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1 LEXINGTON LAW GROUP, LLP
Mark N. Todzo (168389)
2 Eric S. Somers (139050)
Howard J. Hirsch (213209)
3 1627 Irving Street
San Francisco, CA 94122
4 Telephone: (415) 759-4111
Facsimile: (415) 759-4112

5 Attorneys for Plaintiff
6 JON HART

CLERK OF THE SUPERIOR COURT
COUNTY OF ALAMEDA

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CLERK OF THE SUPERIOR COURT
COUNTY OF ALAMEDA

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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF ALAMEDA

RG 07355993

10 ION HART, On Behalf of Himself and All
Others Similarly Situated, and On Behalf of the
11 General Public,

Case No.

CLASS ACTION

12 Plaintiff,

COMPLAINT FOR:

13 vs.

- (1) BREACH OF CONTRACT;
- (2) BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING;
- (3) BUSINESS AND PROFESSIONS CODE §17200 *et seq.*;
- (4) BUSINESS AND PROFESSIONS CODE §17500 *et seq.*; and
- (5) CONSUMER LEGAL REMEDIES ACT

14 COMCAST OF ALAMEDA, INC.; COMCAST
OF CALIFORNIA II, INC.; COMCAST OF
15 CALIFORNIA III, INC.; COMCAST OF
CALIFORNIA IX, INC.; COMCAST OF
16 CALIFORNIA V, INC.; COMCAST OF
CALIFORNIA VI, INC.; COMCAST OF
17 CALIFORNIA X, INC.; COMCAST OF
CALIFORNIA XIII, INC.; COMCAST
18 CORPORATION; COMCAST OF FRESNO,
INC.; COMCAST OF MARIN I, INC.;
19 COMCAST OF MARIN II, INC.; COMCAST
OF NORTHERN CALIFORNIA I, INC.;
20 COMCAST OF NORTHERN CALIFORNIA II,
INC.; COMCAST OF SACRAMENTO I, LLC;
21 COMCAST OF SACRAMENTO II, LLC;
COMCAST OF SAN LEANDRO, INC.;
22 COMCAST OF SIERRA VALLEYS, INC.; and
DOES 1-250

DEMAND FOR JURY TRIAL

23
24 Defendants.

1 Plaintiff Jon Hart ("Plaintiff"), on behalf of himself, those similarly situated, and the
2 general public, based on information and belief and investigation of his counsel, except for
3 information based on personal knowledge, hereby alleges:

4 **NATURE OF ACTION**

5 1. Defendants advertise, market and sell their high speed internet service (the
6 "Service") based on claims of "lightning fast" and "mind-blowing" speeds. Defendants further
7 promise their customers and prospective customers that they will have "unfettered access to all
8 the internet has to offer." Nevertheless, Defendants intentionally and severely impede the use of
9 certain internet applications by their customers, slowing such applications to a mere crawl or
10 stopping them altogether. This class action complaint seeks to end Defendants' practice and
11 seeks recovery of fees paid by customers who paid for services they did not receive.

12 2. Defendants' breach of their promises to provide unfettered access to the internet
13 constitutes a breach of its contract as well as a breach of the implied covenant of good faith and
14 fair dealing. Defendants' marketing and advertising, all of which is based on representations of
15 the speed at which users may download and upload content onto the internet is deceptive, given
16 Defendants' practice of severely limiting the speed of certain internet applications such as peer-
17 to-peer file sharing and lotus notes (the "Blocked Applications"). As such, Defendants'
18 advertising practices violate the Consumers Legal Remedies Act (Civil Code §1750, *et seq.*,
19 hereinafter the "CLRA"), and constitute an unlawful, unfair and fraudulent business practice
20 under Business & Professions Code §17200 and false and misleading advertising under Business
21 & Professions Code §17500.¹

22 3. Defendants impede their customers' access to the Blocked Applications by
23 transmitting unauthorized hidden messages to the computers of customers who utilize such
24 applications. These transmissions severely impair and/or completely block the customers' use
25 of the Blocked Applications by telling the computers to stop communicating via such
26 applications. Thus, Defendants' unauthorized interference with its customers' computers results
27

28 ¹ All statutory references herein are to California statutes, unless otherwise noted.

1 in such customers' loss of use of their computers and the Service. Accordingly, Defendants'
2 practice constitutes unlawful acts in violation of the Computer Fraud and Abuse Act, 18 U.S.C.
3 §1030 (the "CFAA"). Additionally, by impairing use of the Blocked Applications while
4 permitting the unimpaired use of other applications, Defendants unfairly discriminate against
5 certain internet applications, in violation of established Federal Communications Commission
6 ("FCC") policy.

