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SUPERIOR COURT

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10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

11 **COUNTY OF LOS ANGELES**

12 AMY IMBURGIA and MARLENE MECCA,
13 individually and on behalf of all others similarly
situated,

Case Nos. BC398295 and BC398431

CLASS ACTION

14 Plaintiffs,

Assigned for all purposes to the Honorable
Emilie H. Elias

15 vs.

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION**

16 DIRECTV, Inc., a California Corporation; and
17 DOES 1-100, inclusive,

18 Defendants.

[Declarations of Plaintiffs Amy Imburgia,
Marlene Mecca, and Kathy Greiner;
Declarations of Putative Class Members Kevin
Kuhlken, Mary Cox, and Raul Flores;
Declaration of Non-Party Leticia Castro;
Declaration of Jennifer Steinberg, Esq.;
Appendix of Foreign Authorities; (Proposed)
Order filed concurrently herewith]

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Trial Date: None Set

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1 **I. SUMMARY OF APPLICATION AND GROUNDS THEREFORE**

2 Defendant DIRECTV, Inc. (“Defendant” or “DIRECTV”) is a provider of satellite television
3 services that engages in an oppressive, unfair practice of pilfering personal account information from
4 unsuspecting customers. Specifically, Defendant charges its customers an “early cancellation
5 penalty” when they terminate their accounts before their alleged “term commitment” period is over.
6 This “early cancellation penalty” is charged regardless of the reason for the cancellation. DIRECTV
7 fails to disclose this penalty to new customers or to existing customers who replace their equipment
8 or add a new receiver. Further, Defendant removes these penalties directly from its customers’ bank
9 accounts or charges their credit cards directly without obtaining prior consent.

10 Plaintiffs are Defendant’s former and current customers who have been or are subject to
11 being charged an early cancellation penalty without the knowledge such a penalty existed and
12 without having consented to a term commitment period or penalty.

13 This is a motion solely to enjoin Defendant from the act of directly withdrawing early
14 cancellation penalties from its customers’ bank accounts or charging their credit cards without
15 obtaining their consent to do so.¹

16 As set forth herein, plaintiffs Kathy Greiner, Amy Imburgia, and Marlene Mecca, on behalf
17 of themselves and all others similarly situated (“Plaintiffs”), meet the requisite showing for a grant
18 of preliminary injunctive relief pursuant to a two-part test established in *King v. Meese* (1987) 43
19 Cal. 3d 1217. Pursuant to this well-established test, the court must engage in a balancing of two
20 interrelated factors: (1) the likelihood that the moving party will ultimately prevail on the merits, and
21 (2) the relative interim harm to the parties from issuance or nonissuance of the injunction.²
22 In this case, Plaintiffs clearly meet this standard as they are likely to prevail on their UCL and CLRA
23 claims related to Defendant’s act of withdrawing the unlawful early cancellation penalty directly
24 from its customers’ bank accounts and/or charging their credit cards without their prior permission.
25 Moreover, the balancing of relative harm falls squarely in Plaintiffs’ favor.

26
27
28 ¹ Note that this is not an application to enjoin Defendant from *charging* the early cancellation penalty, but solely from
withdrawing these funds directly from Plaintiffs’ bank accounts or directly charging its customers’ credit cards.

² *Id.*; see also *O’Connell v. Superior Court* (2006) 141 Cal. App. 4th 1452, 1467-1468.

1 **II. SUMMARY OF RELIEF SOUGHT**

2 Plaintiffs simply seek an Order enjoining DIRECTV solely from performing the following
3 act during the pendency of this lawsuit: Withdrawing funds directly from customers' bank accounts
4 or charging their credit cards for any allegedly owed early cancellation penalty without the
5 customers' express knowledge and written consent.

6 **III. STATEMENT OF FACTS**

7 **A. DEFENDANT'S CONDUCT**

8 DIRECTV engages in a policy and practice of *not* informing customers of its term
9 commitment or early cancellation penalty when they sign up for its service or when they change
10 their service.³ Further, DIRECTV also fails to inform customers that it will be withdrawing the
11 funds directly from its customers' bank accounts and/or directly charging their credit cards.⁴
12 DIRECTV does not obtain express or implied authority to use personal financial information to
13 charge the early cancellation penalty.⁵

14 **B. THE "AGREEMENT" AT ISSUE**

15 The "agreement" which purportedly gives DIRECTV the right to engage in such a practice is
16 found on the back of a form entitled, "Installation/Service Satisfaction Checklist." The back of the
17 form is misleadingly entitled "DIRECTV Equipment Lease Addendum" ("Lease Addendum") and is
18 filled with single-spaced terms in small type.⁶

19 *Nowhere on the Lease Addendum does it state that DIRECTV reserves the right to*
20 *withdraw an early cancellation penalty directly from its customers' bank accounts, checking*
21 *accounts, or credit cards.* Instead, the Lease Addendum states that it "must be read together with
22 the DIRECTV Customer Agreement."⁷ This Customer Agreement, which is not provided to

23 ³ Declaration of Plaintiff Marlene Mecca ("Mecca Dec") ¶¶7, 8; Declaration of Plaintiff Amy Imburgia ("Imburgia
24 Dec") ¶5; Declaration of Plaintiff Kathy Greiner ("Greiner Dec") ¶¶6, 7; Declaration of Putative Class Member Kevin
Kuhlken ("Kuhlken Dec") ¶¶3, 4; Declaration of Putative Class Member Mary Cox ("Cox Dec") ¶10; Declaration of
Putative Class Member Raul Flores ("Flores Dec") ¶¶2, 7

