

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF LOUISIANA**

IN RE: APPLE iPhone 3G AND 3GS "MMS"  
MARKETING AND SALES PRACTICES  
LITIGATION

THIS DOCUMENT RELATES TO:  
Clyde Bernard Franklin, S.D.AL.  
Case Number 09-704  
EDLA Number 10-0018

MDL NO. 2116

2:09-md-2116

SECTION: J

JUDGE BARBIER  
MAG. JUDGE WILKINSON

**FIRST AMENDED AND SUPPLEMENTAL COMPLAINT**

Plaintiff, by and through their undersigned counsel, individually and on behalf of all others similarly situated, for their First Amended and Supplemental Complaint against Defendants, which fully supplements and amends the Original Complaint filed in the Southern District of Alabama [09-704 (S.D. AL.)], on information and belief, and personal knowledge, states as follows:

**NATURE OF THE CASE**

1. Plaintiff, on behalf of himself and certain purchasers of iPhone 3G and 3GS cellular telephones, as further defined below, brings this consumer rights class action against Defendants, Apple, Inc. ("Apple") and AT&T Mobility, LLC ("AT&T").

2. Since 2007, Apple and AT&T co-marketed the iPhone with AT&T's wireless network service. As a result of Defendants' "exclusivity agreement," when purchasing an iPhone during the Class period, Defendants required all Class members to obtain wireless service, including messaging plans, for their iPhones exclusively from AT&T.

3. On or around the time the Defendants began their launch of the new generation of the 3G phones, text messaging was a standard feature of mobile phones and extremely popular. This medium allowed consumers to send messages and photos to other phone users without having to be connected to an Internet service. Texting is a faster, easier, and less expensive way to communicate between consumers than traditional email. All other phones on AT&T's network that had cameras offered this popular feature to text photos.

4. Plaintiff is informed and believes that as the Defendants were about to launch the 3G phone, a grave complication developed. Sending pictures by text took considerably more capacity than sending a written text message, and AT&T realized that its entire network would be overloaded if millions of new iPhone users began texting pictures on the 3G iPhone.

5. AT&T needed to build up its network to support this new capacity and that would take time. Defendants knew that consumers would expect that the iPhone, a "revolutionary product" with a superior camera and picture quality, would be able to text pictures. Defendants did not want to lose market share by announcing this feature would not be available and did not want to delay the lucrative launch of the new generation of 3G iPhones and thus, lose out on the extra revenue from millions of additional customers who had to lock into AT&T's exclusive contract for service.

6. AT&T's network was unable to provide the service of texting pictures until it upgraded its network and therefore, the Apple iPhone 3G and 3GS phone could not, contrary to almost all other phones on the market, text or receive pictures from other phones.

7. AT&T made a decision to let all of its customers, except iPhone customers, have access to its network to text pictures. AT&T promoted and sold unlimited texting plans to all its customers, called "Messaging Unlimited" which gave its customers the ability to send unlimited

messages to any wireless phone in the United States for \$19.99 per month. Promoting its Messaging Unlimited MMS capabilities, AT&T advertised and represented to consumers, including Plaintiff, that its Messaging Unlimited plan **“included text, picture, video and IM.”** AT&T also offered unlimited “Family Plans” for \$30.00 per month. While AT&T allowed customers other than iPhones users to text pictures, AT&T intentionally barred iPhone users from having the same ability given its network limitations. However, AT&T continued to charge the consumers for that service and represented to the iPhone users that the service included pictures.

8. For Apple’s part, it covered up the “problem” with an intentionally misleading advertising campaign. Specifically, Apple never disclosed to consumers that they had to pay for the picture messaging under the unlimited plans from their exclusive provider, AT&T, even though they would not have that service. Moreover, Apple made affirmative representations that such a service was available on the iPhone, including large in-store videos showing people texting pictures with small, fine print disclosures about when the service was available, intentionally designed so that consumers would not see or understand them.

9. Defendants’ marketing campaign promoted the iPhone operating on AT&T 3G and 3GS networks by promising the latest in mobile technology capable of everything other mobile devices could do, including Multimedia Messaging Service or “MMS”, and much more. Despite these promises, the iPhone’s MMS function was knowingly and consciously disabled while, at the same time, Defendants’ advertised that MMS was a feature included with the iPhone 3G and 3GS and AT&T’s messaging service plans.

10. MMS was and is commonly available on many phones and mobile networks, including AT&T’s. Even though the function was disabled, AT&T charged Class members the

same price as customers with different phones which support MMS service. That is, despite advertisements to the contrary, Class members paid for something they did not receive.

11. AT&T breached its contracts with Plaintiff and the Class by charging for and receiving payment for the MMS feature and service that they did not provide, and they have otherwise been unjustly enriched at the expense of Plaintiff and the Class members.

12. Defendants each engaged in conduct that is likely to deceive and has deceived the public through (1) omission, suppression and concealment from the public of material facts related to the iPhone 3G mobile phone's MMS features and the AT&T messaging plans, and (2) making and disseminating or causing to be made or disseminated untrue and/or misleading statements that were known, or by the exercise of reasonable care should have been known, to be untrue or misleading.

#### **PARTIES**

13. Plaintiff Clyde Bernard Franklin ("Franklin") is a resident of Mobile, Mobile County, Alabama, and a citizen of Alabama. In September 2008, Franklin purchased an iPhone 3G and a messaging service plan from AT&T in Mobile, Alabama. At the time he purchased his iPhone 3G and AT&T messaging service, Franklin expected that the iPhone would have the ability to text pictures and specifically was charged for a texting plan that Apple represented included texting pictures, when in fact it would not.

14. Upon purchasing the iPhone 3G, Franklin reasonably expected that the iPhone would have the capacity and ability to send picture messages. The ability to send a picture by text message was a material part of the purchase of the iPhone 3G to Franklin.

15. Franklin would not have purchased the 3G if he had known that picture messaging was not available at the time of purchase. Franklin reasonably relied upon the

representations by Apple and AT&T and his general understanding of the “revolutionary” nature of the 3G to form his belief that his iPhone 3G had the ability to send picture messages by text.

16. After Franklin purchased the iPhone and signed up for a messaging plan, he learned that his iPhone 3G did not have the capacity to send pictures by text message. He complained to Apple and AT&T about the inability to send pictures by text message, and he was told that the ability to do so would be coming soon. Franklin’s iPhone 3G was never able to send pictures by text message, and on December 24, 2009, Franklin purchased an iPhone 3GS, in part so that he would have the ability to send pictures by text messaging. Since purchasing his iPhone 3GS, Franklin has regularly sent pictures each month with his iPhone 3G, primarily for personal purposes.

