

**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:  
Joey Aleman/S.D. Texas, Case No. 10-11

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 Texas [10-11 (S.D. TX.)], 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, bring this consumer rights class action

against defendants, Apple, Inc. (“Apple”) and AT&T Mobility, LLC (“AT&T”) (collectively “Defendants”).

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 text messages, photos and videos 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 camera phones on AT&T’s network offered this popular feature of text messaging photos and videos.

4. Plaintiff is informed and believe that as the Defendants were about to launch the 3G phone, a grave complication developed. Sending pictures by text message 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. To handle the expected the data surge associated with the 3G iPhone, AT&T needed time to build up its network to support this new capacity. Defendants knew that consumers would expect that the iPhone, a so-called “revolutionary product”

with a superior camera and picture quality, would be able to text message pictures and videos. Defendants did not want to lose market share by acknowledging this important feature would not be available and did not want to delay the lucrative launch of the new generation of 3G iPhones and risk losing 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 text messaging pictures and videos until it upgraded its network and therefore, the Apple iPhone 3G and 3GS phones could not, unlike almost all other phones on the market, send or receive pictures or videos 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 the multimedia messaging service ("MMS") capabilities of its Messaging Unlimited plan, AT&T advertised and represented to consumers, including Plaintiff and members of the Class, that its Messaging Unlimited plan "included text, picture, video and IM." AT&T also offered unlimited "Family Plans" for \$30.00 per month.

8. MMS is a standard way to send messages that include multimedia content (*e.g.*, pictures or videos), to and from mobile phones. MMS was a technological advancement over short message service or "SMS", which only allowed exchange of text

messages up to 160 characters in length. By 2008, worldwide MMS usage level surpassed 1.3 billion active users who generated 50 billion MMS messages.

9. Although AT&T allowed customers other than iPhones users to text pictures, videos, and other multimedia content, AT&T secretly prohibited iPhone users from having the same ability. Nevertheless, AT&T charged Plaintiff and members of the Class for that service and represented to them that its messaging services included the ability send text message pictures and videos.

10. Defendant Apple also intentionally misrepresented and concealed the iPhone 3G and 3GS' MMS unavailability through a false and misleading advertising campaign. Apple never disclosed to consumers that they had to pay for the picture messaging under their AT&T unlimited plans, even though AT&T did not plan to and indeed would not provide Plaintiff and members of the Class with MMS services. Moreover, Apple's extensive advertising campaign included affirmative representations that MMS services were available on its iPhones, 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.

11. Defendants' marketing campaign promoted the iPhone operating on AT&T 3G and 3GS networks by promising the latest in mobile technology and capable of everything other mobile devices could do, including MMS, and much more. Despite these promises, the iPhone's MMS function was knowingly and consciously disabled despite Defendants' statements and advertisements that MMS was a feature included with the iPhone 3G and 3GS and AT&T's messaging service plans.

12. 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 Plaintiff and members of the Class 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.

13. Defendants each engaged in conduct that is likely to deceive and has deceived the public through (a) 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 (b) 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.

#### **THE PARTIES**

14. Plaintiff Joey Aleman ("Aleman") is a resident of Galveston County, Texas and a citizen of Texas. In 2009, Aleman purchased an iPhone 3G and a messaging service plan from AT&T in Galveston County primarily for personal, family or household purposes. At the time he purchased his iPhone 3G and AT&T messaging service, Aleman expected that the iPhone 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.

15. Aleman 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 to Aleman.

16. Aleman would not have purchased the 3G if he had known that picture messaging was not available at the time of purchase. Aleman reasonably relied upon the representations by Apple and AT&T in their advertisements 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.

17. After Aleman purchased the iPhone and signed up for an AT&T messaging plan, he learned that his iPhone 3G did not have the capacity to send pictures by text message.