25 ⁴ Mecca Dec ¶7, 8; Imburgia Dec ¶5; Greiner Dec ¶7; Kulken Dec ¶5; Flores Dec ¶¶2, 5, 7

26 ⁵ Mecca Dec ¶¶8, 10; Declaration of Non-Party Leticia Castro ("Castro Dec") ¶¶4, 5, 7, 8; Greiner Dec ¶¶6, 7, 12, 13;
Kuhlken Dec ¶¶5, 6; Cox Dec ¶10, 14; Flores Dec ¶¶2, 5, 7

27 ⁶ See DIRECTV Equipment Lease Addendum, Document No. DTVECF-002014, provided by DIRECTV in the
concurrent federal litigation, In re: DIRECTV Early Cancellation Fee Litigation, Case No. SACV 08-0741 AG (ANx),
United States District Court for the Central District of California, attached to the Declaration of Jennifer Steinberg
28 ("Steinberg Dec") as Exhibit A (hereafter referred to as "Exhibit A")

⁷ See Exhibit A

1 customers until they receive their first bill,⁸ is four (4) pages long, single-spaced, typed in
2 approximately 6-7-point font and consists of a laundry list of customer duties while neglecting to set
3 forth DIRECTV's obligations or its customers' rights.⁹ This Customer Agreement includes
4 language regarding DIRECTV's practice of withdrawing funds from customers' accounts without
5 notice or permission. However, this language is unconscionable and unlawful.

6 Section 5(e), entitled "Payment Upon Cancellation," on the second page of the Customer
7 Agreement states:

8 You acknowledge that you have provided your credit or debit card account
9 information to us. You understand that you will incur fees and charges as a
10 result of your receipt and use of Service and/or Receiving Equipment, and may
11 incur early cancellation fees and/or equipment non-return fees (as specified in
12 any lease programming or other service commitment agreement you entered
13 into in connection with obtaining Receiving Equipment). By giving us your
14 credit or debit account information, you authorize us to apply this method of
15 payment, in accordance with applicable law, to satisfy any and all amounts due
16 upon cancellation...¹⁰

17 Neither the Customer Agreement nor the Lease Addendum is provided to DIRECTV's
18 customers prior to delivery of its equipment and/or activation of its satellite services *and a signature*
19 *is never required for either form*. In fact, *there is no space allotted on the form for a signature* of
20 either party.

21 C. THE HARM TO PLAINTIFFS

22 Plaintiffs, other DIRECTV customers, and financial institutions have been irreparably
23 harmed by these practices. Money which Plaintiffs need for food and other necessities has been
24 taken directly from their bank accounts without their knowledge.¹¹ On occasion, this has sent their
25 accounts into overdraft, thereby damaging their credit causing much frustration, oppression, and
26 embarrassment.¹² Others have had to dispute the unauthorized charges with their credit card
27 companies, resulting in undue burden and aggravation.¹³

28 ⁸ See Declaration of Valerie McCarthy Filed in Support of DIRECTV's Motion to Dismiss or Stay Proceedings Pending Arbitration and to Compel Arbitration, filed by DIRECTV in Cappuccitti v. DIRECTV, Inc., Civil Case No. 1:09-cv-00627-CAP, United States District Court for the Northern District of Georgia, Atlanta Division, ¶3, attached to Steinberg Dec as Exhibit B (hereafter referred to as "Exhibit B")

⁹ See DIRECTV Customer Agreement, attached to Steinberg Dec as Exhibit C (hereafter referred to as "Exhibit C")

¹⁰ See Exhibit C

¹¹ Castro Dec ¶¶7, 9; Mecca Dec ¶10; Imburgia Dec ¶10; Greiner Dec ¶12; Kuhlken Dec ¶¶5, 6; Cox Dec ¶12, 16; Flores Dec ¶4

¹² Castro Dec ¶7; Cox Dec ¶16; Flores Dec ¶¶5, 6

¹³ Castro Dec ¶9, Greiner Dec ¶14; Cox Dec ¶14, 16; Flores Dec ¶¶5, 6

1 Plaintiffs rely upon the accompanying Declarations of Plaintiffs Amy Imburgia, Marlene
2 Mecca, and Kathy Greiner; of Putative Class Members Kevin Kuhlken, Mary Cox, and Raul Flores;
3 and of Non-Party Leticia Castro. These declarations describe the facts and circumstances relating to
4 the Plaintiffs' and other DIRECTV customers' dealings with DIRECTV.

5 **IV. THE COURT SHOULD GRANT PLAINTIFFS' APPLICATION FOR PRELIMINARY**
6 **INJUNCTIVE RELIEF**

7 **A. LEGAL STANDARD**

8 Code of Civil Procedure section 527(b) specifically authorizes a trial court to issue a
9 preliminary injunction in a class action, irrespective of whether (i) the issue of class certification has
10 been addressed by the Court, or (ii) the class has been certified.¹⁴ A preliminary injunction may be
11 granted:

12 (1) [w]hen it appears by the complaint that the plaintiff is entitled to the relief demanded,
13 and the relief, or any part thereof, consists in restraining the commission or continuance of
14 the act complained of, either for a limited period or perpetually; or,

15 (2) When it appears by the complaint or affidavits that the commission or continuance of
16 some act during the litigation would produce waste, or great or irreparable injury, to a party
17 to the action.