17. Franklin has suffered injury in fact and has lost money as a result of the Defendants’ deceptive trade practices, unfair competition and unlawful conduct because *inter alia* he paid more for an iPhone than he should have paid and he was charged and paid for a service he did not receive.

18. Defendant AT&T Mobility, L.L.C. (AT&T) is a Delaware limited liability corporation with its principal place of business in Atlanta, Georgia. Defendant Apple, Inc. (Apple) is a California corporation with its principal place of business in Cupertino, California.

19. Defendants each participated in advertising campaigns designed to promote the iPhone 3G so that consumers believed they were capable of texting photos or had an MMS feature and MMS included in the messaging plan. At the same time, AT&T promoted its messaging plan so that consumers who purchased the iPhone 3G believed texting photos or MMS was included in the price being charged for the messaging plans.

## **JURISDICTION AND VENUE**

20. The amount in controversy in this action, as defined by 28 U.S.C. § 1332(d)(6), exceeds \$5,000,000 exclusive of costs and interest and some members of the Class are citizens of a state different from a defendant.

21. Apple is a California corporation, and Apple and AT&T each have ongoing and systematic contacts with residents of Alabama. Defendants have at all relevant times engaged in the manufacturing, distributing, marketing, promoting and selling of iPhone and 3G and 3GS and MMS messaging services to residents of the U.S. and the Southern District of Alabama.

## **COMMON FACTS**

22. This section sets forth Defendants' specific representations and omissions described above as part of the conduct of AT&T charging for a service it did not provide and by the deceptive trade and marketing practices of Apple and AT&T.

23. Defendants Apple and AT&T each promoted and advertised the iPhone and AT&T's messaging plans. To maximize profits, Apple would manufacture the iPhones and AT&T was the exclusive network upon which the iPhone would operate including the exclusive provider of messaging service plans for the iPhone, for which AT&T charges its customers more money than a basic phone service or phone and data service plan.

24. Apple is a personal computing and digital media distribution company. Its products include Mac® computers, iPod® digital music players, iTunes® online music store, and iPhone® mobile devices. Apple generated \$32 billion in revenue in fiscal 2008.

25. AT&T is one of the largest wireless network companies in the world, with roughly 80 million wireless subscribers and \$124 billion in revenue in fiscal 2008.

26. In January 2007, Apple announced the creation of a new mobile phone, claiming that it “reinvented the phone” and offered “revolutionary” features. The new phone was called the iPhone. From its launch in 2007 to the present, Defendants have sold iPhones from their stores and websites.

27. The iPhone is a high-end mobile device, capable of making telephone calls, accessing the Internet, taking photographs, operating as a digital music player, and sending and receiving other popular messaging formats, such as MMS.

28. MMS provides added benefits to the consumer, including advantages over email; No separate charge for a data plan for e-mail service is required; MMS allows consumers to make full use of the cell phones’ camera and video functions and then send the pictures or video utilizing the mobile phone number. Sending text, pictures and videos via a mobile phone’s messaging function is faster and simpler; and MMS’s can be sent to and from most mobile phones, even those that do not have email functionality.

29. In an effort to continue building demand for the popular iPhone, following the launch of the iPhone 2G on June 29, 2007, in October of 2007, AT&T continued marketing its Messaging Unlimited plan by airing television commercials that conveyed the same message that its messaging plans allowed customers to send text, pictures and videos over their phones. Typical of the television commercials is one that featured a mother scolding her children and their grandmother for sending thousands of text messages in a month. The announcer then cuts in stating, “Now get a texting plan the whole family can N-J-O-Y. AT&T brings your family unlimited messaging to anyone on any network.” An orange screen appears showing in large bold print, “UNLIMITED MESSAGING” with words, “Text, Picture, Video, IM” below.

30. This well orchestrated and omnipresent marketing plan led to significant demand for the iPhone and messaging plans. In July 2008 Defendants started selling the next generation iPhone, the iPhone 3G.

31. The 3G network offered significant advantages over the 2G network. 3G or 3rd Generation, is a family of standards for mobile telecommunications defined by the International Telecommunication Union, which includes GSM EDGE, UMTS, and CDMA2000 as well as DECT and WiMAX. Services include wide-area wireless voice telephone, video calls, and wireless data, all in a mobile environment. Compared to 2G and 2.5G services, 3G allows simultaneous use of speech and data services and higher data rates (up to 14.0 Mbit/s on the downlink and 5.8 Mbit/s uplink ). Thus, 3G networks enable network operators to offer users a wider range of more advanced services while achieving greater network capacity through improved spectral efficiency.

32. In anticipation of the launch of the iPhone 3G, in June 2008, AT&T announced its “iPhone 3G pricing plans,” which were the same plans offered to all of its customers, including those without the iPhone. All of AT&T’s plans that are relevant here require customers to enroll with AT&T for a period of years or face steep “early termination fees.” These plans expressly included “texting plans.” AT&T offered all of its customers a choice between a \$20 per month “unlimited” individual plan or a \$30 per month “unlimited” family plan. All AT&T customers who purchased one of these texting plans paid for and received MMS, except iPhone 3G customers, who paid for, but did not receive MMS. In other words, just like all other wireless service providers, AT&T sold the MMS service in a “bundle” with text messaging, where both messaging formats are included for a fixed price each month.



33. From the introduction of the iPhone 3G in July of 2008 through June 27, 2009, Apple sold over 20 million iPhones, with AT&T being the exclusive provider of the mobile network and messaging plans.

34. The iPhone 3G was a financial bonanza for Apple and AT&T. In October 2008, Apple CEO Steve Jobs announced that based on revenue, Apple had become the third-largest mobile phone supplier in the world.

35. Only after the launch of the iPhone 3G in July 2008, did AT&T publish a statement in the AT&T Answer Center page of its website acknowledging problems related to MMS:

Customers who are sent a MMS message and own a non-MMS capable device will receive a text message instead of an actual MMS message. The message will contain the website address of [www.viewmymessage.com/1](http://www.viewmymessage.com/1) or [ww.viewmymessage.com/2](http://ww.viewmymessage.com/2) as well as a user name and password. To view the MMS message, please access the website from a computer and enter the user name and password provided in the text message.

