures' operation require the application of information, or a process or a treatment, with TracFone's authority, to gain access to the proprietary software, as set forth in 17 U.S.C. § 1201.

80. The TracFone Prepaid Software contains technological measures that effectively control access to the proprietary software.

81. TracFone did not give Defendants or their co-conspirators authority to reflash, unlock, or otherwise to avoid, bypass, remove, disable, deactivate, or impair the technological measures for effectively controlling access to and operation of the TracFone Prepaid Software.

82. TracFone did not grant Defendants or their co-conspirators the authority to circumvent the technological measures for effectively controlling access to the TracFone Prepaid Software.

83. Defendants acted, and/or knowingly engaged in a conspiracy, to avoid, bypass, remove, disable, deactivate, or impair a technological measure for effectively controlling access to the proprietary software without TracFone's authority.

84. Defendants engaged in this misconduct for the purpose of reselling the altered devices for a profit, and not for the sole purpose of lawfully connecting to a wireless telephone communication network.

85. Defendants acted to, and/or knowingly engaged in a conspiracy designed to circumvent a technological measure that effectively controls access to the TracFone Prepaid

Software that is protected under title 17 of the United States Code, and thereby violated 17 U.S.C. § 1201.

86. Defendants' conduct has caused and, unless restrained, will continue to cause TracFone severe, immediate, and irreparable injury and damages for which TracFone has no adequate remedy at law. TracFone is entitled to injunctive relief restraining such conduct, an award of damages, including punitive damages, as well as other equitable and legal relief.

**COUNT SIX**  
**TRAFFICKING IN CIRCUMVENTION TECHNOLOGY**  
**(Against all Defendants)**

TracFone incorporates by reference each and every allegation set forth in paragraphs 1 through 57, as though fully set forth herein.

87. Defendants are, or are knowingly facilitating co-conspirators who are in possession of certain instrumentalities that avoid, bypass, remove, disable, deactivate, or otherwise impair the technological measures within the TracFone Prepaid Software that effectively control access to the proprietary TracFone Prepaid Software.

88. Defendants are, or are knowingly facilitating co-conspirators who are trafficking in the service of circumventing the technological measures that protect the TracFone Prepaid Software from alteration or modification.

89. Individuals purchasing altered phones from Defendants or their co-conspirators purchase both the TracFone/NET10 Prepaid Phone and the service of circumventing the technological measures that protect the TracFone Prepaid Software from alteration or modification provided by Defendants or their co-conspirators.

90. Accordingly, Defendants are, or are knowingly facilitating co-conspirators who are, trafficking in the service of circumventing TracFone's technological measures that

effectively control access to TracFone's Prepaid Software by offering to the public its alteration service for a fee.

91. The service of altering the TracFone Prepaid Software in TracFone/NET10 Prepaid Phones is primarily designed or produced for the purpose of circumventing TracFone's technological measures that effectively control access to TracFone's Prepaid Software that is protected under title 17 of the United States Code.

92. Accordingly, Defendants have violated, and continue to violate, Section 1201 of the Copyright Act and, as a result, TracFone has been irreparably injured and will continue to be irreparably injured unless the violating activities of Defendants are enjoined by this Court.

93. The service of altering the TracFone Prepaid Software has, at most, only a limited commercially significant purpose or use other than circumventing TracFone's technological measures that effectively control access to TracFone's Prepaid Software that is protected under title 17 of the United States Code.

94. Therefore, Defendants have violated, and continue to violate, Section 1201 of the Copyright Act and, as a result, TracFone has been irreparably injured and will continue to be irreparably injured unless the violating activities of Defendants are enjoined by this Court.

**COUNT SEVEN**  
**COMMON LAW BREACH OF CONTRACT**  
**(Against all Defendants)**

TracFone incorporates by reference each and every allegation set forth in paragraphs 1 through 57, as though fully set forth herein.

