

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

**IN RE: APPLE iPhone 3G AND 3GS
“MMS” MARKETING AND SALES
PRACTICES LITIGATION**

**THIS DOCUMENT RELATES TO ALL
CASES**

CIVIL ACTION

MDL No. 2116

**SECTION “J”
JUDGE BARBIER**

MAGISTRATE JUDGE WILKINSON

**DECLARATION IN SUPPORT OF DEFENDANT APPLE INC.’S MOTIONS TO
DISMISS FIRST AMENDED AND SUPPLEMENTAL COMPLAINTS**

I, PENELOPE A. PREOVOLOS, declare:

1. I am a partner in the law firm of Morrison & Foerster LLP, counsel for defendant Apple Inc. (“Apple”) in this multidistrict litigation. I make this declaration on my own personal knowledge, and if called as a witness, I could and would testify competently to the following facts:

2. On January 9, 2007, Apple issued a press release announcing the introduction of the original iPhone, iPhone 2G. A true and correct copy of Apple’s January 9, 2007 press release is attached hereto as **Exhibit A**. Plaintiffs quote selectively from this press release in each First Amended and Supplemental Complaint (collectively “complaints”), but they do not include it in or attach it to any of the complaints.

3. On March 17, 2009, Apple issued a press release previewing its anticipated iPhone OS 3.0 software and announcing the software's beta release to registered software developers. A true and correct copy of Apple's March 17, 2009 press release is attached hereto at **Exhibit B**. Plaintiffs quote selectively from this press release in each complaint, but they do not include it in or attach it to any of the complaints.

4. Also on March 17, 2009, Apple held an event for registered software developers in which it announced the anticipated iPhone OS 3.0 software and a beta release available exclusively to registered iPhone software developers. A true and correct recording of Apple's March 17, 2009 presentation is submitted herewith, on DVD, as **Exhibit C**. Plaintiffs quote selectively from the March 17, 2009 presentation in each complaint, but do not include the entire presentation in any of the complaints. Apple made clear in that presentation that the iPhone OS 3.0 software update would not be available until summer. (Ex. C at 1:24 - 1:28)

5. On June 8, 2009, Apple announced the launch of iPhone 3GS at the Worldwide Developers Conference. A true and correct recording of Apple's June 8, 2009 presentation is submitted herewith, on DVD, as **Exhibit D**. Plaintiffs refer to the June 2009 iPhone 3GS launch in each complaint, but do not mention that during the launch event, Apple made clear that MMS support would not be available until later that summer. (Ex. D at 56:10 - 57:00)

6. Also on June 8, 2009, Apple issued a press release announcing the launch of the iPhone 3GS. A true and correct copy of the June 8, 2009 press release is attached hereto as **Exhibit E**. As discussed above in paragraph 5, plaintiffs refer to the June 2009 announcement of the iPhone 3GS in each complaint, but do not mention that in the press release announcing the iPhone 3GS, Apple stated that "MMS support from AT&T will be available in late summer" for iPhone 3G and 3GS.

7. From June 2009 to September 2009, Apple advertised MMS functionality as "coming in late summer" in the United States. In each complaint, plaintiffs quote selectively from Apple's advertisements, but do not include or attach full advertisements in any of the

complaints. Accordingly, true and correct copies of the following advertisements, from which plaintiffs quote selectively, are attached:

- **Exhibit F: Apple's "[s]end photos, video, audio, and more" and "[s]end MMS" web page:** Apple's web page promoting the ability to "send photos, video, audio, and more" is drastically reduced in size in each complaint in order to render the disclosure that immediately follows unreadable. That disclosure reads "MMS support from AT&T coming in late summer." The reduced image is also cropped in each complaint in order to eliminate the disclosure where it appears a second time at the bottom of the web page. **Exhibit F1** is a screenshot showing the web page in an approximation of a 17 inch screen, as it actually would have appeared to plaintiffs.
- **Exhibit G: Apple's iPhone Software Update web page:** Plaintiffs selectively quote the portion of the web page discussing MMS ("[s]end MMS messages and include photos, audio, and contact info," "tap to snap a picture right inside Messages") in each complaint, but omit the disclosure that immediately follows. That disclosure reads "MMS support from AT&T coming in late summer." **Exhibit G1** is a screenshot showing the web page in an approximation of a 17 inch screen, as it actually would have appeared to plaintiffs.
- **Exhibit H: Apple/ATTM Kiosk video (submitted on DVD):** Plaintiffs describe the kiosk video in each complaint, alleging that the video played on seven-foot-tall kiosks in Apple and ATTM retail stores and contained "a specific section about MMS." Plaintiffs, however, omit the disclosure "MMS support from AT&T coming in late summer." **Exhibit H1** is a screenshot showing the MMS representation and disclosure as it actually appeared in the kiosk video, which ran on a 14" x 21" screen.
- **Exhibit I: Apple's iPhone 3GS Guided Tour video (submitted on DVD):** Plaintiffs allege in each complaint that the iPhone 3GS Guided Tour video

contains “a section devoted to MMS.” Plaintiffs also include an image from the video in each complaint. Plaintiffs, however, omit the disclosure “MMS support from AT&T coming in late summer.” **Exhibit I1** is a screenshot showing the MMS representation and disclosure as it actually appeared in the Guided Tour video in an approximation of a 19-inch screen.

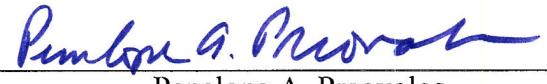
- **Exhibit J: Apple’s “Photos and Videos” web page:** Plaintiffs selectively quote the portion of the web page discussing photos and videos (“[y]ou can take a photo or make a video (iPhone 3 GS only) from within Messages and include it in your conversation with another MMS-capable device”) in each complaint, but omit the disclosure that appears at the bottom of the page. That disclosure reads “MMS support from AT&T coming in late summer.” **Exhibit J1** is a screenshot showing the web page in an approximation of a 17 inch screen, as it actually would have appeared to plaintiffs.

8. Plaintiffs allege in each complaint that the iPhone 3G packaging did not contain the disclosure regarding MMS availability. Plaintiffs overlook the fact that the packaging did not refer to or otherwise advertise MMS functionality. True and correct copies of packaging art and the label for the iPhone 3G box are attached hereto as **Exhibit K**.

9. On July 21, 2009, Apple held its Q3 quarterly earnings investor conference call during which an Apple spokesperson made a passing reference to the more than 100 new features of the iPhone OS 3.0 software, including MMS. (Ex. L at 4 para. 3) Plaintiffs mention that investor call in each complaint, but do not attach the transcript. A true and correct copy of the transcript of the July 21, 2009 Q3 2009 Apple Inc. Earnings Conference Call is attached hereto as **Exhibit L**.

I declare under penalty of perjury under the laws of the United States of America and the State of California that the foregoing is true and correct.

Executed this 9th day of August, 2010, at San Francisco, California.



Penelope A. Preovolos