18 * * *

19 (4) When pecuniary compensation would not afford adequate relief.¹⁵

20 The purpose of a preliminary injunction is to prevent threatened injury or injury for past acts
21 which are likely to recur.¹⁶ It is particularly appropriate when violations of the California Consumer
22 Protection Laws are alleged, as the court has "very broad discretion" to impose injunctive relief
23 under these laws.¹⁷

24 The decision to issue a preliminary injunction lies within the sound discretion of the trial
25 court.¹⁸ It exercises that discretion in favor of the party most likely to be injured.¹⁹ In doing so, the
26 Court evaluates two interrelated factors: (1) the likelihood that the moving party will ultimately

27 ¹⁴ See C.C.P. 527(b) ("A...preliminary injunction...may be granted in a class action...whether or not the class has been
28 certified.").

¹⁵ C.C.P. § 526(a)(1), (2), and (4).

¹⁶ See *Ernst & Ernst v. Carlson* (1966) 247 Cal.App.2d 125, 128.

¹⁷ See, e.g., *People ex rel. Brown v. Mergent, Inc.* (2009) 170 Cal. App. 4th 333, 341-342 (in a UCL action, the court
upheld order enjoining defendant seller from making sales without complying with certain disclosure provisions); see
also *People v. McKale* (1979) 25 Cal.3d 626, 632 ("The Legislature 'intended ...to permit tribunals to enjoin on-going
wrongful business conduct in whatever context such activity might occur.'").

¹⁸ See *Continental Baking Co. v. Katz* (1968) 68 Cal.2d 512, 527.

¹⁹ See *Gosney v. State of California* (1970) 10 Cal.App.3d 921, 924.

1 prevail on the merits and (2) the relative balance of harm that is likely to result from granting or
2 denying interim injunctive relief.²⁰

3 In making this determination, the court “is guided by a ‘mix’ of the potential-merit and
4 interim-harm factors; the greater the plaintiff’s showing on one, the less must be shown on the other
5 to support an injunction.”²¹ Thus, the more likely it is that plaintiffs will ultimately prevail, the less
6 the “relative balance of harm” needs to support the injunction.²²

7 As set forth below, Plaintiffs demonstrate (i) a strong likelihood they will prevail on their
8 claims under the California Consumer Protection Laws and (ii) the balance of harm weighs
9 substantially in Plaintiffs’ favor.

10 **B. PLAINTIFFS WILL LIKELY SUCCEED ON THEIR CLAIMS UNDER THE**
11 **CALIFORNIA CONSUMER PROTECTION LAWS**

12 **1. Injunctive Relief under the California Consumer Protection Laws Generally**

13 The CLRA targets a class of “unfair methods of competition and unfair or deceptive acts or
14 practices” enumerated in Civil Code Section 1770.²³ The statute is “liberally construed and applied
15 to promote its underlying purposes, which are to protect consumers against unfair and deceptive
16 business practices and to provide efficient and economical procedures to secure such protection.”²⁴
17 It allows consumers, on their own behalf and on behalf of a class, to bring claims for injunctive
18 relief.²⁵ Importantly, it is well-settled that a plaintiff does not have to comply with “class action
19 procedure” to obtain injunctive relief under the CLRA.²⁶

20
21 ²⁰ See, e.g., *Right Site Coalition v. Los Angeles Unified School Dist.* (2008) 160 Cal. App. 4th 336, 341-342; *O’Connell v. Superior Court* (2006) 141 Cal. App. 4th 1452, 1467-1468.

22 ²¹ *Butt v. California* (1992) 4 Cal. 4th 668, 678 (citing *King v. Meese* (1987) 43 Cal.3d 1217, 1227-28).

23 ²² See *King, supra*, 43 Cal.3d at 1227; see also *Pleasant Hill Bayshore Disposal, Inc. v. Chip-It Recycling, Inc.* (2001) 91 Cal. App. 4th 678, 696 (when plaintiff showed high likelihood of success on the merits, court had discretion to issue injunction even if plaintiff could not show balance of harm was in its favor).

24 ²³ See Civ. Code § 1770(a).

25 ²⁴ Civ. Code § 1760.

26 ²⁵ See Civ. Code § 1780 (a)(2) (stating that any consumer who suffers any damage as a result of the use of unfair methods of competition and unfair or deceptive acts or practices may bring an action for injunctive relief); see also *Broughton v. Cigna Healthplans of California* (1999) 21 Cal. 4th 1066, 1080-82 (noting, “the evident purpose of the injunctive relief provision of the CLRA is not to resolve a private dispute but to remedy a public wrong. Whatever the individual motive of the party requesting injunctive relief, the benefits of granting injunctive relief by and large do not accrue to that party, but to the general public in danger of being victimized by the same deceptive practices as the plaintiff suffered.”).

27 ²⁶ See William L. Stern, *Bus & Prof. Code §17200 Practice*, §10.42 (citing *Thompson v. 10,000 RV Sales, Inc.*, (2005) 130 Cal 4th 950, 980).