7 4. Accordingly, Plaintiff and the class seek contract damages to compensate them
8 for the impediments to their Service. Plaintiff and the class further seek an order enjoining
9 Defendants' acts of unfair competition and false and misleading advertising and awarding
10 restitution to the individual victims of Defendants' unfair and deceptive practices pursuant to
11 Business & Professions Code §§17203 and 17535. In addition, Plaintiff and the class of
12 similarly situated California individuals on whose behalf Plaintiff brings this action seek an
13 injunction and actual and punitive damages pursuant to the CLRA.

14 **PARTIES**

15 5. Plaintiff Jon Hart is a citizen of the State of California. Plaintiff is a "person"
16 within the meaning of Business & Professions Code §17204, and brings this action on behalf of
17 himself, those similarly situated and the general public. Plaintiff is a purchaser of the Service
18 and has experienced severe limitations on the speed of the Service when he utilizes Blocked
19 Applications.

20 6. Defendant Comcast of Alameda, Inc. is a California corporation and is a person
21 within the meaning of Business & Professions Code §17201. Comcast of Alameda, Inc.
22 distributes, markets and/or sells the Service for use in California.

23 7. Defendant Comcast of California II, Inc. is a California corporation and is a
24 person within the meaning of Business & Professions Code §17201. Comcast of California II,
25 Inc. distributes, markets and/or sells the Service for use in California.

1 8. Defendant Comcast of California III, Inc. is a California corporation and is a
2 person within the meaning of Business & Professions Code §17201. Comcast of California III,
3 Inc. distributes, markets and/or sells the Service for use in California.

4 9. Defendant Comcast of California IX, Inc. is a California corporation and is a
5 person within the meaning of Business & Professions Code §17201. Comcast of California IX,
6 Inc. distributes, markets and/or sells the Service for use in California.

7 10. Defendant Comcast of California V, Inc. is a California corporation and is a
8 person within the meaning of Business & Professions Code §17201. Comcast of California V,
9 Inc. distributes, markets and/or sells the Service for use in California.

10 11. Defendant Comcast of California VI, Inc. is a California corporation and is a
11 person within the meaning of Business & Professions Code §17201. Comcast of California VI,
12 Inc. distributes, markets and/or sells the Service for use in California.

13 12. Defendant Comcast of California X, Inc. is a California corporation and is a
14 person within the meaning of Business & Professions Code §17201. Comcast of California X,
15 Inc. distributes, markets and/or sells the Service for use in California.

16 13. Defendant Comcast of California XIII, Inc. is a California corporation and is a
17 person within the meaning of Business & Professions Code §17201. Comcast of California XIII,
18 Inc. distributes, markets and/or sells the Service for use in California.

19 14. Defendant Comcast Corporation is a Pennsylvania corporation and is a person
20 within the meaning of Business & Professions Code §17201. Comcast Corporation distributes,
21 markets and/or sells the Service for use in California.

22 15. Defendant Comcast of Fresno, Inc. is a California corporation and is a person
23 within the meaning of Business & Professions Code §17201. Comcast of Fresno, Inc.
24 distributes, markets and/or sells the Service for use in California.

25 16. Defendant Comcast of Marin I, Inc. is a California corporation and is a person
26 within the meaning of Business & Professions Code §17201. Comcast of Marin I, Inc.
27 distributes, markets and/or sells the Service for use in California.

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1 17. Defendant Comcast of Marin II, Inc. is a California corporation and is a person
2 within the meaning of Business & Professions Code §17201. Comcast of Marin II, Inc.
3 distributes, markets and/or sells the Service for use in California.

4 18. Defendant Comcast of Northern California I, Inc. is a California corporation and
5 is a person within the meaning of Business & Professions Code §17201. Comcast of Northern
6 California I, Inc. distributes, markets and/or sells the Service for use in California.

7 19. Defendant Comcast of Northern California II, Inc. is a California corporation and
8 is a person within the meaning of Business & Professions Code §17201. Comcast of Northern
9 California II, Inc. distributes, markets and/or sells the Service for use in California.

10 20. Defendant Comcast of Sacramento I, LLC is a California corporation and is a
11 person within the meaning of Business & Professions Code §17201. Comcast of Sacramento I,
12 LLC distributes, markets and/or sells the Service for use in California.