18. Aleman has suffered injury in fact and has lost money as a result of the Defendants’ unfair competition and unlawful conduct because inter alia he purchased an iPhone that he would not otherwise have bought and he was charged and paid for AT&T messaging services he did not receive.

19. 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.

20. 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**

21. 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.

22. Apple and AT&T have ongoing and systematic contacts with residents of Texas. Defendants have at all relevant times engaged in the manufacturing, distributing, marketing, promoting and selling of iPhone and 3G, 3GS and MMS messaging services in of Texas.

### **COMMON FACTS**

23. Defendants Apple and AT&T each promoted and advertised the iPhone and AT&T's messaging plans. Apple is the manufacturer of the iPhones and AT&T is the exclusive network upon which the iPhones operate.

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 and videos, operating as a digital music player, and sending and receiving other popular messaging formats, such as MMS.

28. The unique benefits of MMS are material to consumers, including Plaintiff and members of the Class. For example, MMS has advantages over email, including having no separate data plan charge that is associated with e-mail service, and allowing consumers to make full use of the cell phones' camera and video functions and sending the pictures or video utilizing their mobile phone number. Sending text, pictures and videos via a mobile phone's messaging function is faster and simpler than via email service; and MMS's can be sent to and from most mobile phones, even those that do not have email functionality.

29. Following the launch of the iPhone 2G on June 29, 2007, in October of 2007, AT&T continued to build demand for the popular iPhone, including by marketing its Messaging Unlimited plan by airing television commercials stating that its messaging plans allowed customers to send text, pictures and videos over their phones. Typical of AT&T's 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. Defendants' well orchestrated and extensive marketing plan led to significant consumer demand for the iPhone and AT&T messaging plans.

31. In July 2008 Defendants started selling the next generation iPhone, the iPhone 3G. 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." In reality, the iPhone 3G pricing plans 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." All AT&T wireless plans, including iPhone plans, were expressly advertised to include "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 MMS and SMS messaging formats are included for a monthly fixed price.

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 [www.viewmymessage.com/2](http://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.

### **3GS**

36. 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.

37. In the spring of 2009, Defendants each initiated an advertising campaign to sell its older 3G models in preparation for the launch of 3GS. As it had done with the iPhone 3G, in March of 2009 Defendants began falsely advertising the iPhone 3GS claiming it had a MMS feature.

38. For example, 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...” These statements are false and misleading.

39. Leading up to and continuing after the iPhone 3GS product launch, Defendants consistently repeated the false and deceptive statements regarding iPhone 3GS’ MMS capabilities. For example, 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 iPhone 3GS’ MMS feature, AT&T continued marketing its iPhone 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.

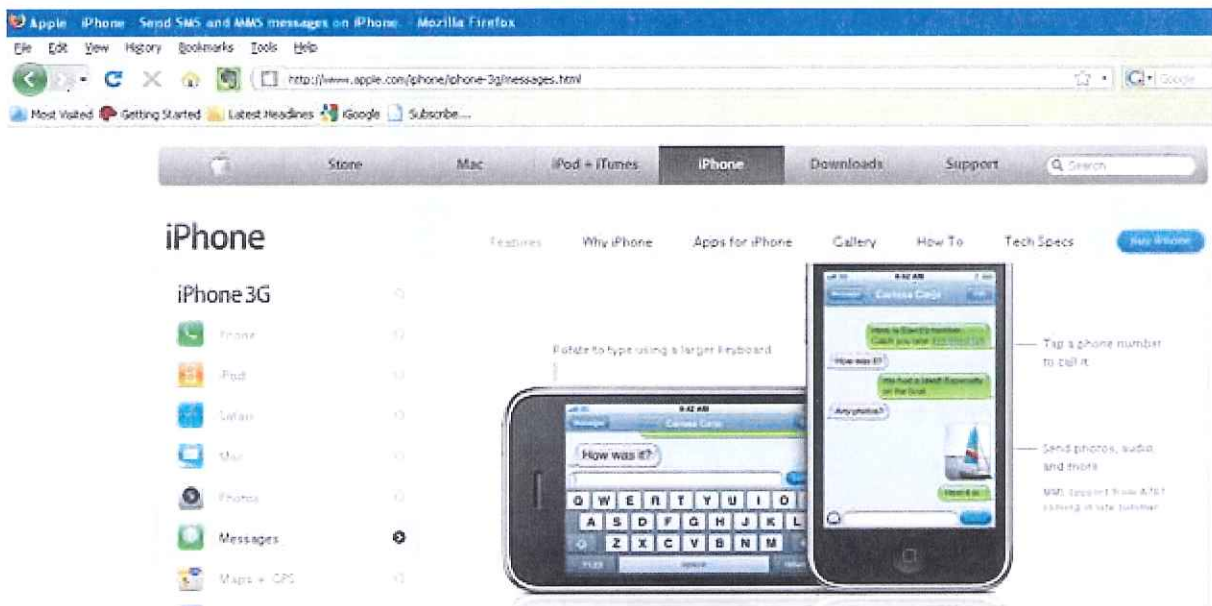
41. Upon launch of the iPhone products, Defendants’ misrepresentations regarding MMS capabilities were also made on the products’ packaging and labeling. For example, beginning in June 2009, and as part of the false advertising campaign, the