1 The Unfair Competition and False Advertising Laws (UCL and FAL) provide similar
2 protections to consumers. Business and Professions Code sections 17203 and 17535 provide that
3 “any person, [or] corporation...who engages...in unfair competition may be enjoined in any court of
4 competent jurisdiction. The court may make such orders or judgments...as may be necessary to
5 prevent the use or employment by any... corporation...of any practice which constitutes unfair
6 competition...as may be necessary to restore to any person in interest any money or property, real or
7 personal, which may have been acquired by means of such unfair competition.” The UCL and the
8 FAL also provide for individuals to pursue representative claims or relief on behalf of others, so long
9 as that individual meets standing requirements and complies with section 382 of the Code of Civil
10 Procedure.²⁷ Moreover, “only...the representative plaintiff... is required to meet the standing
11 requirements” of the UCL.²⁸

12 **2. DIRECTV’s Violations of the CLRA**

13 The practice which Plaintiffs seek to enjoin in the current motion violates Civil Code
14 Sections 1770(a)(14) and (a)(19) as follows:

15 **(a) DIRECTV has Violated Cal. Civ. Code §1770(a)(14)**

16 Civil Code section 1770(a)(14) proscribes the act of “representing that a transaction confers
17 or involves rights, remedies, or obligations which it does not have or involve, or which are
18 prohibited by law.” In the case at bar, Defendant has represented that a transaction confers rights or
19 obligations which are prohibited by law, and has failed to disclose this unlawful term to its
20 customers. Specifically, Defendant’s practice of automatically withdrawing funds without consent is
21 a direct violation of the Electronic Fund Transfer Act (the “EFTA”), codified at 15 U.S.C. §1693 *et*
22 *seq.*

23 The stated purpose of the EFTA is to “provide a basic framework establishing the rights,
24 liabilities, and responsibilities of participants in electronic fund transfer systems.”²⁹ The EFTA's
25

26 ²⁷ See *Bus. & Prof. Code* §§17203 & 17535; see also *In re Tobacco II Cases* (2009) 46 Cal. 4th 298, 313-314 (noting
27 “the UCL class action is a procedural device that enforces substantive law by aggregating many individual claims into a
28 single claim, in compliance with Code of Civil Procedure section 382... This remains true even after passage of
Proposition 64.”).

²⁸ *In Re Tobacco II Cases*, *supra*, 46 Cal. 4th 315-316.

²⁹ 15 U.S.C. §1693(b).

1 “primary objective . . . is the provision of individual consumer rights.”³⁰ “The language of the
2 EFTA indicates that the consumer protection measures contemplated by it are aimed at promoting
3 disclosure, preventing fraud, and allocating liability.”³¹

4 Though the EFTA is generally geared toward financial institutions, Section 1693m provides
5 that “any *person* who fails to comply with any section of this title [15 USCS §§1693, et seq.] with
6 respect to any consumer...is liable to such consumer...”³² Section 1693m is not a basis of liability
7 under this statute, but rather an enforcement mechanism.³³ However, as noted in dicta in *Nordberg*,
8 the language of various sections of the statute make it clear that a “person” who is not a financial
9 institution can be liable under the EFTA.³⁴

10 Here, Defendant did not obtain Plaintiffs’ signatures before withdrawing funds directly from
11 their accounts.³⁵ This practice is a clear violation of Section 1693e of the EFTA. 15 U.S.C.
12 §1693e(a) states that “[a] preauthorized electronic fund transfer from a consumer’s account may be
13 authorized by the consumer only in writing, and a copy of such authorization shall be provided to the
14 consumer when made.” Further, Section 1693e(b) states, “[i]n the case of preauthorized transfers
15 from a consumer’s account to the same person which may vary in amount, the financial institution or
16 designated payee shall, *prior to each transfer*, provide reasonable advance notice to the consumer...
17 of the amount to be transferred and the scheduled date of the transfer.”³⁶

18 Here, Plaintiffs never authorized Defendant to transfer funds from their accounts and there is
19 certainly no written authorization for such a transfer. As such, Defendant has violated Section
20 1693e(a) of the EFTA. Further, even if it can be argued that Plaintiffs implicitly authorized the
21 withdrawal by providing their account information, Defendant has violated Section 1693e(b) by
22 failing to provide advance notice to Plaintiffs of the amount and scheduled date of the transfer.
23

24 ³⁰ *Id.*

25 ³¹ See 15 U.S.C. §1693c (requiring disclosure of terms and conditions of electronic transfers); § 1693d (requiring
26 documentation of transfers); §1693e (requiring a writing for preauthorized electronic fund transfers); ... § 1693i
(prohibiting waiver of consumer rights under the EFTA); *Bank of Am. v. City & County of S.F.* (9th Cir. 2002) 309 F.3d
551, 564.

27 ³² 15 U.S.C. §1693m (emphasis added).

28 ³³ See *Nordberg v. Trilogiant Corp.* (N.D.Cal. 2006) 445 F. Supp. 2d 1082, 1094 (overturned on other grounds).

³⁴ *Id.*

³⁵ Mecca Dec ¶8; Greiner Dec ¶¶7, 13; Kuhlken Dec ¶5; Cox Dec ¶14; Flores Dec ¶7

³⁶ 15 U.S.C. §1693e(b), emphasis added.