36. AT&T was instructing customers interested in MMS to access a website from a computer to view a message sent from one mobile phone to another mobile phone, which negated the whole purpose of purchasing a phone and message plan that supposedly included MMS capabilities.

### **3GS**

37. The most recent version of the iPhone, launched in June 2009, is called the “3GS.” The iPhone 3GS sold over one million units in its first three days on the market, which included the best sales day in Apple history.

38. In the spring of 2009, Apple and AT&T each initiated an advertising campaign to sell its older 3G models in preparation for the launch of 3GS. Following the previous formula of

falsely advertising MMS capabilities and messaging plans that included MMS, in March of 2009 Defendants began promoting the iPhone 3GS claiming it had a MMS feature. On March 17, 2009, Apple issued a press release relating to the iPhone 3GS, which stated in part, “The new iPhone OS 3.0 software will be available to iPhone...users this summer with over 100 new features including...MMS to send and receive photos....” That same press release states that “MMS available only on the iPhone 3G...”, which was false and misleading.

39. On March 17, 2009, Apple gave a presentation to the media about the upcoming release of the new 3GS, including a video presentation by Scott Forstall, Apple’s Senior VP for iPhone software, where he stated, “But the big news for the messages application is we’re adding support for MMS. So this, this is support for multimedia, you can now send and receive photos...so now you have one app to send and receive text, photos...That is what we’re doing with messages.... Several minutes later, Mr. Forstall says, “messages now support for MMS.” This too was false and misleading.

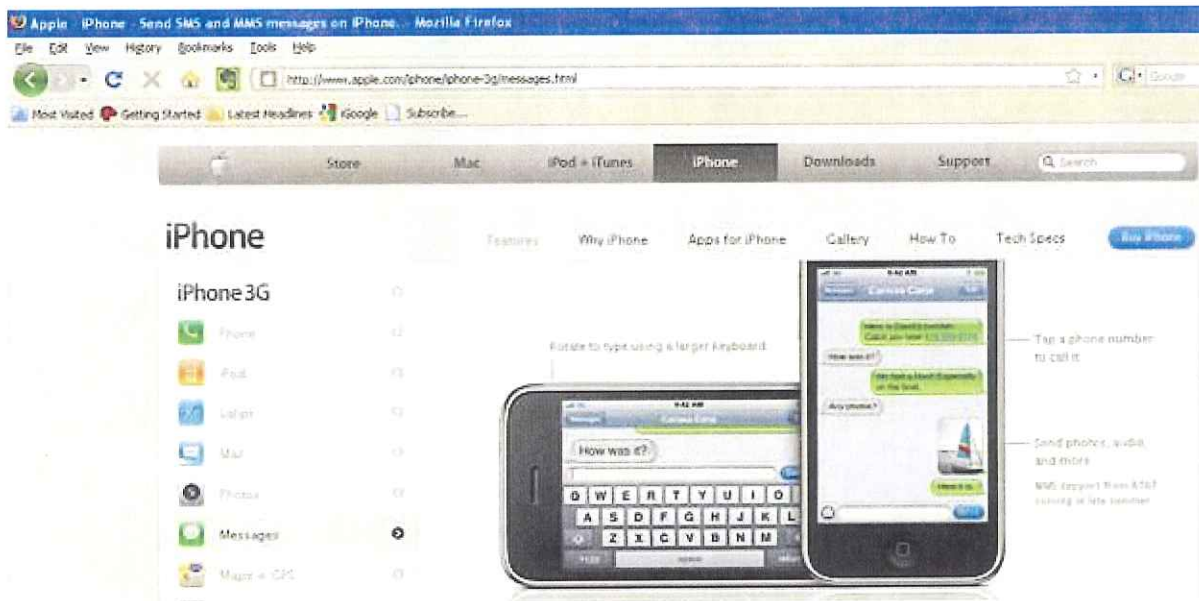
40. While Apple was promoting the 3GS’s MMS feature, AT&T continued marketing its messaging plans claiming they included MMS capability, when, in fact, that was not the case for its current 3G users and was not going to be the case for the new 3GS purchasers.

41. On June 8, 2009, a new customer of AT&T and Apple was able to purchase the iPhone 3G at a greatly reduced price. As part of the false advertising campaign, the Apple packaging that came with the iPhone 3G claimed the availability of MMS, with no reference to the service not being available until late summer. This packaging insert was also false and misleading.

42. On June 10, 2009, AT&T continued to falsely promote the iPhone and its messaging service by advertising on its website, without any late summer disclaimer, that the iPhone 3G-S had MMS functionality.

43. Likewise, furthering this false advertising campaign to promote the iPhone and messaging plan, Apple posted on its website, on the “iPhone OS 3.0 Software Update” page, that MMS would be available, so that customers could “send MMS messages and include photos, audio, and contact info. Even tap to snap a picture right inside Messages.” A graphic showed the iPhone text message bubbles with a picture inserted.

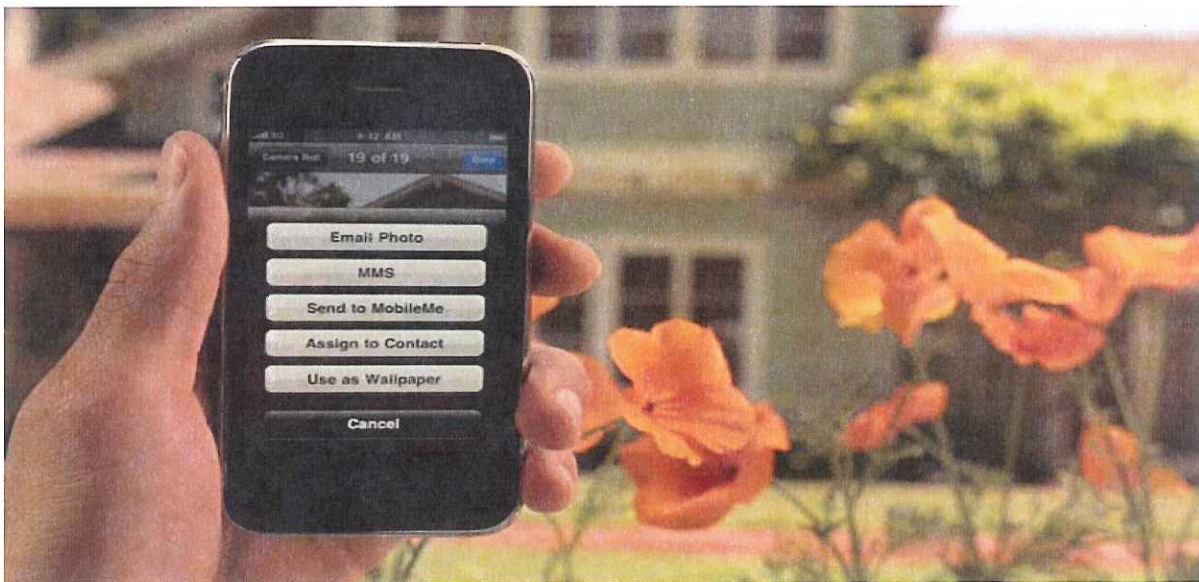
44. At certain times during the class period, a graphic appeared on Apple’s website promoting the iPhone 3G and its ability to “send photos, video, audio and more” with a mouse print-sized disclaimer indicating “MMS Support from AT&T coming in late summer.”