13 21. Defendant Comcast of Sacramento II, LLC is a California corporation and is a
14 person within the meaning of Business & Professions Code §17201. Comcast of Sacramento II,
15 LLC distributes, markets and/or sells the Service for use in California.

16 22. Defendant Comcast of San Leandro, Inc. is a California corporation and is a
17 person within the meaning of Business & Professions Code §17201. Comcast of San Leandro,
18 Inc. distributes, markets and/or sells the Service for use in California.

19 23. Defendant Comcast of Sierra Valleys, Inc. is a California corporation and is a
20 person within the meaning of Business & Professions Code §17201. Comcast of Sierra Valleys,
21 Inc. distributes, markets and/or sells the Service for use in California.

22 24. Defendant Does 1 through 250 are persons or entities whose true names and
23 capacities are presently unknown to Plaintiff, and who therefore are sued by such fictitious
24 names. Plaintiff is informed and believes, and on that basis alleges, that each of the fictitiously
25 named defendants perpetrated some or all of the wrongful acts alleged herein and are responsible
26 in some manner for the matters alleged herein. Plaintiff will amend this complaint to state the
27 true names and capacities of such fictitiously named defendants when ascertained.
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1 in this county, and a substantial part of the events and conduct giving rise to the violations of law
2 asserted herein occurred in this county.

3 **CLASS ACTION ALLEGATIONS**

4 30. Plaintiff brings this suit as a class action pursuant to CCP §382 and Civil Code
5 §1781, on behalf of himself and the class defined as follows:

6 all persons in California who purchased the Service between
7 November 13, 2003 and the present and used or attempted to use
8 peer-to-peer or online file sharing applications and/or lotus notes.
9 Specifically excluded from this Class are Defendants; the officers,
10 directors or employees of Defendants; any entity in which
11 Defendants have a controlling interest; and any affiliate, legal
12 representative, heir or assign of Defendants. Also excluded are any
13 federal, state or local governmental entities, any judicial officer
14 presiding over this action and the members of his/her immediate
15 family and judicial staff, and any juror assigned to this action.

16 (the "Class").

17 31. The Class is sufficiently numerous as it includes hundreds or thousands of
18 persons who have purchased the Service throughout California. Thus, joinder of such persons in
19 a single action or bringing all members of the Class before the Court is impracticable. The
20 disposition of the Class members' claims in this class action will substantially benefit both the
21 parties and the Court.

22 32. There is a well-defined community of interest in the questions of law and fact
23 involved in this action and affecting the parties. These common questions of law and fact
24 substantially predominate over any questions that may affect only individual Class members.
25 Among these common questions of law and fact are:

26 (a) whether Defendants advertise and market the Service by promoting the
27 speed at which its customers may download and upload data from the internet;

28 (b) whether Defendants promise that customers of the Service will be
provided with unfettered access to the internet;

(c) whether Defendants block the Blocked Applications;

(d) whether Defendants impede the Blocked Applications;

1 (e) whether Defendants' blockage or impediment of the Blocked Applications
2 constitutes a breach of the contract;

3 (f) whether there is an enforceable written contract between Defendants and
4 the Class;

5 (g) whether Defendants' blockage or impediment of the Blocked Applications
6 results in aggregate loss by the Class in excess of \$5000;

7 (h) whether Defendants' blockage or impediment of the Blocked Applications
8 constitutes a violation of the CFAA;

9 (i) whether Defendants' blockage or impediment of the Blocked Applications
10 while permitting unfettered use of other applications constitutes a violation of Federal
11 Communications Commission ("FCC") Policy Statement, FCC 05151;

12 (j) whether Defendants' marketing and advertising is likely to deceive the
13 Class; and

14 (h) whether members are entitled to compensatory, injunctive and other
15 equitable relief.

16 33. Plaintiff asserts claims that are typical of the claims of the entire Class. Plaintiff
17 and all Class members have been subjected to the same wrongful conduct because they have
18 purchased the Service, which does not perform in the manner that Defendants represent.
19 Plaintiff and the Class have thus all overpaid for the Service.

20 34. Plaintiff will fairly and adequately represent and protect the interests of the other
21 Class members and has no interests antagonistic to those of other Class members. Plaintiff is
22 committed to the vigorous prosecution of this action and has retained counsel experienced in
23 litigation of this nature to represent him. Plaintiff anticipates no difficulty in the management of
24 this litigation as a class action.