1 The contract term purporting to allow the unlawful transfer of funds at issue is also clearly
2 unconscionable, as discussed, *infra*, section IV(B)(2)(b), thereby violating Civil Code Sections
3 1670.5 and 1770(a)(19).

4 Pursuant to the foregoing, Defendant has violated Section 1770(a)(14) of the CLRA by
5 including an unlawful provision in its contract purporting to allow it to withdraw funds from
6 customers' bank accounts without their prior written authorization and without giving notice of the
7 specific date and amount of the withdrawal.

8 **(b) DIRECTV has Violated Cal. Civ. Code §1770(a)(19)**

9 Section 1770(a)(19) proscribes the act of inserting an unconscionable provision in a contract.
10 It is well settled that a court can refuse to enforce an unconscionable provision in a contract and can
11 find such a contract unconscionable as a matter of law.³⁷

12 The term "unconscionability" is generally "recognized to include an absence of meaningful
13 choice on the part of one of the parties together with contract terms which are unreasonably
14 favorable to the other party."³⁸ Unconscionability has both a procedural and a substantive element.³⁹
15 The procedural element focuses on two factors: (1) oppression, arising from inequality of bargaining
16 power and the absence of real negotiation or a meaningful choice, and (2) surprise, resulting from
17 hiding the disputed term in a prolix document.⁴⁰ The substantive element focuses on whether a
18 contractual provision reallocates risks in an objectively unreasonable or unexpected manner.⁴¹

19 Under this two factor approach,

20 [B]oth the procedural and substantive elements must be met before a contract or
21 term will be deemed unconscionable. Both, however, need not be present to the
22 same degree. A sliding scale is applied so that 'the more substantively oppressive
the contract term, the less evidence of procedural unconscionability is required to
come to the conclusion that the term is unenforceable, and vice versa.'⁴²

23 ³⁷ Cal. Civ. Code §1670.5; *Freeman v. Wal-Mart Stores, Inc.* (2003) 111 Cal.App.4th 660, 668.

24 ³⁸ *Ilkhchooyi v. Best* (1995) 37 Cal.App.4th 395, 409.

25 ³⁹ *A & M Produce Co. v. FMC Corp.* (1982) 135 Cal.App.3d 473, 486.

26 ⁴⁰ *Id.* at 487

27 ⁴¹ *Morris v. Redwood Empire Bancorp* (2005) 128 Cal.App.4th 1305, 1317 (citing *Jones v. Wells Fargo Bank* (2003) 112
28 Cal.App.4th 1527, 1539). The *Morris* court notes that two separate approaches have developed for determining whether
a contract or provision thereof is unconscionable. One is based on the common law doctrine and the other – the one
outlined above – was based upon cases applying the UCC unconscionability provision. While it notes that there is some
confusion about the application of each test, it also notes that the procedural/substantive approach (enlisted above)
conforms more closely to cases decided under the UCC, upon which California's unconscionability statute is based.
(*Morris, supra*, at 1318.)

⁴² *Ibid.*

1 i. The Contract at Issue is Procedurally Unconscionable

2 As previously stated, the procedural element of unconscionability focuses on the existence of
3 oppression or surprise. “The procedural element of an unconscionable contract generally takes the
4 form of a contract of adhesion.”⁴³ A contract of adhesion is defined as “a standardized contract,
5 which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing
6 party only the opportunity to adhere to the contract or reject it.”⁴⁴

7 The contract at issue is clearly a contract of adhesion. It is a form contract, drafted by
8 DIRECTV, which gives its customers *no option other than to accept the contract or else cancel the*
9 *service completely*. In fact, the top of the agreement states in capital letters, “If you do not accept
10 these terms, please notify us immediately and we will cancel your service. If you instead decide to
11 receive our service, it will mean that you accept these terms and they will be legally binding.”⁴⁵
12 Additionally, the contract explicitly states that DIRECTV may change the terms of the contract at
13 anytime. The California Court of Appeal has explicitly held that this customer agreement “is a
14 ‘consumer contract of adhesion.’”⁴⁶

15 A contract is considered oppressive where there is an inequality of bargaining power that
16 results in the *absence of meaningful choice*.⁴⁷ In this case, Plaintiffs lacked any meaningful choice,
17 as their only options were to accept the terms of the contract or not receive the service. This “take it
18 or leave it” contract is clearly oppressive and therefore procedurally unconscionable. In addition,
19 Defendant’s practice of not revealing the contract terms to its customers before they sign up for the
20 service eliminates its customers’ ability to make an *educated* decision.

21 Moreover, Plaintiffs *did not sign or receive a copy of the “customer agreement” which*
22 *contained the automatic transfer of funds provision*.⁴⁸ In *Bradberry v. T-Mobile USA, Inc.*, the
23 court found that even though market alternatives may exist, a contract is unconscionable where the
24 plaintiff has no opportunity to negotiate, modify or waive the Class Action Waiver because he did

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26 ⁴³ *Gatton v. T-Mobile USA, Inc.* (2007) 152 Cal.App.4th 571, 582 (citing *Discover Bank v. Superior Court* (2005) 36
Cal.4th 148, 160).

27 ⁴⁴ *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal. 4th 83, 113.

28 ⁴⁵ See Exhibit A

⁴⁶ *Cohen v. DIRECTV, Inc.* (2006) 142 Cal. App. 4th 1442, 1451.

⁴⁷ *Gatton, supra*, 152 Cal.App.4th at 581.