Apple packaging that came with the iPhone claimed the availability of MMS, with no reference to the service not being available until late summer.

42. Defendants' misrepresentations regarding MMS capabilities were also made on their iPhone websites. For example, beginning in June 2009, AT&T made the false statements promoting the iPhone and its messaging service by advertising on its website, that the iPhone 3GS had MMS functionality. AT&T's misrepresentation did not contain the disclaimer that MMS would not be available until late in the summer of 2009.

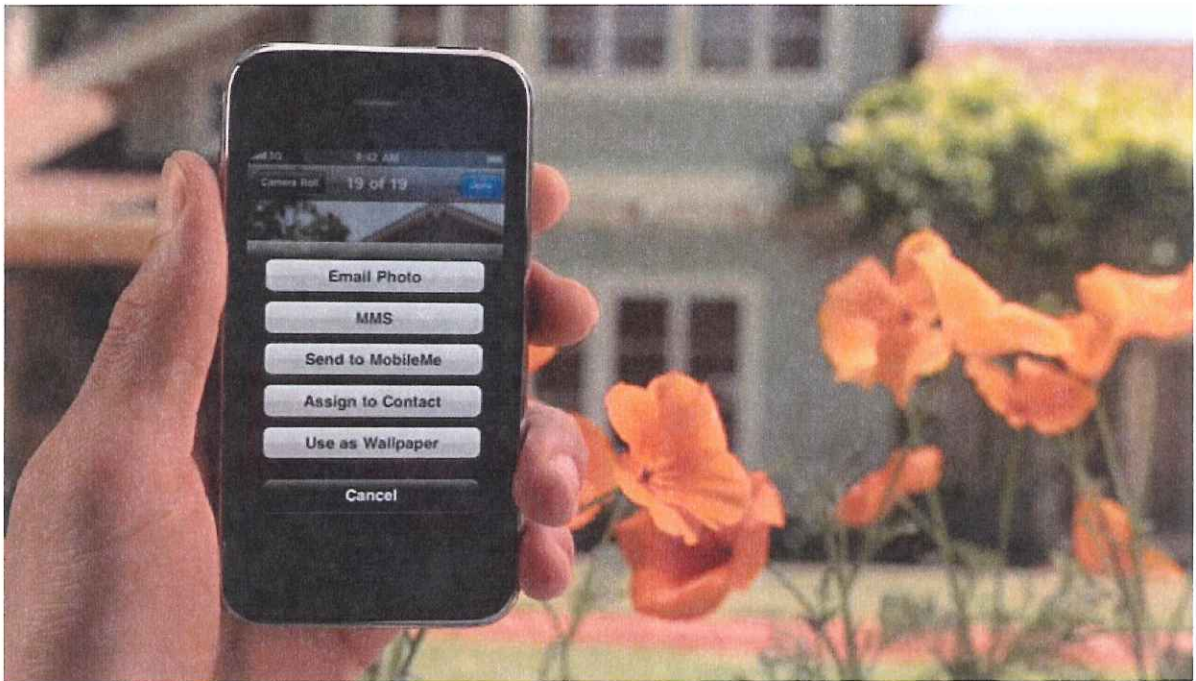
43. Likewise, furthering this false advertising campaign to promote the iPhone and messaging plan, Apple posted on its website, on the "iPhone OS 3.0 Software Update" page, that MMS would be available, so that customers could "send MMS messages and include photos, audio, and contact info. Even tap to 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 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."