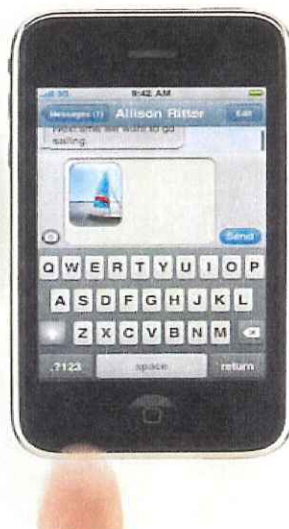
45. At certain times during the class period, both Apple and AT&T had in-store displays and/or videos that showed the iPhone sending photos via text messaging. AT&T stores had seven foot-tall white Apple kiosks, which showed a continuously rolling video

demonstrating all the features of the iPhone 3G-S, including a specific section about MMS demonstrating someone sending a video of kids playing on the beach and sending a picture of a sailboat via MMS.

46. The false advertising regarding the MMS feature and messaging service plan was also reinforced by Apple's Guided Tour for the 3G-S. This Guided Tour has an entire section devoted to the iPhone's camera and claims that the user can "MMS" pictures:



47. Then, several minutes later in Apple's Guided Tour for the 3G-S, there is a



section devoted to MMS where the announcer claims that the “messaging application on iPhone 3G-S now supports MMS.”

48. On its website, Apple represented the following at certain times during the class period:

*Send MMS*

*Take a photo or shoot some video, then send it via Messages. You can also send audio recordings from Voice Memos, contact information from Contacts, and locations from Maps.*

49. At certain times during the class period, a Pop-Up window on Apple’s website read:

*Sharing Photos and Videos*

*You can take a photo or make a video (iPhone 3G-S only) from within Messages and include it in your conversation with another MMS-capable device.*

50. On its website AT&T represented the following at certain times during the class period:

Messages

*Use messages to send text, photos, audio, video, and more. Forward a whole message or just the important parts.*



51. As a direct result of relying upon the false and deceptive representations and omissions in Defendants' advertisements and promotions, millions of customers, including the named Plaintiff herein, purchased the 3G and 3GS, reasonably expecting to have the ability to send and receive MMS messages on their iPhones.

52. Contrary to Defendants' advertising claims, AT&T's iPhone mobile phone messaging service did not support MMS during the class period.

53. In furtherance of this false advertising, on July 21, 2009, Apple held an Investors Conference Call. Apple mentioned the availability of MMS (incorrectly stated it was "MMF"). During the Investors Conference Call Apple mentioned nothing about MMS not being available until late summer.

54. Regardless of whether consumers purchased their iPhone 3Gs or 3GSs from Apple or AT&T, the purchase of an iPhone requires a two-year contract for service through AT&T. The iPhone cannot be used on any other mobile phone service network in the United States.

55. Regardless of the particular iPhone purchased, the same basic pricing plans exist for all iPhones. For messaging, individual plans through AT&T charge \$20 per month for Messaging Unlimited, \$15 per month for Messaging 1500, and \$5 per month for Messaging 200. Family Plans charge \$30 per month (per phone) for Messaging Unlimited.

56. At various times during the class period, AT&T's invoices and account statement summaries specifically indicated that "Multimedia Messaging" or MMS was included in the messaging packages purchased by certain Class members.

57. For example, one Class plaintiff received statements for the billing periods October 2008 - November 2008 and December 2008 - January 2009 that indicated MMS was included in his messaging plan. Specifically, the portion of his statements for the “FAMILY MSG UNLIMITED” plan stated that it “Includes: Multimedia Messaging Text Messaging”.

<b>Wireless Data</b>				
DATA PLAN IPHONE	08/15-09/14		30.00	30.00
FAMILY MSG UNLIMITED	08/15-09/14		30.00	30.00
Includes:				
Multimedia Messaging				
Text Messaging				
MEDIA MAX UNL MNET	08/15-09/14		0.00	0.00
Includes:				
DATA ACCESS				
DATA ACCESS				
<b>TOTAL MONTHLY SERVICE CHARGES</b>				<b>\$140.99</b>

58. At least 12 other AT&T mobile phones provided MMS as part of the messaging bundles during the class period. The AT&T mobile phone network had the capacity to support MMS services during the class period, and AT&T provides MMS to non-iPhone customers. However, AT&T did not provide MMS to any iPhone customers during the class period despite charging them the same rates for their messaging bundles.

59. During the class period, AT&T charged iPhone customers the same price for messaging bundles per month, as represented in the iPhone customers’ invoices that stated that the charge for messaging included MMS, but failed to provide the MMS portion of the messaging service - even though it provided this service to all other AT&T mobile phone customers with MMS-capable telephones for the same price it was charging the iPhone customers who were not provided the MMS service. Specifically, for every other AT&T mobile phone, Messaging Unlimited, Messaging 1500, and Messaging 200 are the exact same prices, respectively, as the Messaging Unlimited, Messaging 1500, and Messaging 200 charges for iPhone customers.

60. During the class period through advertising campaigns, Apple and AT&T each misrepresented and/or concealed, suppressed, or omitted material facts to and from customers about the fact that MMS was not an available feature on the iPhone 3G. Further, iPhone users had to pay for MMS if they wanted unlimited AT&T messaging plans.

