

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

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

MDL NO. 2116

2:09-md-2116

SECTION: J

THIS DOCUMENT RELATES TO:
Ryan Baxter
E.D. MI Case No. 2:09-cv-13938

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 Eastern District of Michigan [09-13938 (E.D. MI.)], 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 his iPhones exclusively from AT&T.

3. On or around the time the Defendants began his 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. Plaintiffs are informed and believe 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 phones 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 its 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.

11. 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.

12. AT&T breached its contracts with Plaintiff, the Class and the Sub-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.

13. 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 and 3GS mobile phones' 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

14. Plaintiff Ryan Baxter is a resident of Fair Haven, Michigan, and is a citizen of Michigan. On June 21, 2009, Baxter purchased an iPhone 3GS from an Apple store in the Eastern District of Michigan. He also purchased a Messaging Unlimited text messaging service plan.

15. At the time he purchased his iPhone 3GS and AT&T messaging service, Baxter expected that the iPhone 3GS would have the ability to text pictures and specifically was charged for a texting plan that AT&T represented included texting pictures, when in fact it would not.

16. Prior to purchasing the 3GS, Baxter had an iPhone 2G through AT&T. Upon purchasing the iPhone 3GS, Baxter reasonably expected that the newer iPhone model 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 to Baxter.

17. Baxter would not have purchased the iPhone 3GS if he had known that picture messaging was not available at the time of purchase. Baxter reasonably relied upon the representations by Apple and AT&T and his general understanding of the “revolutionary” nature of the iPhone 3G and 3GS to form his belief that the iPhone 3GS had the ability to send picture messages by text.

18. After Baxter purchased the iPhone and signed up for a messaging plan, he learned that his iPhone 3GS did not have the capacity to send pictures by text message. Since the time picture messaging finally became available to iPhone users, Baxter has regularly sent pictures each month with his iPhone.

19. Baxter purchased the iPhone primarily for personal, family, or household use.

20. Baxter has suffered injury in fact and has lost money as a result of the Defendants' unfair competition and unlawful conduct because inter alia he paid more for an iPhone than he should have paid and was charged and paid for a service that he did not receive.

21. 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.

22. Defendants each participated in advertising campaigns designed to promote the iPhone 3G and 3GS 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 and 3GS believed texting photos or MMS was included in the price being charged for the messaging plans.

JURISDICTION AND VENUE

23. 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 members of the Class and Sub-Class are citizens of a state different from a defendant.
24. This case, originally filed in the United States District Court for the Southern District of Michigan but was later transferred to this court as part of a Multi-District Litigation proceeding pursuant to 28 U.S.C. Sec. 1407.

COMMON FACTS

25. 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 marketing practices of Apple and AT&T.

26. 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.

27. 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.

28. 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.

29. 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 his stores and websites.

30. 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.

31. 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.

32. 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 his phones. Typical of the television commercials, is one that featured a mother scolding her children and his 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.

33. 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.

34. 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.

35. 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.

36. 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.

37. 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.

38. 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 or www.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.

39. 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

40. 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.

41. 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.

42. 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.