25 35. Proceeding as a class action provides substantial benefits to both the parties and
26 the Court because this is the most efficient method for the fair and efficient adjudication of the
27 controversy. Class members have suffered and will suffer irreparable harm and damages as a
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1 result of Defendants' wrongful conduct. Because of the nature of the individual Class members'
2 claims, few, if any, could or would otherwise afford to seek legal redress against Defendants for
3 the wrongs complained of herein, and a representative class action is therefore appropriate, the
4 superior method of proceeding, and essential to the interests of justice insofar as the resolution of
5 Class members' claims is concerned. Absent a representative class action, Class members would
6 continue to suffer losses for which they would have no remedy, and Defendants would unjustly
7 retain the proceeds of their ill-gotten gains. Even if separate actions could be brought by
8 individual members of the Class, the resulting multiplicity of lawsuits would cause undue
9 hardship and expense for the Court and the litigants, as well as create a risk of inconsistent
10 rulings which might be dispositive of the interests of the other Class members who are not
11 parties to the adjudications and/or may substantially impede their ability to protect their interests.

12 BACKGROUND FACTS

13 36. Defendants market and/or sell the Service. The Service is designed to provide
14 Defendants' customers with high-speed access to the internet. Accordingly, Defendants refer to,
15 market and sell the Service under the name "High Speed Internet."

16 37. The speed at which a user is able to access the internet is one of the most
17 important aspects of internet service. Internet access speed is particularly important for
18 individuals who download and/or upload large files and is thus particularly material to Plaintiff
19 and members of the Class.

20 38. Users of the Blocked Applications typically download and/or upload large files,
21 so internet access speed is particularly important to such users.

22 39. Plaintiff and the Class are users of Blocked Applications.

23 40. Defendants' advertising and marketing of the Service revolves around claims
24 regarding the speed of the Service. For example, Defendants make the following representations
25 concerning the Service in their advertising:

26 * Get on the fast track...fast. With Comcast High-Speed Internet, surf the
27 web at lightning speed;
28

- 1 * Stop crawling the web and start burning rubber with scorching speeds.
- 2 * Stop crawling the web and start burning rubber with our Performance (6
- 3 Mbps) service! And now with PowerBoost, our fast connection gets even
- 4 faster.
- 5 * Zoom around the web at mind-blowing speeds.
- 6 * Comcast High-Speed Internet delivers everything you need to get the most
- 7 from your Internet experience. Download at crazy-fast speeds.
- 8 * Our customers enjoy unfettered access to all the content, services, and
- 9 applications that the internet has to offer.
- 10 * Way faster than DSL ... up to 4 times faster than 1.5 Mbps DSL and up to
- 11 twice as fast as 3.0 Mbps DSL.

12 41. Plaintiff upgraded his internet service to Defendants' High-Speed Internet
13 Performance Plus in September 2007 in order to gain faster uploads and downloads to and from
14 the internet. A major reason for the upgrade, was to enable Plaintiff to utilize the Blocked
15 Applications, which require high speed internet access.

16 42. Defendants have numerous different terms of service and/or use posted on their
17 website. In addition, at the time a potential subscriber attempts to purchase the service on
18 Defendants' website, a scroll window opens with the Comcast High-Speed Internet Subscriber
19 Agreement (the "Agreement"). Although only 10-15 lines of text are visible at one time in the
20 scroll box, if the Agreement is cut and pasted into a word processor, it is 22 pages of single-
21 spaced text. Given these different documents referencing the terms of use of the Service, it is not
22 easy to determine what, if any contract applies to the Service. However, all of the different
23 terms of service promise that Defendants will provide the Service. Many of the terms of service
24 explicitly reference the internet access speeds. For example, the Terms and Conditions state that
25 "Comcast speed tiers range from 4.0 to 16.0 Mbps download speed (maximum upload speed
26 from 384Kbps to 786Kbps respectively)." Significantly, none of the terms of service state that

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28

1 Comcast can or will impede, limit, discontinue, block or otherwise impair or treat differently the
2 Blocked Applications.

3 43. Plaintiff and Class members have performed their obligations under the terms of
4 their agreements with Defendants by paying their monthly charges.

5 44. Nevertheless, Defendants severely impede and/or block the Blocked Applications
6 used by Plaintiff and the Class. As a result of Defendants' impairment, Plaintiff and the Class
7 experience internet upload and download speeds for the Blocked Applications that are
8 exponentially slower than the speeds advertised by Defendants and/or experience complete
9 blockage of their file sharing applications.