45. During the class period, both Apple and AT&T had in-store displays and/or videos that made similar misrepresentations regarding MMS availability. For example, videos depicted the iPhone sending photos via text messaging and 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.

46. The false advertising regarding the iPhone's MMS feature and AT&T's 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:



47. 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."



48. On its website, Apple made the following similar misrepresentations 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. Also 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.*

50. During the class period, AT&T made similar MMS availability misrepresentations on its website. For example:

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 iPhone 3Gs and 3GSs.

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

53. Apple made similar misrepresentations regarding MMS availability during its investor conference calls. For example, on July 21, 2009, a month after the launch of the 3GS, Apple discussed the availability of MMS and mentioned nothing about MMS not being available until late summer.

54. Regardless 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 wireless service 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" (1500 messages per month), and \$5 per month for "Messaging 200" (200 messages per month). AT&T's "Family Plans" are \$30 per month (per phone) for Messaging Unlimited.

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



57. 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 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. Throughout the class period and through their advertising campaigns, Apple and AT&T systematically misrepresented and/or concealed, suppressed, or omitted material facts 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**

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

All Texas 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 Texas 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.

61. The Class is sufficiently numerous because it is comprised of millions of consumers, the joinder of which is not practicable.

62. 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 advertised the iPhone 3G and 3GS as having the ability to text pictures;

b. Whether the Defendants advertised that the messaging plans included the ability to text pictures;

c. Whether the Defendants charged Plaintiff and the Class for a phone that could text pictures when it did not;

d. Whether Defendants 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 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 Texas Deceptive Trade Practices – Consumer Protection; and

j. Whether the Class is entitled to monetary relief, including damages, and the proper measure of that relief.

63. 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.

64. The trial and the litigation of Plaintiffs' claims are manageable as a class action.

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

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

67. 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.

68. 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**

### **Texas Deceptive Trade Practices Act**

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

70. Plaintiff restates each and every paragraph of this Complaint as if fully set forth herein.

71. This count is brought pursuant to Texas Deceptive Trade Practices Act, Tex. Bus. & Com. Code Ann. § 17.41 *et seq* (Vernon 1987) by Plaintiff Aleman, individually and on behalf all others similarly situated against Defendants.

72. Defendants misrepresented, concealed, suppressed or omitted the following Texas Business & Professions Code § 17.46 Deceptive Trade Practices Unlawful: (a) False, misleading or deceptive trade acts or practices in the conduct of

trade or commerce are hereby declared unlawful and are subject to action by the consumer protection division under §§ 17.47, 17.58, 17.60 and 17.61 of this code.

73. Defendants' actions were intentional and outrageous, without justification or excuse, and warrant the imposition of treble damages under the TDTPA.

74. Defendants misrepresented, concealed, suppressed, or omitted the following material facts in connection with the sale and advertisement of the iPhones to consumers in Texas: (a) AT&T has not upgraded its towers to support MMS, and therefore MMS would be unavailable on iPhones until the towers were upgraded; (b) AT&T would not have the towers upgraded for many months; and (c) The 3.0 Software Upgrade would not, by itself, solve the problem and make MMS available.