43. 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

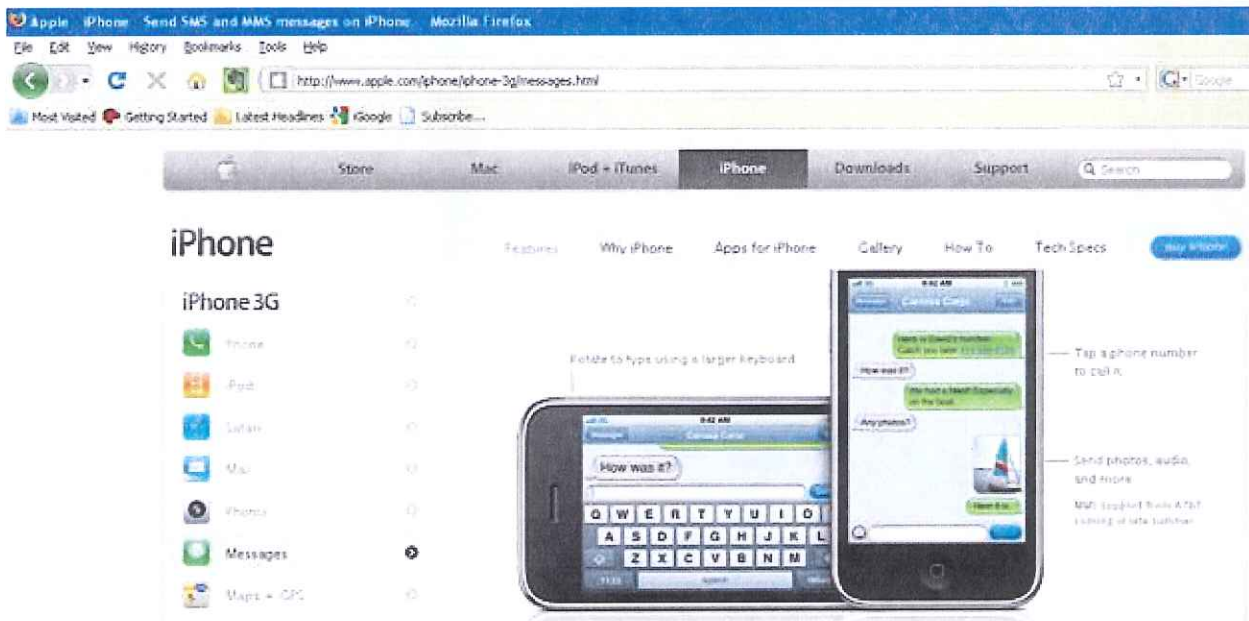
was not the case for its current 3G users and was not going to be the case for the new 3GS purchasers.

44. 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.

45. 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 3GS had MMS functionality.

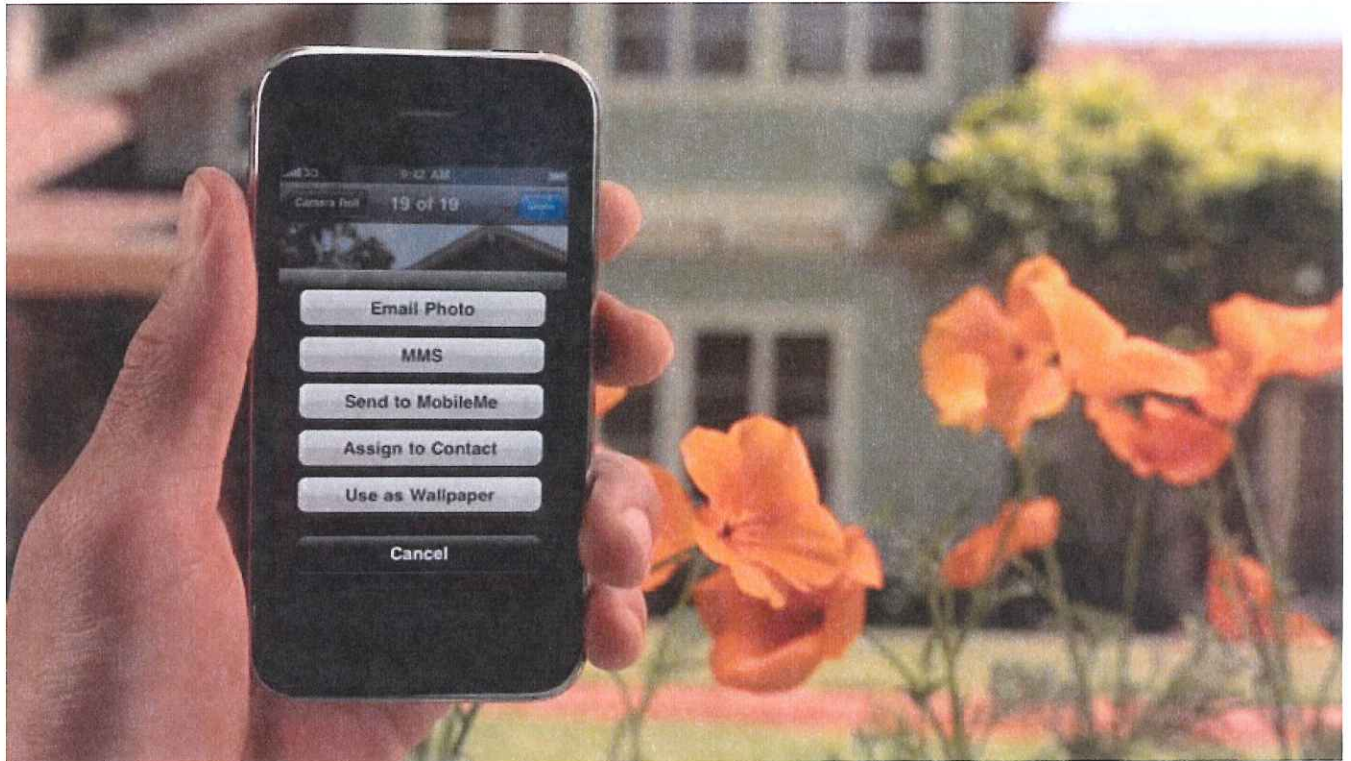
46. Likewise, furthering this false advertising campaign to promote the iPhone and messaging plan, Apple posted on its website, on the “iPhone OS 3.0 Software Update” page, that MMS would be available, so that customers could “send MMS messages and include photos, audio, and contact info. Even tap to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