⁴⁸ Mecca Dec ¶¶7, 8, Castro Dec ¶8; Greiner Dec ¶¶6, 7, 131 Kuhlken Dec ¶5, Cox Dec ¶10; Flores Dec ¶¶2, 7

1 not know he was agreeing to such a waiver.⁴⁹ Here, Plaintiffs had no idea they were agreeing to a
2 term contract, were unaware they would be charged a penalty for terminating the contract before the
3 “term” had ended, and were unquestionably ignorant about the fact that this “early cancellation
4 penalty” would be directly withdrawn or charged to their accounts.⁵⁰

5 The procedural element of surprise is also clearly met. Procedural surprise focuses on
6 whether the challenged term is hidden in a prolix printed form or is otherwise beyond the reasonable
7 expectation of the weaker party.⁵¹ The contract at issue in *Bradberry*, *supra*, contained a “Class
8 Action Waiver” provision which was found to be procedurally unconscionable due to oppression and
9 surprise.⁵² The element of “surprise” was met because the waiver was not provided to the plaintiff
10 when he purchased the product from defendant and, “[a]lthough the Class Action Waiver appear[ed]
11 on the first page of the Terms and Conditions, the Terms and Conditions [was] a prolix printed form
12 consisting of four pages of small font type.”⁵³ The situation in *Bradberry* is entirely consistent with
13 the facts at issue here. In addition to the Customer Agreement not being provided to customers
14 before signing up for service with DIRECTV, all terms and conditions are listed on a prolix printed
15 form consisting of four pages of small font type.⁵⁴

16 Finally, the California Supreme Court has indicated that the element of surprise will be found
17 where the contractual character of a document is not obvious, the contractual language appears in
18 print so small that many cannot read it, and the entity who drafted the “contract” has all the rights
19 and the receiver of the “contract” has all of the duties.⁵⁵ Each of these factors is present here. First,
20 the contractual nature of the document is not obvious, given that the *consumer is not given the*
21 *document before agreeing to purchase Defendant’s service and the consumer’s signature is never*
22 *required*. Second, the writing is so small that it is at best difficult, and at worst impossible, to read.
23 Third, the “contract” consists merely of a laundry list of obligations of the consumer and does not
24 indicate any of the duties of Defendant.

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26 ⁴⁹ 2007 U.S. Dist. LEXIS 34826, No. C 06-6567 CW, at 17.

⁵⁰ Mecca Dec ¶7; Imburgia Dec ¶5; Greiner Dec ¶7, 12; Kuhlken Dec ¶¶3, 4, 5; Flores Dec ¶¶2, 4, 5, 6, 7

⁵¹ *Bradberry*, *supra*; see also *Morris*, *supra*, 128 Cal.App.4th at 1321.

⁵² *Id.* at 2

⁵³ *Bradberry*, *supra*, at 17.

⁵⁴ See Exhibit C

⁵⁵ *Perdue v. Crocker National Bank* (1985), 38 Cal. 3d. 913, 928.

1 As such, the contract at issue is clearly procedurally unconscionable.

2 ii. The Contract at Issue is Substantively Unconscionable

3 As previously stated, the substantive element of unconscionability focuses on whether a
4 contractual provision reallocates risks in an objectively unreasonable or unexpected manner.⁵⁶ A
5 provision is substantively unconscionable if it “involves contract terms that are so one-sided as to
6 ‘shock the conscience’ or that impose harsh or oppressive terms.”⁵⁷

7 The contract clause at issue is entirely one-sided and imposes harsh and oppressive terms.
8 First, this contract does not comport with the reasonable expectations of the weaker or “adhering”
9 party.⁵⁸ A reasonable person would not ordinarily expect to pay an early cancellation fee when s/he
10 was not even aware that the contract imposed a term commitment. Further, even if this could
11 somehow be reasonably expected, it shocks the conscience to think that this penalty would be taken
12 directly from individuals’ bank accounts without their advance knowledge or consent and without
13 even a signature to indicate they received the contract on which these terms are found.

14 Second, this practice works solely to the benefit of Defendant and imparts absolutely no
15 benefit upon the consumer. This practice benefits Defendant by ensuring immediate payment, and
16 harms Plaintiffs, who are often stunned and confused once they realize these penalties have been
17 removed without their consent.⁵⁹

18 Third, the early cancellation penalty is often as high as four hundred eighty dollars
19 (\$480.00).⁶⁰ The amount of the fee is supposedly calculated on the basis of a prorated schedule,⁶¹
20 but neither the amount nor the details of this prorated schedule are revealed on the Lease Addendum
21 or the Customer Agreement. The early cancellation penalty bears no relation to the damage, if any,
22 incurred by DIRECTV.

23 Fourth, the “term” agreement and “early cancellation penalty” apply not only when new
24 customers cancel their service before their “term” has ended, but also when customers who have

25 ⁵⁶ *Morris, supra*, 128 Cal.App.4th at 1317.

26 ⁵⁷ *Morris, supra*, at 1322 (citing *24 Hour Fitness, Inc. v. Superior Court* (1998) 66 Cal.App.4th 1199, 1213).

27 ⁵⁸ See *Murphy v. Check ‘N Go of California, Inc.* (2007) 156 Cal.App.4th 138, 145.