95. By purchasing TracFone/NET10 Prepaid Phones, Defendants acknowledged and agreed to the Terms and Conditions included with each Phone as conspicuously printed on the package and as contained in the printed inserts packaged with the Phones.

96. The Terms and Conditions constitute a valid binding contract between TracFone and Defendants.

97. TracFone has performed or tendered performance in accordance therewith.

98. Defendants have breached the Terms and Conditions by, inter alia, purchasing TracFone/NET10 Prepaid Phones with the specific intent to reflash or unlock the phones or ship the phones outside of the United States.

99. TracFone has suffered damages as a result of Defendants' breach of the Terms and Conditions.

**COUNT EIGHT**  
**COMMON LAW TORTIOUS INTERFERENCE WITH A CONTRACTUAL RIGHT**  
**(Against all Defendants)**

TracFone incorporates by reference each and every allegation set forth in paragraphs 1 through 57 as though fully set forth herein.

100. Downstream Runners who purchased TracFone/NET10 Phones that were ultimately sold to Defendants entered into a valid, binding contract with TracFone pursuant to the Terms and Conditions set forth on the packaging of the handset. In accordance with the Terms and Conditions, the original purchasers of the Phones (the Downstream Runners) agreed that the Phones would be used in the United States, that the TracFone Prepaid Software would not be hacked or otherwise altered, and that the Phones would be used exclusively with TracFone or NET10 prepaid wireless airtime cards.

101. Defendants' actions complained of herein were made with full knowledge and awareness of the contractual provisions regarding the use of and tampering with the Phones.

102. Defendants have engaged in intentional acts designed to induce a breach or disruption of the contractual relationship between TracFone and the Downstream Runners without legitimate justification.

103. TracFone has been proximately damaged and continues to be damaged as a result of Defendants' interference.

104. Defendants' conduct constitutes interference with contract under the common law of the State of Pennsylvania. Defendants' conduct was intentional, malicious, and willful, such that an award of punitive damages is appropriate.

**COUNT NINE**  
**COMMON LAW UNJUST ENRICHMENT**  
**(Against all Defendants)**

TracFone reasserts the allegations set forth in paragraphs 1 through 57 above, as though fully set forth herein.

105. By bulk purchasing the TracFone/NET10 Prepaid Phones below the manufacturers' cost of the phones, Defendants obtained benefits from TracFone that have resulted in significant financial benefits to Defendants through their resale of the bulk purchased TracFone/ NET10 Prepaid Phones.

106. Defendants acquired the benefits voluntarily and with full knowledge.

107. Defendants have retained the benefits under such circumstances that make it unjust and inequitable for Defendants to retain the benefits without paying TracFone the value of the benefits Defendants' acquired.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiff, TracFone Wireless, Inc., a Delaware corporation, respectfully requests that this Court enter final judgment and permanent injunctive relief in favor of TracFone and against Defendants, 1st Premier Communications and Jeffrey Stablein (collectively "Defendants") as follows:



- a. Awarding TracFone its compensatory, consequential, statutory, special, treble, and punitive damages including, without limitation, its lost profits, loss of goodwill and damage to its reputation, as provided by law, together with pre and post-judgment interest;
- b. Awarding to TracFone restitution of all money and property unlawfully and unfairly taken by Defendants' through their unfair and unlawful conduct;
- c. Awarding TracFone permanent injunctive relief against Defendants enjoining Defendants from engaging in the unlawful practices described in this complaint;
- d. Requiring Defendants, pursuant to the Lanham Act, to deliver their entire inventory of phones bearing or infringing any of the Marks or a confusingly similar copy thereof, to TracFone;
- e. Awarding TracFone its reasonable attorneys' fees and costs of this action; and
- f. Granting such further relief as this Court deems just and proper.

#### **DEMAND FOR JURY TRIAL**

Plaintiff, TracFone Wireless, Inc. hereby demands a trial by jury on all triable issues.

DATED this 26th day of June, 2009.

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