10 45. Defendants actively and intentionally slow and/or block the Blocked Applications
11 by sending hidden messages to computers that are running file sharing applications. These
12 hidden messages appear to the computer as coming from the other computers with which it is
13 sharing files, telling it to stop communicating. The result is that file sharing applications are
14 completely blocked or severely impeded.

15 46. Plaintiff and the Class did not authorize Defendants to send them hidden
16 messages in order to block and/or impair their use of the Blocked Applications.

17 47. Plaintiff and the Class have suffered damage as a result of Defendants'
18 transmission of unauthorized messages. Plaintiff and the Class have suffered a loss of use of
19 their computers and the Service as a result of Defendants' unauthorized transmissions. The loss
20 to Plaintiff and the Class exceeds \$5,000.

21 48. On September 23, 2005, the FCC issued a Policy Statement, FCC 05-155, that set
22 out its policy that internet network services should be operated in a neutral manner. The FCC's
23 policy of network neutrality furthers a number of principles including that:

- 24 * "consumers are entitled to access the lawful Internet content of their
25 choice;
- 26 * "consumers are entitled to run applications and use services of their
27 choice, subject to the needs of law enforcement.

1 49. Defendants' policy of discriminating against use of the Blocked Applications
2 violates FCC Policy Statement, FCC 05-155.

3 **FIRST CAUSE OF ACTION**

4 **(Breach of Contract)**

5 50. Plaintiff realleges and incorporates herein by reference paragraphs 1 through 49
6 of this Complaint.

7 51. Plaintiff and the Class entered into a written or implied contract with Defendants
8 to pay monthly fees in order to obtain the Service.

9 52. Plaintiff and members of the Class performed their obligations under the contract
10 by paying their monthly fees. Nevertheless, Defendants unjustifiably breached the contract by
11 restricting Plaintiff's and the Class' access to, and use of, the Service.

12 53. Plaintiff and members of the Class were damaged by Defendants' breach of the
13 contract in that they did not receive the Service for which they paid, and are therefore entitled to
14 damages according to proof at trial.

15 Wherefore, Plaintiff prays judgment against Defendants, as set forth hereafter.

16 **SECOND CAUSE OF ACTION**

17 **(Breach of Implied Covenant of Good Faith and Fair Dealing)**

18 54. Plaintiff realleges and incorporates herein by reference paragraphs 1 through 53
19 of this Complaint.

20 55. In exchange for payment of a monthly fee by Plaintiff and the Class, Defendants
21 agreed to provide the Service to Plaintiff and the Class. Defendants did not inform Plaintiff and
22 the Class that it could or would limit their service by impeding and/or blocking the Blocked
23 Applications. In fact, Defendants told Plaintiff and the Class that they would "enjoy unfettered
24 access to all the content, services, and applications that the internet has to offer."

25 56. Plaintiff and members of the Class purchased the Service with the reasonable
26 expectation that they would have full access to the Service, including when using the Blocked
27 Applications.
28

1 57. In addition, Plaintiff and members of the Class purchased the Service with the
2 reasonable expectation that Defendants would deal with them honestly, fairly, equitably, in good
3 faith and in full conformity with the fundamental and implied terms of the contract. Defendants
4 brought about and intended this expectation through the language used in its terms of use and in
5 the Agreement, through their advertising, and through the express representations of their
6 employees, agents and representatives.

7 58. In breach of the covenant of good faith and fair dealing, Defendants have blocked
8 and/or impeded use of the Service by Plaintiff and the Class by impairing use of the Blocked
9 Applications. Defendants have thus unreasonably denied Plaintiff and Class members the
10 benefit of their bargain.

11 59. Defendants have materially and fundamentally breached the duty of good faith
12 and fair dealing owed to Plaintiff and members of the Class in at least the following respects:

13 a. Unreasonably, secretly, and in bad faith scheming to impede use of the
14 Blocked Applications;

15 b. Unreasonably and in bad faith failing to clearly and definitely notify
16 Plaintiff and members of the Class of the fact that Plaintiff and members of the Class would be
17 unable to use the Blocked Applications;

18 c. Unreasonably and in bad faith continuing to misrepresent to Plaintiff and
19 members of the Class that they would enjoy unfettered access to the internet, when in fact
20 Defendants were impeding their access to the internet; and

21 d. Unreasonably and in bad faith putting the interest of Defendants ahead of
22 Plaintiff and the Class members.