28 ⁵⁹ Castro Dec ¶¶5, 7, 8, 9; Imburgia Dec ¶¶5, 10; Greiner Dec ¶12, 13; Kuhlken Dec ¶5, 6; Cox Dec ¶10, 12, 14, 15, 16;
Flores Dec ¶¶4, 5, 6

⁶⁰ Mecca dec ¶10; Castro Dec ¶7; Imburgia Dec ¶10; Greiner Dec ¶12; Kuhlken Dec ¶¶4, 5; Cox Dec ¶10; Flores Dec ¶4

⁶¹ See Exhibit A (“If you fail to maintain your minimum programming agreement...you agree that DIRECTV may charge you a prorated fee of up to \$360 for standard receivers and up to \$480 for advanced products/receivers.”)

1 been with DIRECTV for many years are forced to order a new receiver because their old receiver
2 has stopped working.⁶² These customers are forced to enter into a new agreement and therefore are
3 at risk of being charged an “early cancellation penalty” even if they have been customers for far
4 longer than the original term.⁶³ In other words, this early cancellation penalty is tied to the “lease”
5 of a receiver, not to delivery of programming services.

6 Finally, it is oppressive, unfair and deplorable that DIRECTV would pilfer the personal
7 account information provided by unsuspecting customers who are required to provide such
8 information in order to obtain an account with DIRECTV. Defendant’s customers are given no
9 choice when they initially sign up for DIRECTV’s service. If they do not provide account
10 information, they cannot receive the service. A reasonable consumer would never expect this
11 account information to be used for any purpose which s/he did not specifically authorize.

12 These practices are clearly so one-sided as to ‘shock the conscience’ and impose harsh or
13 oppressive terms on Defendant’s customers.

14 **3. DIRECTV’s Violations of the UCL**

15 The UCL prohibits all business acts or practices which are “unlawful, unfair, or
16 fraudulent.”⁶⁴ Under this definition, any unlawful act (including those which are made to be
17 unlawful pursuant to the CLRA) violates the UCL. Further, conduct can be “unfair” even if no other
18 law prohibits the challenged conduct.⁶⁵ In the context of consumer cases, “unfairness is determined
19 by weighing the utility of the practice against the gravity of the harm to the consumer.”⁶⁶

20 **(a) DIRECTV’s Practices are Unlawful**

21 Defendant’s practice of withdrawing early cancellation penalties directly from its customers’
22 bank accounts or charging their credit cards is unlawful under a host of laws, including, but not
23 limited to, Civil Code Section 1670.5, the CLRA, and the EFTA. A discussion of Defendant’s
24 violations of each is discussed *supra*, section IV.B.2(a) and (b).

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27 ⁶² Mecca Dec ¶¶5, 6; Greiner Dec ¶3, 4, 10; Imburgia Dec ¶4, 5, 8, 9; Cox Dec ¶4, 5, 6, 7, 8

⁶³ Mecca Dec ¶¶5, 6; Imburgia Dec ¶6, 7, 8, 9; Greiner Dec ¶10; Cox Dec ¶¶3, 4; Flores Dec ¶2, 4

⁶⁴ Cal. Bus. & Prof. Code §17200.

⁶⁵ *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 182–183.

⁶⁶ *Kinert v. Mission Fin. Servs. Corp.* (2003) 110 Cal.App.4th 242, 265.

1 **(b) DIRECTV's Practices are Unfair**

2 The "unfairness" prong of the UCL is "intentionally broad, thus allowing courts maximum
3 discretion to prohibit new schemes to defraud." *Podolsky v. First Healthcare Corp.* (1996) 50
4 Cal.App.4th 632, 647. The test of whether a business practice is unfair involves weighing the utility
5 of the defendant's conduct against the gravity of the harm to the alleged victim. *Id.*

6 In the instant case, the balance of utility and harm unmistakably falls on the side of Plaintiffs.
7 The practice Plaintiffs are seeking to enjoin is an unlawful practice, the only benefit of which is to
8 ensure that Defendant be paid as quickly as possible without the hassle of actually notifying its
9 customers of the charges and properly billing them for said charges.

10 The harm to Plaintiffs, on the other hand, is vast. In many cases, the automatic and
11 unauthorized withdrawal of hundreds of dollars has sent these individuals' bank accounts into
12 overdraft.⁶⁷ Many plaintiffs have been reported to credit agencies, and their credit has been
13 potentially irreversibly harmed.⁶⁸ Many have been charged with overdraft fees and have had to
14 sacrifice other goods or services in order to account for this unexpected fee.⁶⁹ Further, many
15 individuals have been forced to borrow money from friends and family in order to avoid sending
16 their accounts into overdraft and incurring additional fees.⁷⁰

17 **C. THE BALANCE OF HARM FAVORS PLAINTIFFS**

18 In analyzing the balancing the equities part of the test for a preliminary injunction, the Court
19 must exercise its discretion "in favor of the party most likely to be injured [and] [i]f the denial of an
20 injunction would result in great harm to the plaintiff, and the defendants would suffer little harm if it
21 were granted, then it is an abuse of discretion to fail to grant the preliminary injunction."⁷¹ That is
22 especially so when the party seeking the injunction makes a sufficiently strong showing of the
23 likelihood of success on the merits.⁷²

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25 ⁶⁷ Castro Dec ¶7; Cox Dec ¶16; Flores Dec ¶5

26 ⁶⁸ Cox Dec ¶15

27 ⁶⁹ Castro Dec ¶7; Cox Dec ¶16, Kuhlken Dec. ¶6; Flores Dec ¶6

28 ⁷⁰ Kuhlken Dec. ¶6

⁷¹ *Robbins v. Superior Court* (1985) 38 Cal.3d 199, 205; see also *Baldocchi v. Four Fifty Sutter Corp.* (1933) 129 Cal. App. 383, 392-93 ("[a] court of equity will not even deign to balance the inconvenience of the tortious wrongdoer against the inconvenience of the innocent").