### **CLASS ACTION ALLEGATIONS**

61. Plaintiff brings this action pursuant to Fed. R. Civ. P. 23(a), (b)(1) and (b)(3) on behalf of the following Class:

All Alabama residents who purchased an iPhone 3G or 3GS from AT&T Mobility L.L.C. or Apple, Inc. from July 11, 2008 to September 25, 2009. Excluded from the Class are any judicial officers presiding over this action, and defendants, including their officers, directors and employees.

This Class includes the following Sub-Class:

All Alabama residents who purchased an iPhone and a text messaging plan from AT&T from July 11, 2008 to September, 2009. Excluded from the Sub-Class are any judicial officers presiding over this action, and defendants, including their officers, directors and employees.

62. The Class is sufficiently numerous because they are comprised of millions of consumers, the joinder of which is not practicable.

63. There are questions of law and fact that are common to the proposed Class, including, but not limited to, the following:

- a. Whether the Defendants each advertised the iPhone 3G and 3GS as having the ability to text pictures;
- b. Whether the Defendants each advertised that the messaging plans included the ability to text pictures;
- c. Whether the Defendants each charged Plaintiff and the Class for a phone that could text pictures when it did not;



- d. Whether Defendants each charged Plaintiff and the Class for messaging service plans that that could text pictures when they did not;
- e. Whether Defendants' conduct is unlawful, unfair, or fraudulent;
- f. Whether Defendants each engaged in unfair, deceptive, untrue or misleading advertising;
- g. Whether Defendants' conduct is unfair, misleading or tends to mislead;
- h. Whether Defendants each intended the public to be misled into believing that the iPhone 3G and 3GS mobile phone had the ability to send and receive pictures by text;
- i. Whether Defendants' conduct is in violation of the Alabama Deceptive Trade Practices Act;
- j. Whether Defendants' conduct is in violation of the consumer protection laws of other states; and
- k. Whether the Class is entitled to monetary relief, including damages, and the proper measure of that relief.

64. The money lost by Plaintiff or individual members of the Class is relatively small when compared to the expense of litigating the legal and factual issues raised by this lawsuit. As a result, unless this case proceeds as a class action, Plaintiff and the Class members will, as a practical matter, be unable to pursue their individual claims. Thus, certification of this case as a class action is the only fair and efficient method for the adjudication of this controversy.

65. Plaintiff and his counsel do not envision any unusual difficulty in the management of this action as a class action.

66. The common questions set forth above predominate over any issues affecting only individual Class members.

67. Plaintiff's claim is typical of the claims of the members of the Class as all such claims arise from the purchase of the iPhone 3G and 3GS and the messaging plans Plaintiff purchased from AT&T.

68. Class treatment is a superior method for the fair and efficient adjudication of the controversy in that such treatment will permit a large number of similarly situated persons to efficiently prosecute their common claims without the duplication of evidence, effort and expense that would arise from individual actions.

69. Plaintiff will fairly and adequately represent the interests of the members of the Class. Plaintiff's interests are the same as, and not in conflict with, the other members of the proposed Class. Plaintiff's counsel is experienced in handling class actions and complex litigation.

**COUNT I**  
**(Violation of Alabama Deceptive Trade Practices Act)**

70. Plaintiff Franklin by and through his undersigned counsel, individually and on behalf of all others similarly situated, and for Count I of his Complaint against Defendants, states as follows:

71. Plaintiff incorporates paragraphs 1 through 69 by reference, as though fully set forth herein.

72. This count is brought pursuant to Alabama Deceptive Trade Practices Act, Code of Alabama § 8-19-1 *et sequitur* by Plaintiff Franklin, individually and on behalf all others

similarly situated against Defendants.

73. Alabama Deceptive Trade Practices Act, Code of Ala. § 8-19-5 provides that: “[certain enumerated] *deceptive acts or practices in the conduct of any trade or commerce are hereby declared to be unlawful*”.

74. Alabama Deceptive Trade Practices Act, Code of Alabama § 8-19-5, provides, in relevant part, that the following deceptive acts or practices in the conduct of any trade or commerce are hereby declared to be unlawful:

- (1) *Passing off goods or services as those of another, provided that this section shall not prohibit the private labeling of goods or services.*
- (2) *Causing confusion or misunderstanding as to the source, sponsorship, approval, or certification of goods or services.*
- (3) *Causing confusion or misunderstanding as to the affiliation, connection, or association with, or certification by another, provided that this section shall not prohibit the private labeling of goods or services.*
- (4) *Using deceptive representations or designations of geographic origin in connection with goods or services.*
- (5) *Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or qualities that they do not have or that a person has sponsorship, approval, status, affiliation, or connection that he or she does not have.*
- (6) *Representing that goods are original or new if they are deteriorated, reconditioned, reclaimed, used, secondhand, or altered to the point of decreasing their value or rendering the goods unfit for the ordinary purpose for which they were purchased, provided that this subdivision shall not apply to new goods which have been reconditioned, reclaimed, or repaired and such fact is disclosed to the purchaser.*
- (7) *Representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another.*

- (8) *Disparaging the goods, services, or business of another by false or misleading representation of fact.*
- (9) *Advertising goods or services with intent not to sell them as advertised.*
- (10) *Advertising goods or services with intent not to supply reasonably expectable public demand unless the advertisement discloses a limitation of quantity.*
- (11) *Making a false or misleading statement of fact concerning the reasons for, existence of, or amounts of, price reductions.*
- (12) *Knowingly failing to identify flood, water, fire, or accidentally damaged goods as damaged goods if they are damaged to the point of decreasing their value or rendering the goods unfit for the ordinary purpose for which they were purchased, provided, that this subdivision shall not apply to accidentally damaged new goods where the goods are reconditioned, reclaimed, or repaired to substantially their original condition and such fact is disclosed to the purchaser.*
- (13) *Knowingly making false or misleading statements of fact concerning the need for parts, replacement, or repair service.*
- (14) *Misrepresenting the authority of a salesperson, representative, or agent to negotiate the final terms of a transaction.*
- (15) *Disconnecting, turning back, replacing, or resetting the odometer of any motor vehicle so as to reduce the number of miles indicated on the odometer gauge with the intent of deception.*
- (16) *Advertising of any sale by falsely representing that a person is going out of business.*
- (17) *After receipt of payment for goods or services, failing to ship the goods or furnish such services within the time advertised or otherwise represented or, if no specific time is advertised or represented, failing to ship the goods or furnish such services within 30 days, unless within the applicable time period the seller provides the buyer with the option to either cancel the sales agreement and receive a refund of all previous payments to the seller or to extend the date to a specific date proposed by the seller. Any refund shall be mailed or delivered to the buyer within 10 business days after the seller receives written notification from*