23 60. Defendants' conduct represents a failure and/or refusal to discharge their
24 contractual responsibilities, prompted by a conscious and deliberate act, which unfairly frustrates
25 the agreed common purposes and disappoints the reasonable expectations of Plaintiff and
26 members of the Class and thereby deprives Plaintiff and members of the Class of the benefits of
27 the agreed-upon terms in the Agreement.
28

1 61. Plaintiff and members of the Class performed their obligations under the written
2 or implied contract by paying their monthly fees.

3 62. Plaintiff and members of the Class were damaged by Defendants' breach of the
4 covenant of good faith and fair dealing in that they did not receive the benefits of the Service for
5 which they paid, and are therefore entitled to damages according to proof at trial.

6 Wherefore, Plaintiff prays judgment against Defendants, as set forth hereafter.

7 **THIRD CAUSE OF ACTION**

8 **(Violations of the Consumer Legal Remedies Act – Injunctive Relief Only)**

9 63. Plaintiff realleges and incorporates herein by reference paragraphs 1 through 62
10 of this Complaint.

11 64. The acts and practices of Defendants as described above were intended to deceive
12 Plaintiff and the Class members as described herein and has resulted and will result in damages
13 to Plaintiff and the Class members. These actions violated and continue to violate the CLRA in
14 at least the following respects:

15 a. In violation of Section 1770(a)(5) of the CLRA, Defendants' acts and
16 practices constitute representations that the Service has characteristics, uses and/or benefits
17 which it does not;

18 b. In violation of Section 1770(a)(7) of the CLRA, Defendants' acts and
19 practices constitute representations that the Service is of a particular quality which it is not; and

20 c. In violation of Section 1770(a)(9) of the Act, Defendants' acts and
21 practices constitute the advertisement of the goods in question without the intent to sell them as
22 advertised.

23 65. By reason of the foregoing, Plaintiff and the Class members have been irreparably
24 harmed.

25 66. By committing the acts alleged above, violated the CLRA.

26 67. In compliance with the provisions of California Civil Code §1782, in conjunction
27 with the filing of this action, while the Complaint is an appropriate notice of violation, Plaintiff
28

1 will notify Defendants in writing of the particular violations of §1770 of the Act and demand
2 Defendants rectify the actions described above by refunding the purchase price and give notice
3 to all affected consumers of their intent to do so. Plaintiff will send this notice by certified mail,
4 return receipt requested, to Defendants' principal places of business.

5 68. If Defendants fail, within thirty days after receipt of the §1782 notice, to
6 adequately respond to Plaintiff's demand to rectify the wrongful conduct described above on
7 behalf of all Class members, Plaintiff will amend the Complaint to seek actual and punitive
8 damages for violations of the CLRA.

9 69. Plaintiff and Class members are entitled, pursuant to California Civil Code
10 §1780(a)(2), to an order: (1) enjoining the above-described wrongful acts and practices; (2)
11 requiring payment of damages to Plaintiff and the Class; and (3) requiring the payment of
12 restitution to Plaintiff and the Class. In addition, Plaintiff and the Class are entitled to the
13 payment of costs and attorneys' fees and any other relief deemed appropriate and proper by the
14 Court under California Civil Code §1780(d).

15 Wherefore, Plaintiff prays judgment against Defendants, as set forth hereafter.

16 **FOURTH CAUSE OF ACTION**

17 **(Violations of Business & Professions Code §17200 *et seq.***
18 **Based On Fraudulent Acts And Practices)**

19 70. Plaintiff realleges and incorporates herein by reference paragraphs 1 through 69
20 of this Complaint.

21 71. Under Business & Professions Code §17200, any business act or practice that is
22 likely to deceive members of the public constitutes a fraudulent business act or practice.

23 72. Defendants have engaged and continue to engage in conduct that is likely to
24 deceive Plaintiff and members of the Class, all of whom are members of the general public. This
25 conduct includes, but is not limited to, promoting and advertising the fast speeds that apply to the
26 Service without limitation, when, in fact, Defendants severely limit the speed of the Service for
27 certain applications. It further includes Defendants' misrepresentations that its customers will
28 enjoy "unfettered access" to all internet applications, when, in fact, Defendants not only fetter

1 certain applications, but completely block them. Further, Defendants deceive consumers into
2 purchasing the Service in the mistaken belief that they will be able to utilize the Service for file
3 sharing applications, while actively limiting and/or blocking such applications.

4 73. The speed at which a user is able to access the internet is an important and
5 material factor to consumers of high speed internet services and is especially important and
6 material to users of Blocked Applications including Plaintiff and the Class.