47. At certain times during the class period, a similar 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.”



48. 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 3GS, 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.

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



50. Then, several minutes later in Apple’s Guided Tour for the 3GS, there is a section devoted to MMS where the announcer claims that the “messaging application on iPhone 3GS now supports MMS.”



51. 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.

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

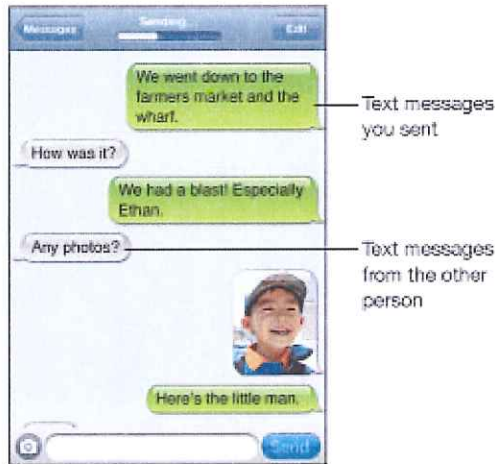
Sharing Photos and Videos

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

53. 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.



54. 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 his iPhone 3Gs and 3GSs.

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

56. In furtherance of this false advertising, on July 21, 2009, a month after the launch of the 3GS, 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.

57. Regardless of whether consumers purchased his 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.

58. 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.

59. 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.

60. For example, one of the Class Plaintiffs received statements for the billing periods 07/15/2009-8/14/2009 and 8/15/2009-9/14/2009 that indicated MMS was included in his messaging plan. Specifically, the portion of the statements for the "FAMILY MSG UNLIMITED" plan stated that it "Includes: Multimedia Messaging Text Messaging".

Wireless Data				
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				
TOTAL MONTHLY SERVICE CHARGES				\$140.99

61. 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 his messaging bundles.

62. 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.

63. 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 and 3GS. Further, iPhone users had to pay for MMS if they wanted unlimited AT&T messaging plans.

CLASS ACTION ALLEGATIONS

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

All Michigan 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, primarily for personal, family, or household use. Excluded from the Class

are any judicial officers presiding over this action, and defendants, including his officers, directors and employees.

This Class includes the following Sub-Class:

All Michigan residents who purchased an iPhone and a text messaging plan from AT&T from July 11, 2008 to September, 2009, primarily for personal, family, or household use. Excluded from the Sub-Class are any judicial officers presiding over this action, and defendants, including his officers, directors and employees.