75. Defendants employed, in connection with the sale and advertisement of iPhones, to Texas consumers, deception, 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.

76. At the time Plaintiff purchased his iPhones, 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 he paid for.

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

78. Plaintiff Aleman 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 plan in reliance on Defendants' representations and his understanding that he 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.

79. 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.

80. As a direct result of the deceptions, false pretenses, misrepresentation, unfair practices, concealments, suppressions, and omissions of Defendants, Plaintiff have suffered an ascertainable loss of money, namely the difference in value between the iPhone as represented and the iPhone as it actually exists.

81. 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.

82. 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**

83. Plaintiff Aleman, 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:

84. Plaintiff restates each and every paragraph of this Complaint as if fully set forth herein.

85. Plaintiff and Class members each entered into standardized contracts for iPhone wireless service with Defendant AT&T. Plaintiff and Class members were required to enter into an exclusive two year wireless service agreement with AT&T. Plaintiff and Class members could not utilize their iPhones on any other wireless carrier's network. As part of their two year service agreements, Class members purchased 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 standardized agreement.

87. Defendant AT&T expressly and/or impliedly promised Plaintiff and Class members 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. AT&T charged Plaintiff and Class members 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.

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 agreements by failing to provide messaging service plans that included the ability to send picture messages during the Class period.

92. As a result of AT&T’s 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**

#### **Texas Consumer Protection Act**

93. Plaintiff Aleman, by and through his undersigned counsel, individually and on behalf of all others similarly situated, and for Count III of his Complaint against Defendants Apple, Inc. and AT&T Mobility, LLC, state as follows:



94. Plaintiff restates each and every paragraph of this Complaint as if fully set forth herein.

95. This count is brought pursuant to the Texas Deceptive Trade Practices-Consumer Protection Act, Texas Bus. & Commerce Code §§ 17.41, et seq. (“TDTPA”) by Plaintiff Aleman individually and on behalf of the Class against Apple and AT&T.

96. The TDTPA laws govern Defendants’ conduct.

97. Texas Bus & Commerce Code section 17.45 provides in relevant part:

*(a) “Goods” means tangible chattels or real property purchased or leased for use.*

*(b) “Person” means an individual, partnership, corporation, association, or other group, however organized.*

*(c) “Consumer” means an individual, partnership, corporation, this state or subdivision or agency of this state who seeks or acquires by purchase or lease, any goods or services, except that the term does not include a business consumer that has assets or \$25 million or more, or that is owned or controlled by a corporation or entity with assets of \$15 million or more.*

*(d) “Trade” and “commerce” means the advertising, offering for sale, sale, lease, or distribution of any good or service, or any property, tangible or intangible, real, personal, or mixed and any other article, commodity, or thing of value, wherever situated, and shall include any trade or commerce directly or indirectly affecting the people of this state.*

98. At all relevant times both Apple and AT&T were “persons” as that term is defined in Texas Bus. & Commerce Code § 17.45(3).

99. At all relevant times, Plaintiff and Class members were “consumers” as defined in Texas Bus. & Commerce Code §17.45(4), since Plaintiff and Class members

purchased the Apple iPhone 3G and/or 3GS primarily for personal, family or household purposes.

100. Defendants' iPhone 3G and 3GS mobile phones are "goods" within the meaning of Texas Bus. & Commerce Code §17.45(1).

101. In addition, Plaintiff was exposed to Defendants' uniform advertising campaign claiming that iPhone 3G, 3GS and the messaging plans included MMS, when, in fact, that was not the case.

102. The TDTPA provides in pertinent part:

*The following False, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful....undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer are unlawful: ... (5) Representing that goods or services have ... characteristics, ... uses, (or) benefits, ... which they do not have .... ... (7) Representing that goods or services are of a particular standard, quality, or grade, ... if they are of another. ... (9) Advertising goods or services with intent not to sell them as advertised.*

Texas Bus. & Commerce Code §17.46.