7 74. By committing the acts alleged above, Defendants have engaged in fraudulent
8 business acts and practices, which constitute unfair competition within the meaning of Business
9 & Professions Code §17200.

10 75. Plaintiff and the Class have all paid money for the Service. However, Plaintiff
11 and the Class did not obtain the full value of the advertised Service due to Defendants'
12 undisclosed obstruction of certain file sharing applications. Accordingly, Plaintiff and the Class
13 have suffered injury in fact and lost money or property as a result of Defendants' acts of false
14 advertising.

15 76. An action for injunctive relief and restitution is specifically authorized under
16 Business & Professions Code §17203.

17 Wherefore, Plaintiff prays judgment against Defendants, as set forth hereafter.

18 **FIFTH CAUSE OF ACTION**

19 **(Violations of Business & Professions Code §17500 *et seq.*)**

20 77. Plaintiff realleges and incorporates by reference as if specifically set forth herein
21 Paragraphs 1 through 76 inclusive.

22 78. Business & Professions Code §17500 provides that it is unlawful for any
23 corporation to knowingly make, by means of any advertising device or otherwise, any untrue or
24 misleading statement with the intent to sell a product or service, or to induce the public to
25 purchase a product or service. Any statement in advertising that is likely to deceive members of
26 the public constitutes false and misleading advertising under Business & Professions Code
27 §17500.

1 84. The violation of any law constitutes an unlawful business practice under Business
2 & Professions Code §17200.

3 85. As detailed more fully in the preceding paragraphs, the acts and practices alleged
4 herein were intended to or did result in the sale of the Service in violation of the CLRA, Civil
5 Code Section 1750, *et seq.*, and specifically Section 1770(a)(5), Section 1770(a)(7), and Section
6 1770(a)(9).

7 86. As detailed more fully above, Defendants have committed violations of Business
8 & Professions Code §17500 *et seq.* by knowingly disseminating and continuing to disseminate
9 false and misleading advertisements regarding the Service.

10 87. By violating the CLRA and Business & Professions Code §17500, Defendants
11 have engaged in unlawful business acts and practices which constitute unfair competition within
12 the meaning of Business & Professions Code §17200.

13 88. Under the CFAA, it is unlawful to knowingly and without authorization cause the
14 transmission of a program, information, code or command to a computer used for interstate
15 commerce or communication, where such transmission causes damage, and the aggregate
16 resulting loss is at least \$5,000 in value. 18 U.S.C. §1030(a)(5). By sending unauthorized secret
17 messages to the computers of Plaintiff and the Class in order to block and/or impede their use of
18 the Blocked Applications, Defendants have caused Plaintiff and the Class to suffer damage and
19 loss as set forth above, in an aggregate amount in excess of \$5,000. Accordingly, Defendants
20 have violated the CFAA.

21 89. By violating the CFAA, Defendants have engaged in unlawful business acts and
22 practices which constitute unfair competition within the meaning of Business & Professions
23 Code §17200.

24 90. As detailed above, Defendants' practice of discriminating against use of the
25 Blocked Applications violates FCC Policy Statement, FCC 05-151. By violating the FCC
26 policy, Defendants have engaged in unlawful business acts and practices which constitute unfair
27 competition within the meaning of Business & Professions Code §17200.

28

1 91. Plaintiff and the Class have all paid money for the Service. However, Plaintiff
2 and the Class did not obtain the full value of the advertised Service due to Defendants'
3 undisclosed obstruction of certain file sharing applications. Accordingly, Plaintiff and the Class
4 have suffered injury in fact and lost money or property as a result of Defendants' acts of false
5 advertising.

6 92. An action for injunctive relief and restitution is specifically authorized under
7 Business & Professions Code §17203.

8 Wherefore, Plaintiff prays judgment against Defendants, as set forth hereafter.

9 **SEVENTH CAUSE OF ACTION**

10 **(Violations of Business & Professions Code §17200 *et seq.***
11 **Based on Unfair Acts and Practices)**

12 93. Plaintiff realleges and incorporates by reference as if specifically set forth herein
13 Paragraphs 1 through 92 inclusive.

14 94. Under Business & Professions Code §17200, any business act or practice that is
15 unethical, oppressive, unscrupulous and/or substantially injurious to consumers, or that violates a
16 legislatively declared policy, constitutes an unfair business act or practice.