65. The Class and Sub-Class are sufficiently numerous because they are comprised of millions of consumers, the joinder of which is not practicable.

66. There are questions of law and fact that are common to the proposed Class and Sub-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, the Class and Sub-Class for a phone that could text pictures when it did not;
- d. Whether Defendants each charged Plaintiff, the Class and Sub-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 Michigan Consumer Protection Act; and
- j. Whether the Class and Sub-Class are entitled to monetary relief, including damages, and the proper measure of that relief.

67. The money lost by Plaintiff or individual members of the Class or Sub-Class are 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 his individual claims. Thus, certification of this case as a class action is the only fair and efficient method for the adjudication of this controversy.

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

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

70. Plaintiff's claims are typical of the claims of the members of the Class and Sub-Class, as all such claims arise from the purchase of the iPhone 3G or 3GS and the messaging plans Plaintiff purchased from AT&T.

71. 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 his common claims without the duplication of evidence, effort and expense that would arise from individual actions.

72. Plaintiff will fairly and adequately represent the interests of the members of the Class and Sub-Class.

73. Plaintiff's interests are the same as, and not in conflict with, the other members of the proposed Class and Sub-Class. Plaintiff's counsel is experienced in handling class actions and complex litigation.

COUNT I

(Michigan Consumer Protection Act, MCL Secs. 445.901 et seq.)

Plaintiff reincorporates and realleges Paragraphs 1 through 73 as if more fully set forth herein.

74. MCL § 445.903, entitled "*Unfair, unconscionable, or deceptive methods, acts, or practices in conduct of trade or commerce; rules; applicability of subsection (1)(hh),*" provides as follows":

(1) Unfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce are unlawful and are defined as follows:

* * *

(c) Representing that goods or services have...characteristics...uses, benefits, or quantities that they do not have....;

* * *

(e) 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.

* * *

(q) Representing or implying that the subject of a consumer transaction will be provided promptly, or at a specified time, or within a reasonable time, if the merchant knows or has reason to know it will not be so provided.

* * *

(s) Failing to reveal a material fact, the omission of which tends to mislead or deceive the consumer, and which fact could not reasonably be known by the consumer;

* * *

(t) Entering into a consumer transaction in which the consumer waives or purports to waive a right, benefit, or immunity provided by law, unless the waiver is clearly stated and the consumer has specifically consented to it.

* * *

(w) Representing that a consumer will receive a rebate, discount, or other benefit as an inducement for entering into a transaction, if the benefit is contingent on an event to occur subsequent to the consummation of the transaction.

* * *

(bb) Making a representation of fact or statement of fact material to the transaction such that a person reasonably believes the represented or suggested state of affairs to be other than it actually is.

(cc) Failing to reveal facts that are material to the transaction in light of representations of fact made in a positive manner.

* * *

75. For the reasons set forth above, Defendants violated MCL Sec.445.903(1)(c), (e), (q), (s), (t), (w) (bb), and (cc) in connection with their advertisement and sale of 3G and 3G-S iPhones by representing that the iPhones were capable of providing MMS functionality at the time of sale when, in fact, they were not; and, with respect to any statements that MMS functionality would be provided “in June 2009,” or “in late summer,” misrepresented facts known by Defendants because said MMS functionality was in fact not provided by June 2009 or “late summer.” Defendants also failed to disclose material facts to the consumer about the lack of MMS functionality, including the fact that AT&T had not taken appropriate actions to provide for support of MMS; Defendants knew that MMS would not be available for many months; and Defendants

knew, but failed to disclose, that the 3.0 Software Upgrade in June 2009 would not provide, in and of itself, the availability of MMS functionality.

76. Further, Defendants failed to disclose that customers would be charged for messaging plans which were supposed to include MMS, when in fact such plans did not include MMS.

77. Material omissions also stand as violations of these statutes. Defendants omitted the fact that Plaintiff and class members would be charged for MMS services, despite Defendants knowing that MMS services would not be provided. Such omissions were material for at least two reasons: (1) money is always material and (2) the services contract obligates AT&T to provide MMS services.