*the buyer of the buyer's option to cancel the sales agreement and receive the refund.*

- (18) *Using or employing a chain referral sales plan in connection with the sale or offering for sale of goods, merchandise, or anything of value, involving a sales technique, plan, arrangement, or agreement in which the buyer or prospective buyer is offered the opportunity to purchase merchandise or goods and in connection with the purchase receives the seller's promise or representation that the buyer shall have the right to receive compensation or consideration in any form for furnishing to the seller the names of other prospective buyers, if the receipt of the compensation or consideration is contingent upon the occurrence of an event subsequent to the time the buyer purchased the goods, merchandise, or anything of value.*
  
- (19) *Selling or offering to sell, either directly or associated with the sale of goods or services, a right to participation in a pyramid sales structure. As used herein, "pyramid sales structure" includes any plan or operation for the sale or distribution of goods, services, or other property wherein a person for consideration acquires the opportunity to receive a pecuniary benefit, which is based primarily upon the inducement of additional persons by that person, and others, regardless of number, to participate in the same plan or operation, and is not primarily contingent on the volume or quantity of goods, services, or other property sold or distributed. For purposes of this subdivision, "consideration" shall not include payments made for sales demonstration equipment and materials furnished on a nonprofit basis for use in making sales and not for resale wherein such payments amount to less than one hundred dollars (\$100) annually.*
  
- (20) *In connection with any seller-assisted marketing plan, either misrepresenting the amount or extent of earnings to result therefrom, or misrepresenting the extent or nature of the market for the goods or services, or both, sold or delivered in connection with the plan, or misrepresenting that the seller of the plan will repurchase all or part of the goods or services, or both, sold or delivered in connection with the plan, or failing to deliver goods or services, or both, within the time represented. As used herein, "seller-assisted marketing plan" includes any plan, scheme, or system in which for a consideration a buyer acquires goods or services, or both, together with a plan, scheme, or system for the resale of said goods or services, or both.*

- (21) *Intentionally misrepresenting that a warranty or guarantee confers or involves certain rights or remedies."*

75. In the marketing of the iPhone 3G and 3GS and messaging bundled service plans, Defendants have engaged in unfair competition as defined in Alabama Deceptive Trade Practices Act, Code of Ala. § 8-19-1 *et sequitur*, through the practices enumerated in this Complaint.

76. At the time Plaintiff purchased his iPhone, all phones with cameras had the ability to text pictures. Defendants' marketing campaign and sales promotions were likely to deceive Plaintiff and the Class so that they reasonably would believe that the iPhone, as the leader in graphics and with the best camera on the market, could text a picture. Defendants failed to disclose that they would not allow Plaintiff to text pictures because AT&T's network would be over-burdened. Further, Plaintiff was charged by AT&T and paid for messaging plans that included the ability to text pictures and video, but did not receive what they paid for.

77. Plaintiff Franklin relied on representations made in Defendants' uniform campaign of untrue and/or misleading marketing when choosing to purchase an iPhone 3G and messaging plans as set forth above.

78. Alabama Deceptive Trade Practices Act, Code of Ala. § 8-19-1 *et sequitur* provides for a private cause of action, and at § 8-19-5 of that Act, in particular, it provides that private actions may be brought by consumers for at least the following matters specifically relevant to this Complaint:

- (4) *Using deceptive representations or designations of geographic origin in connection with goods or services.*
- (5) *Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or qualities that they do not have or that a person has sponsorship, approval, status, affiliation, or connection that he or she does not have.*

- (7) *Representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another.*
- (9) *Advertising goods or services with intent not to sell them as advertised.*
- (10) *Advertising goods or services with intent not to supply reasonably expectable public demand unless the advertisement discloses a limitation of quantity.*

79. Plaintiff Franklin has suffered injury in fact and has lost money or property as a result of Defendants' unfair competition. Plaintiff purchased a 3G iPhone and messaging service plans under the impression that it would be able to text pictures. During the class period, Class Members and Plaintiff continued to pay for messaging bundles at the same rates (for concomitant packages) that AT&T charged customers whose wireless plans did, in fact, provide the ability to text pictures, while the Plaintiff did not.

80. After AT&T allowed iPhone users to text pictures, Plaintiff and Class members were still charged and continued to pay the exact same rate for their messaging bundles and/or packages.

81. Alabama Deceptive Trade Practices Act, Code of Ala. § 8-19-10 provides, in part, the court with available remedies in stating that:

- (a) *Any person who commits one or more of the acts or practices declared unlawful under this chapter and thereby causes monetary damage to a consumer, and any person who commits one or more of the acts or practices declared unlawful in subdivisions (19) and (20) of Section 8-19-5 and thereby causes monetary damage to another person, shall be liable to each consumer or other person for:*

- (1) *Any actual damages sustained by such consumer or person, or the sum of \$100, whichever is greater; or*

(2) *Up to three times any actual damages, in the court's discretion. In making its determination under this subsection, the court shall consider, among other relevant factors, the amount of actual damages awarded, the frequency of the unlawful acts or practices, the number of persons adversely affected thereby and the extent to which the unlawful acts or practices were committed intentionally; and*

(3) *In the case of any successful action or counterclaim to enforce the foregoing liability or in which injunctive relief is obtained, the costs of the action or counterclaim, together with a reasonable attorney's fee.*

82. Defendants have wrongfully retained moneys belonging to Plaintiff and Class members that it has acquired by means of unlawful, unfair or fraudulent business acts or practices and/or unfair, deceptive, untrue, or misleading advertising.

83. By the conduct alleged above, Defendants have each engaged in a scheme to cheat a large number of consumers out of individually small sums of money.

**COUNT II**  
**(Breach of Contract Against AT&T —Messaging Plans)**

Plaintiff Franklin, by and through his undersigned counsel, individually and on behalf of all others similarly situated, and for Count II of his Complaint against AT&T, states as follows:

84. Plaintiff incorporates paragraphs 1 through 83 by reference, as though fully set forth herein.

85. Defendant AT&T required Plaintiff and Class members to enter into an agreement for wireless service in exchange for the “privilege” of purchasing an iPhone. Specifically, Plaintiff and Class members were required to enter into an exclusive two year wireless service agreement with AT&T. The iPhone was forbidden from being used on any other wireless carrier’s network. Part of that two year service agreement for Class members included the



purchase of messaging plans which were marketed and sold both as “unlimited messaging” and as messaging bundles.