⁷² See *Pleasant Hill Bayshore Disposal, Inc. v. Chip-It Recycling, Inc.* (2001) 91 Cal. App. 4th 678, 696 (finding the "complete likelihood" that the plaintiff would prevail on the merits was by itself sufficient to warrant the injunction).

1 Here, Plaintiffs have conclusively demonstrated they are likely to prevail on the merits of
2 their claims.⁷³ In addition, Plaintiffs further demonstrate DIRECTV will not be harmed in any way
3 by the issuance of a preliminary injunction. Indeed, granting the preliminary injunction will simply
4 compel DIRECTV to follow the law which they were on notice of at the time they drafted the
5 contract at issue. Prohibiting DIRECTV from *automatically* withdrawing funds from Plaintiffs'
6 bank accounts or directly charging their credit cards will not impose any great cost on DIRECTV
7 and will not impede the operation of its business.

8 On balance, DIRECTV's continued ability to avoid properly providing consumers with
9 notice of the fees they are being charged will have a huge impact on Plaintiffs and consumers, which
10 is especially troubling in these economic times.⁷⁴ Courts have routinely granted injunctions when
11 plaintiffs and the public faced far less harm. For example, preliminary injunctions have been granted
12 to prevent the public from unknowingly using uncertified accountants.⁷⁵ Moreover, the UCL and
13 CLRA give courts "extraordinarily broad" discretion to fashion whatever relief would be necessary
14 to prevent unfair competition.⁷⁶

15 Here, Plaintiffs have crafted a reasonable Preliminary Injunction Order which requires
16 DIRECTV to do nothing more than cease the practice of automatically removing funds from its
17 customers' accounts, requiring it to put consumers on notice of the early cancellation penalty being
18 issued against them. Under the circumstances, the status quo can be maintained during the pendency
19 of this action. DIRECTV can still bill customers for the disputed charges, and customers will
20 actually have the opportunity to dispute such charges before any money is taken from their accounts
21 without explicit authorization.

22 V. **THE COURT SHOULD WAIVE ANY BOND OR UNDERTAKING GIVEN**
23 **THE SIGNIFICANT PUBLIC INTEREST INVOLVED**

24 The California Supreme Court has noted that under proper circumstances, California courts
25 have the power to dispense with bond requirements intended to protect an adversary's financial

26 ⁷³ See Section IV.B, *supra*.

27 ⁷⁴ *Id.*

28 ⁷⁵ *People v. Hill* (1977) 66 Cal.App.3d 320, 331 (preliminary injunction granted to protect public from unknowingly using uncertified accountants); *Youngblood v. Wilcox*, (1989) 207 Cal. App. 3d 1368, 1375 (injunction granted to prevent charges of country club membership fees).

⁷⁶ See *Consumers Union v. Alta-Dena Certified Dairy, et al.* (1992) 4 Cal. App. 4th 963, 972..

1 interest.⁷⁷ The court in *Conover* found a court has this power when it can “reasonably conclude from
2 the facts before it that plaintiffs...cannot afford to post an injunction bond.”⁷⁸ Here, Plaintiffs are
3 individuals, many of whom are struggling to get by in these tough economic times. Many of the
4 Plaintiffs do not have the funds to pay the early cancellation penalty in the first place and none of
5 them could possibly afford to pay the cost of the injunction.

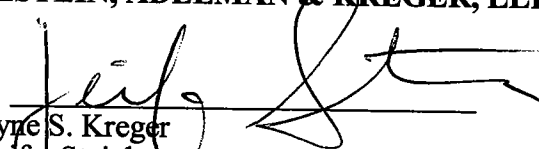
6 Further, even if the Court does require a bond as a condition of issuing a preliminary
7 injunction, the amount of the bond is within the Court’s discretion.⁷⁹ It is Defendant’s burden here
8 to present admissible and quantitative evidence of the harm that an injunction would cause.⁸⁰ Given
9 the strong public interest involved in this case and the fact that Plaintiffs are not seeking an order to
10 preliminarily enjoin the charging and collecting of the early cancellation penalty, but to enjoin the
11 illegal and unconscionable manner in which it is taken from customers’ accounts, the Court should
12 waive the bond requirement.

13 **VI. CONCLUSION**

14 For the foregoing reasons, Plaintiffs respectfully request that the Court enter the proposed
15 Preliminary Injunction Order, which is submitted herewith.

16
17 DATE: September 21, 2009

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27 ⁷⁷ *Conover v. Hall* (1974) 11 Cal. 3d 842, 851.

28 ⁷⁸ *Id.*

⁷⁹ *Hummell v. Republic Fed. Sav. & Loan Ass'n* (1982) 133 Cal.App.3d 49, 51.

⁸⁰ *Id.*

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