78. Defendants intended that consumers rely on their statements and omissions regarding MMS functionality. But Defendants' statements were blatantly false and Defendants omitted the material fact that AT&T was completely incapable of providing MMS services for iPhone. Any disclosure allegedly provided to consumers was not a reasonable one.

79. The disclaimers provided by Defendants were inadequate, hard to find, and not prominent enough to leave an accurate, unambiguous impression. The tendency of the advertising to deceive must be judged by viewing it as a whole, without emphasizing isolated words or phrases apart from their context, such as any purported "disclaimers" Defendants may use as a defense. Disclosures and disclaimers must be viewed in the context of the marketing campaign itself.

80. In the alternative, even if alleged disclaimers were prominent and unambiguous in the context of the entire advertisement, they omitted material information necessary to tell the whole truth. For instance, even if the disclaimer prominently and unambiguously communicated that AT&T and iPhone would not provide MMS services until September 24, 2009, it failed to inform consumers that they would still be charged for MMS services, the same as AT&T customers with different cell phones who actually received MMS services.

81. MCL § 445.911, entitled, "Action by person for declaratory judgment, injunction, or and actual damages; class action by person for actual damages; order; hearing; receiver; sequestration of assets; cost of notice; limitations," provides as follows:

(1) Whether or not he seeks damages or has an adequate remedy at law, a person may bring an action to do either or both of the following:

(a) Obtain a declaratory judgment that a method, act, or practice is unlawful under section 3.

(b) Enjoin in accordance with the principles of equity a person who is engaging or is about to engage in a method, act, or practice which is unlawful under section 3.

* * *

(3) A person who suffers loss as a result of a violation of this act may bring a class action on behalf of persons residing or injured in this state for the actual damages caused by any of the following:

(a) A method, act, or practice in trade or commerce defined as unlawful under sec. 3....

* * *

(4) On motion of a person and without bond in an action brought under subsection (3) the court may make an appropriate order: to reimburse persons who have suffered damages; to carry out a transaction in accordance with the aggrieved persons' reasonable expectations; to strike or limit the application of unconscionable clauses of contracts to avoid an unconscionable result; or to grant other appropriate relief. The court after a hearing may appoint a receiver or order sequestration of the defendant's assets if it appears to the satisfaction of the court that the defendant threatens or is about to remove, conceal, or dispose of his assets to the detriment of members of the class.

(5) If at any stage of proceedings brought under subsection (3) the court requires that notice be sent to the class, a person may petition the court to require the defendant to bear the cost of notice. In determining whether to impose the cost on the defendant or the plaintiff, the court shall consider the probability that the person will succeed on the merits of his action.

* * *

(7) An action under this section shall not be brought more than 6 years after the occurrence of the method, act, or practice which is the subject of the action nor more than

1 year after the last payment in a transaction involving the method, act, or practice which is the subject of the action, whichever period of time ends at a later date. However, when a person commences an action against another person, the defendant may assert, as a defense or counterclaim, any claim under this act arising out of the transaction on which the action is brought.

82. Defendants employed, in connection with the sale and advertisement of 3G and 3G-S iPhones, to Michigan consumers, deception, fraud, false pretense, false promise, misrepresentation, and unfair practices, including but not limited to representing that the phones would support MMS when Defendants knew, in fact, that they would not support MMS.

83. At the time Plaintiff purchased his iPhones, all phones with cameras had the ability to text pictures.

84. 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.

85. Defendants failed to disclose that they would not allow Plaintiff to text pictures because AT&T's network would be over-burdened. Further, Plaintiff were 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.

86. Plaintiff purchased 3G and 3GS iPhones and messaging service plans under the impression that they would be able to text pictures.

87. 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.

88. 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 his messaging bundles and/or packages.

89. 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.

90. Plaintiff Baxter in fact relied on the misrepresentations of the Defendants and suffered an ascertainable loss of money or property.