86. Plaintiff and Class members performed all conditions, covenants, and promises required by them on their part to be performed in accordance with the terms and conditions of the agreement.

87. Defendant AT&T expressly and/or impliedly promised Plaintiff that the iPhone 3G and 3GS messaging plans included the ability to send pictures by text message. This feature is and has been at various times referred to as “picture messaging” “texting a picture” and by its more technical term – MMS.

88. Defendant AT&T both explicitly and implicitly promised to provide the ability for iPhone users who purchased messaging plans and bundles (whether purchased as a “messaging unlimited” plan or purchased in finite numbers of messages) the ability to send picture messages. AT&T charged the same price for each of its messaging plans and bundles to iPhone users as it charged to all other wireless service subscribers with cellular phones other than the iPhone.

89. All other AT&T wireless customers were provided the picture messaging functionality for the same price charged to iPhone customers of AT&T. iPhone users were denied this ability and functionality despite paying for it. AT&T charged for this function knowing that during the class period AT&T could not and/or would not provide picture messaging with the iPhone 3G and 3GS and messaging plans.

90. In return for this promise, Plaintiff and Class members paid AT&T for messaging plans reasonably expecting these plans to include the ability to send picture messages.

91. AT&T breached the agreement by failing to provide messaging service plans that included the ability to send picture messages during the Class period.

92. As a result of Defendants' breach of the agreements with Plaintiff and Class members, Plaintiff and the Class members suffered damages to be determined according to proof at the time of trial.

**COUNT III**  
**(Breach of Express and/or Implied Warranty)**

Plaintiff Franklin by and through his undersigned counsel, individually and on behalf of all others similarly situated, and for Count III of his Complaint against Defendants, states as follows:

93. Plaintiff incorporates paragraphs 1 through 92 by reference, as though fully set forth herein.

94. Defendants each expressly and/or impliedly promised Plaintiff that the iPhone 3G and 3GS and the messaging plans included MMS.

95. In return for this promise, Plaintiff paid the Defendants for iPhone 3G and 3GS and messaging plans that were to include MMS.

96. Defendants each breached the contract by failing to provide iPhone 3G and 3GS and messaging service plans that included MMS.

97. As a result, Plaintiff and the Class Members suffered damages to be determined according to proof at the time of trial.

**COUNT IV**  
**(Breach of Implied Covenants of Good Faith and Fair Dealing)**

Plaintiff Franklin, by and through his undersigned counsel, individually and on behalf of

all others similarly situated, and for Count IV of his Complaint against Defendants, states as follows:

98. Plaintiff incorporates paragraphs 1 through 97 by reference, as though fully set forth herein.

99. The contract between Plaintiff and Defendants included an implied covenant of good faith and fair dealing.

100. Defendants each breached this implied covenant in the contract when, in bad faith, they promised to provide an iPhone and messaging service plan that included MMS, charged for that functionality, knowing that during the class period they could not and/or would not provide MMS with the iPhone 3G and 3GS and messaging plans.

101. As a result of each Defendant's breach of the implied covenant of good faith and fair dealing, Plaintiff and the Class Members suffered damages to be determined according to proof at the time of trial.

**COUNT V  
(Unjust Enrichment)**

Plaintiff Franklin by and through their undersigned counsel, individually and on behalf of all others similarly situated, and for Count V of his Complaint against Defendants, states as follows:

102. Plaintiff incorporates paragraphs 1 through 101 by reference, as though fully set forth herein.

103. By their deceptive, misleading and unlawful conduct alleged herein, Defendants unjustly received a benefit at the expense of Plaintiff and Class Members.

104. It is unjust to allow Defendants to retain the profits from their deceptive, misleading and unlawful conduct alleged herein without providing compensation to Plaintiff and Class Members.

105. Defendants acted with conscious disregard for the rights of Plaintiff and Class Members.

106. Plaintiff and the Class Members are entitled to restitution of, disgorgement of, and/or the imposition of a constructive trust upon, all profits, benefits, and other compensation obtained by the Defendants from their deceptive, misleading and unlawful conduct.

**COUNT VI  
(Breach of Contract)**

Plaintiff Franklin, by and through their undersigned counsel, individually and on behalf of all others similarly situated, and for Count VI of his Complaint against Defendants, states as follows:

107. Plaintiff incorporates paragraphs 1 through 106 by reference, as though fully set forth herein.

108. Plaintiff and each member of the Class formed a contract with each Defendant at the time Plaintiff and the other Class members purchased the iPhone 3G and 3GS and messaging plans that were to include MMS functionality, but did not.

109. The terms of that contract include the promises and affirmations of fact made by Defendants on the iPhone and AT&T labels, packaging materials, websites, advertisements and/or press releases, all of which created or constituted express warranties that became part of the basis of the bargain and part of a standardized contract between Plaintiff and the Class members on the one hand, and Defendants on the other.

110. All conditions precedent to Defendants' liability under this contract have been performed by Plaintiff and the Class.

111. Defendants each breached the terms of this contract, including the express warranties, with Plaintiff and the Class members by not providing an iPhone 3G and messaging service plans that included MMS.

112. As a result of Defendants' breach of their contract and warranties, Plaintiff and the Class members suffered damages to be determined according to proof at the time of trial.

**COUNT VII  
(Fraud)**

Plaintiff Franklin, by and through his undersigned counsel, individually and on behalf of all others similarly situated, and for Count VII of his Complaint against Defendants, states as follows:

113. Plaintiff incorporates paragraphs 1 through 112 by reference, as though fully set forth herein.

114. Defendants misrepresented, concealed, suppressed, or omitted the following material facts in connection with the sale and advertisement of iPhone 3G and 3GS and messaging plans to Plaintiff and Class members:

- (i) AT&T had not upgraded its network to support MMS, and, therefore, MMS would be unavailable on iPhones until the network was upgraded;
- (ii) AT&T would not have its network upgraded for many months;
- (iii) The 3.0 Software Upgrade would not, by itself, solve the problem and make MMS available on the iPhone.

115. Defendants failed to exercise ordinary care in their advertising, marketing, and sale of the iPhone 3G and messaging plans to Plaintiff, Class members, and/or the public in general.