17 95. Defendants have engaged, and continues to engage, in conduct which is immoral,
18 unethical, oppressive, unscrupulous and/or substantially injurious to consumers. This conduct
19 includes, but is not limited to misrepresenting that its customers enjoy unfettered access to all
20 internet applications while at the same time severely limiting access to certain applications by
21 sending hidden messages to its customers computers. Defendants deceive consumers into
22 purchasing the Service in the mistaken belief that they will be able to utilize the Service for use
23 of the Blocked Applications, while actively limiting and/or blocking such applications.
24 Defendants' scheme was and is immoral, unethical, oppressive, unscrupulous and/or
25 substantially injurious to consumers. The gravity of harm caused by Defendants' conduct as
26 described herein far outweighs the utility, if any, of such conduct.

27 96. Defendants have engaged, and continue to engage, in conduct which violates the
28 legislatively declared policy of the CLRA against misrepresenting the characteristics, uses,

1 benefits, and quality of goods and services for sale. In addition, Defendants have engaged, and
2 continue to engage in conduct which violates the policies behind the CFAA and FCC Policy 05-
3 151.

4 97. By committing the acts alleged above, Defendants have engaged in unfair
5 business acts and practices which constitute unfair competition within the meaning of Business
6 & Professions Code §17200.

7 98. Plaintiff and the Class have all paid money for the Service. However, Plaintiff
8 and the Class did not obtain the full value of the advertised Service due to Defendants'
9 undisclosed obstruction of certain file sharing applications. Accordingly, Plaintiff and the Class
10 have suffered injury in fact and lost money or property as a result of Defendants' acts of false
11 advertising.

12 99. An action for injunctive relief and restitution is specifically authorized under
13 Business & Professions Code §17203.

14 Wherefore, Plaintiff prays judgment against Defendants, as set forth hereafter.

15 **PRAYER FOR RELIEF**

16 WHEREFORE, Plaintiff prays for judgment and relief against Defendants as follows:

17 A. That the Court declare this a class action;

18 B. That the Court preliminarily and permanently enjoin Defendants from conducting
19 their businesses through the unlawful, unfair or fraudulent business acts or practices, untrue and
20 misleading advertising and other violations of law described in this Complaint;

21 C. That the Court order Defendants to conduct a corrective advertising and
22 information campaign advising consumers that the Service does not have the characteristics,
23 uses, benefits, and quality Defendants have claimed;

24 D. That the Court order Defendants to implement whatever measures are necessary
25 to remedy the unlawful, unfair or fraudulent business acts or practices, untrue and misleading
26 advertising and other violations of law described in this Complaint;

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1 E. That the Court order Defendants to notify each and every member of the Class of
2 the pendency of the claims in this action in order to give such individuals and businesses an
3 opportunity to obtain restitution from Defendants;

4 F. That the Court order Defendants to pay restitution to restore to all affected
5 persons all funds acquired by means of any act or practice declared by this Court to be an
6 unlawful, unfair or a fraudulent business act or practice, untrue or misleading advertising or a
7 violation of the CLRA, CFAA and/or FCC Policy 05-151, plus pre-judgment and post-judgment
8 interest thereon;

9 G. That the Court order Defendants to disgorge all monies wrongfully obtained and
10 all revenues and profits derived by Defendants as a result of their acts or practices as alleged in
11 this Complaint;

12 H. As to the First and Second Causes of Action, that the Court award damages
13 calculated as purchase price of the Products here at issue, plus any out-of-pocket costs associated
14 with the replacement of such Products, plus pre-judgment and post-judgment interest thereon;

15 I. As to the Second Cause of Action, that the Court impose statutory, punitive
16 and/or exemplary damages for Defendants' acts constituting oppression, fraud or malice in an
17 amount sufficient to punish and deter others from similar wrongdoing;

18 J. That the Court grant Plaintiff his reasonable attorneys' fees and costs of suit
19 pursuant to Code of Civil Procedure §1021.5, Civil Code § 1780(d), the common fund doctrine
20 and/or any other applicable legal theory; and

21 K. That the Court grant such other and further relief as may be just and proper.

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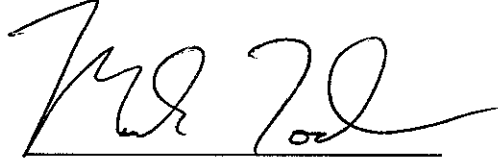
JURY DEMAND

Plaintiff demands a trial by jury on all causes of action so triable.

DATED: November 13, 2007

Respectfully submitted,

LEXINGTON LAW GROUP, LLP



Mark N. Todzo, Esq.
Attorneys for Plaintiff
JON HART