91. As a direct result of the deceptions, frauds, false pretenses, misrepresentations, unfair practices, concealments, suppressions, and omissions of Defendants, Plaintiffs have suffered an ascertainable loss of money, namely the difference in value between the iPhone as represented and the iPhone as it actually exists; as well as amounts expended for messaging plans which were supposed to include MMS but in fact did not.

92. Moreover, Defendants actions were intentional and outrageous, without any justification or excuse, and warrant the imposition of punitive damages under the MCPA.

93. In the event Plaintiff and the Class are the prevailing parties, Plaintiffs also seek a reasonable attorney's fees and costs under the MCPA.

COUNT II

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

Plaintiff Baxter, 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, state as follows:

94. Plaintiff incorporate paragraphs 1 through 93 by reference, as though fully set forth herein.

95. 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.

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

97. 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.

98. 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.

99. 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 or 3GS and messaging plans.

100. 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.

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

102. 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 Contract Against Defendants—Purchase of iPhone)

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

103. Plaintiff incorporate paragraphs 1 through 102 by reference, as though fully set forth herein.

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

105. In return for this promise, Plaintiff paid the Defendants for iPhones and messaging plans that were to include MMS.

106. Defendants each breached the contract by failing to provide iPhones and messaging service plans that included MMS.

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

COUNT IV

(Breach of the Implied Covenant of Good Faith and Fair Dealing)

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

108. Plaintiff incorporate paragraphs 1 through 107 by reference, as though fully set forth herein.

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

110. 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, 3GS and messaging plans.

111. As a result of each Defendants' 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

(Breach of Express and/or Implied Warranty)

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

112. Plaintiff incorporate paragraphs 1 through 111 by reference, as though fully set forth herein.

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

114. 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.

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

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

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

COUNT VI

(Unjust Enrichment)

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

118. Plaintiff incorporate paragraphs 1 through 117 by reference, as though fully set forth herein.

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

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

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

122. 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 his deceptive, misleading and unlawful conduct.

COUNT VII

(Alternative Count—Negligent Misrepresentation)

Plaintiff Baxter, by and through his undersigned counsel, individually and on behalf of all others similarly situated, and for Alternative Count VII of his Complaint against Defendants, in the event the Court finds that the Defendants' acts were not intentional as alleged above, then Plaintiff state as follows:

123. Plaintiff incorporate paragraphs 1 through 122 by reference, as though fully set forth herein.

124. Defendants misrepresented, concealed, suppressed, or omitted the following material facts in connection with the sale and advertisement of iPhone 3G, iPhone 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;

(iv) Messaging plans would not include MMS.

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

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

127. 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.

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

129. Material omissions also stand as violations of Michigan law. Defendants omitted the fact that Plaintiff and class members would be charged for MMS services, despite Defendants knowing that MMS services would not be provided. Such omissions were material for at least two reasons: (1) money is always material and (2) the services contract obligates AT&T to provide MMS services.

130. Defendants intended that consumers rely on their statements and omissions regarding MMS functionality. But Defendants' statements were blatantly false and Defendants omitted the material fact that AT&T was completely incapable of providing MMS services for iPhone. Any disclosure allegedly provided to consumers was not a reasonable one.

131. The disclaimers provided by Defendants were inadequate, hard to find, and not prominent enough to leave an accurate, unambiguous impression. The tendency

of the advertising to deceive must be judged by viewing it as a whole, without emphasizing isolated words or phrases apart from their context, such as any purported “disclaimers” Defendants may use as a defense. Disclosures and disclaimers must be viewed in the context of the marketing campaign itself.

132. In the alternative, even if alleged disclaimers were prominent and unambiguous in the context of the entire advertisement, they omitted material information necessary to tell the whole truth. For instance, even if the disclaimer prominently and unambiguously communicated that AT&T and iPhone would not provide MMS services until September 24, 2009, it failed to inform consumers that they would still be charged for MMS services, the same as AT&T customers with different cell phones who actually received MMS services.

133. 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.

WHEREFORE, Plaintiff prays:

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

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

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

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

DEMAND FOR JURY TRIAL

Plaintiff hereby demand 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