116. Defendants breached their duty in representing the functionality and effectiveness of the MMS feature for the iPhone 3G and 3GS and their associated messaging plans to Plaintiff, Class members, and/or the public in general.

117. As a direct result of the deception, misrepresentation, unfair practices, concealment, suppression, and omission by each Defendant, Plaintiff has suffered an ascertainable loss of money, including, but not limited to the difference in value between the iPhone and messaging plans as represented and the iPhone and messaging plans that Defendants actually provided to Plaintiff and Class Members.

118. Defendants' actions were negligent, if not intentional, without a justification or excuse.

119. As a direct and proximate result of the foregoing acts and omissions, Plaintiff and Class members have suffered damages. Plaintiff and Class members are entitled to compensatory damages, equitable and declaratory relief, punitive damages, costs and reasonable attorneys' fees.

**COUNT VIII**  
**(Misrepresentation of Material Fact)**

Plaintiff Franklin, by and through his undersigned counsel, individually and on behalf of all others similarly situated, and for Count VIII of his Complaint against Defendants, states as follows:

120. Plaintiffs reincorporate and reallege Paragraphs 1 through 119 as if more fully set forth herein.

121. Defendants misrepresented material facts willfully or recklessly without knowledge, in violation of the Code of Alabama §6-5-101 in connection with the sale and advertisement of iPhone 3G and 3GS and messaging plans to Plaintiff and Class members.

122. Code of Alabama §6-5-101 states as follows:

*Misrepresentations of a material fact made willfully to deceive, or recklessly without knowledge, and acted on by the opposite party, or if made by mistake and innocently and acted on by the opposite party, constitute legal fraud.*

123. Misrepresentations of material facts made by Defendants willfully to deceive and/or recklessly without knowledge, and acted upon by Plaintiffs include, among others:

- (i) AT&T had not upgraded its network to support MMS, and, therefore, MMS would be unavailable on iPhones until the network was upgraded;
- (ii) AT&T would not have its network upgraded for many months;
- (iii) The 3.0 Software Upgrade would not, by itself, solve the problem and make MMS available on the iPhone.

124. As a direct and proximate result of the foregoing acts and omissions, Plaintiff and Class members have suffered damages. Plaintiff and Class members are entitled to compensatory damages, equitable and declaratory relief, punitive damages, costs and reasonable attorneys' fees.

**COUNT IX**  
**(Oppression, Fraudulent, Wantonness, Malice)**

Plaintiff Franklin, by and through his undersigned counsel, individually and on behalf of all others similarly situated, and for Count IX of his Complaint against Defendants, states as follows:

125. Plaintiffs reincorporate and reallege Paragraphs 1 through 124 as if more fully set forth herein.

126. Plaintiffs bring claims against the Defendants due to their consciously or deliberately engaging in oppression, fraud, wantonness or malice with regard to the Plaintiffs as described in this Complaint, in violation of and pursuant to the Code of Alabama §6-11-20.

127. Code of Alabama §6-11-20 provides, in part, as follows:

- (a) *Punitive damages may not be awarded in any civil action, except civil actions for wrongful death pursuant to Sections 6-5-391 and 6-5-410, other than in a tort action where it is proven by clear and convincing evidence that the defendant consciously or deliberately engaged in oppression, fraud, wantonness, or malice with regard to the plaintiff. Nothing contained in this article is to be construed as creating any claim for punitive damages which is not now present under the law of the State of Alabama.*
  
- (b) *As used in this article, the following definitions shall apply:*
  - (1) *FRAUD. An intentional misrepresentation, deceit, or concealment of a material fact the concealing party had a duty to disclose, which was gross, oppressive, or malicious and committed with the intention on the part of the defendant of thereby depriving a person or entity of property or legal rights or otherwise causing injury.*
  
  - (2) *MALICE. The intentional doing of a wrongful act without just cause or excuse, either:*
    - a. *With an intent to injure the person or property of another person or entity, or*
  
    - b. *Under such circumstances that the law will imply an evil intent.*
  
  - (3) *WANTONNESS. Conduct which is carried on with a reckless or conscious disregard of the rights or safety of others.*
  
  - (4) *CLEAR AND CONVINCING EVIDENCE. Evidence that, when weighed against evidence in opposition, will produce in the mind of the trier of fact a firm conviction as to each essential element of the claim and a high probability as to the correctness of the conclusion. Proof by clear and convincing evidence requires a level of proof greater than a preponderance of the evidence or the substantial weight of the evidence, but less than beyond a reasonable doubt.*
  
  - (5) *OPPRESSION. Subjecting a person to cruel and unjust hardship in conscious disregard of that person's rights.*

127. By consciously or deliberately engaging in oppression, fraud, wantonness or malice with regard to the Plaintiffs, in violation of and pursuant to the Code of Alabama §6-11-20, Defendants have engaged in the following actions or failures to act:



- (i) AT&T had not upgraded its network to support MMS, and, therefore, MMS would be unavailable on iPhones until the network was upgraded;
- (ii) AT&T would not have its network upgraded for many months;
- (iii) The 3.0 Software Upgrade would not, by itself, solve the problem and make MMS available on the iPhone.

128. As a direct and proximate result of the foregoing acts and omissions, Plaintiff and Class members have suffered damages. Plaintiff and Class members are entitled to compensatory damages, punitive damages, treble damages, equitable and declaratory relief, punitive damages, costs and reasonable attorneys' fees.

**WHEREFORE**, Plaintiff prays:

129. That this matter be certified as a class action with the Class defined as set forth above, that Plaintiff be appointed Class Representatives and his attorneys be appointed Class Counsel;

130. That judgment be entered against Defendants for damages, restitution and disgorgement in an amount to be proven at trial; and

131. Actual damages;

132. Exemplary, statutory or punitive damages as provided by law;

133. For other equitable relief or other relief that the Court may deem just and proper, including pre- and post-judgment interest.

134. For attorneys' fees and reasonable costs incurred during the prosecution of this class action.

**DEMAND FOR JURY TRIAL**

Plaintiff hereby demands a trial by jury.

DATED: June 4, 2010

Respectfully Submitted,

/s/ SCOTT R. BICKFORD  
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**CERTIFICATE OF SERVICE**

I hereby certify that on the 4th day of June 2010, I electronically filed the foregoing with the Clerk of court by using the CM/ECF system which will send a notice of electronic filing.

/s/ SCOTT R. BICKFORD  
SCOTT R. BICKFORD