103. The acts or practices were deceptive, misrepresented, concealed, suppressed or omitted facts material to Plaintiff's and Class members' decisions to purchase iPhone 3G and 3GS mobile phones and messaging bundles.

104. The deceptive facts released by the Defendants that misrepresented, concealed or suppressed material facts, as alleged in the preceding paragraph, occurred in connection with Defendants' conduct of trade and commerce.

105. Defendants' unfair and/or deceptive acts and/or practices violate the TDTPA.

106. Plaintiff seeks damages, restitution and punitive damages under Texas Bus. & Commerce Code – Deceptive Trade Practices & Consumer Protection §17.50.

107. 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 IV**

##### **Breach of the Covenant of Good Faith and Fair Dealing Against AT&T**

108. Plaintiff Aleman by and through his undersigned counsel, individually and on behalf of all others similarly situated, and for Count IV of his Complaint against AT&T, state as follows:

109. Plaintiff restates each and every paragraph of this Complaint as if fully set forth herein.

110. In all contracts, including the AT&T wireless services contracts, there is an implied covenant of good faith and fair dealing that no party will do anything that will have the effect of impairing, destroying, or injuring the rights of the other party to receive the benefits of their agreement.

111. AT&T breached this implied covenant in the contracts when, in bad faith, it promised to provide an iPhone and messaging service plan that included MMS, and charged for that functionality while knowing that during the class period they could not and/or would not provide MMS with the iPhone 3G or 3GS and messaging plans.

112. As a result of AT&T's breach of the implied covenant of good faith and fair dealing, Plaintiff and members of the Class suffered damages to be determined according to proof at the time of trial.

## COUNT V

### **Breach of Express and/or Implied Warranty**

113. Plaintiff Aleman, 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:

114. Plaintiff restates each and every paragraph of this Complaint as if fully set forth herein.

115. Plaintiff and each member of the Class purchased the iPhone 3G or 3GS.

116. Defendants made representations regarding the iPhone 3G and 3GS's MMS capabilities through advertising, public statements, statements on their websites, and in packaging materials including the product brochure. Through these representations, Defendants expressly and/or impliedly promised Plaintiff and members of the Class that the iPhone 3G and 3GS and associated messaging plans included MMS. These representations were part of the basis of the bargain or the contract of sale between Plaintiff and members of the Class on the one hand and Defendants on the other.

117. Defendants breached their express and/or implied warranties to Plaintiff and the Class by failing to provide an iPhone 3G or 3GS that could provide the capabilities described above, in accordance with their representations.

118. Defendants knew that during the Class period the MMS capabilities would not be available for iPhone 3G and 3GS users.

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

120. As a result of Defendants' breach of express and/or implied warranties, Plaintiff and members of the Class suffered damages to be determined according to proof at the time of trial

## **COUNT VI**

### **Unjust Enrichment**

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

122. Plaintiff restates each and every paragraph of this Complaint as if fully set forth herein.

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

124. 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.

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

126. 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.

**WHEREFORE**, Plaintiff prays:

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

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

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

D. 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  
SCOTT R. BICKFORD (1165)  
Martzell & Bickford  
338 Lafayette St.  
New Orleans, LA 70130  
Telephone: 504/581-9065  
Facsimile: 504/581-7636  
[usdcedla@mbfirm.com](mailto:usdcedla@mbfirm.com)  
Liaison Counsel on Behalf of the  
Plaintiffs' Steering Committee

SADIN LAW FIRM, P.C.  
Arthur Sadin  
Texas State Bar No. 17508450  
121 Magnolia, Ste. 102  
Friendswood, Texas 77546  
Telephone: 281/648-7711  
Facsimile: 281/648-7799

Attorneys for Plaintiff

**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