

**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:
Kyle Irving/D. Minn., Case No.09-2613

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 District of Minnesota [09-2613 (D.Minn.)], on information and belief, and personal knowledge, states as follows:

NATURE OF THE CASE

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

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

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

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

5. AT&T needed to build up its network to support this new capacity and that would take time. Defendants knew that consumers would expect that the iPhone, a “revolutionary product” with a superior camera and picture quality, would be able to text pictures. Defendants did not want to lose market share by announcing this feature would not be available and did not

want to delay the lucrative launch of the new generation of 3G iPhones and thus, lose out on the extra revenue from millions of additional customers who had to lock into AT&T's exclusive contract for service.

6. AT&T's network was unable to provide the service of texting pictures until it upgraded its network and therefore, the Apple iPhone 3G and 3GS 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 of its customers, called "Messaging Unlimited" which gave its customers the ability to send unlimited messages to any wireless phone in the United States for \$19.99 per month. Promoting its Messaging Unlimited MMS capabilities, AT&T advertised and represented to consumers, including Plaintiff, that its Messaging Unlimited plan "**included text, picture, video and IM.**" AT&T also offered unlimited "Family Plans" for \$30.00 per month. While AT&T allowed customers other than iPhones users to text pictures, AT&T intentionally barred iPhone users from having the same ability given its network limitations. However, AT&T continued to charge the consumers for that service and represented to the iPhone users that the service included pictures.

8. For Apple's part, it covered up the "problem" with an intentionally misleading advertising campaign. Specifically, Apple never disclosed to consumers that they had to pay for the picture messaging under the unlimited plans from their exclusive provider, AT&T, even though they would not have that service. Moreover, Apple made affirmative representations that such a service was available on the iPhone, including large in-store videos showing people

texting pictures with small, fine print disclosures about when the service was available, intentionally designed so that consumers would not see or understand them.

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

10. MMS was and is commonly available on many phones and mobile networks, including AT&T's. Even though the function was disabled, AT&T charged Class members the same price as customers with different phones which support MMS service. That is, despite advertisements to the contrary, Class members paid for something they did not receive.

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

12. Defendants each engaged in conduct that is likely to deceive and has deceived the public through (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.

PARTIES

13. Plaintiff Kyle Irving (“Irving”) is a resident of Dakota County, Minnesota and a citizen of Minnesota. On June 22, 2009, Irving purchased an iPhone 3GS from Apple and a messaging service plan from AT&T in Apple Valley, Minnesota. At the time he purchased his iPhone 3GS and AT&T messaging service, Irving 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.

14. After Irving purchased his iPhone and messaging plan he learned that his iPhone 3GS did not have the capacity to send pictures by text message.

15. Irving reasonably expected that the 3GS 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 3GS to Irving.

16. Irving would not have purchased the 3GS if he had known that picture messaging was not available at the time of purchase. Irving reasonably relied upon the representations by Apple and AT&T made in their advertisements, public announcements and during the sales process, and his general understanding of the “revolutionary” nature of the 3GS to form his belief that his iPhone 3GS had the ability to send picture messages by text.

17. Irving 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 he was charged and paid for a service he did not receive.

JURISDICTION AND VENUE

18. 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. Plaintiff Irving is a resident of Minnesota and some members of the Class are citizens of a state different from a defendant.

19. Apple and AT&T each have ongoing and systematic contacts with residents of Minnesota. 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 Minnesota.

COMMON FACTS

20. 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 provided the exclusive network upon which the iPhone would operate, including the messaging service plans for the iPhone. AT&T charges its customers more money for the iPhone messaging service plans than it does for a basic phone service or phone and data service plan.

21. 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.

22. 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.

23. 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.

24. 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.

25. 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.

26. 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. The commercials conveyed the same message that AT&T's messaging plan allowed customers to send text, pictures and videos over their phones. Typical of the television commercials is one that featured a mother scolding her children and their grandmother for sending thousands of text messages in a month. The announcer then cuts in stating, "Now get a texting plan the whole family can N-J-O-Y. AT&T brings your family unlimited messaging to anyone on any network." An orange screen appears showing in large bold print, "UNLIMITED MESSAGING" with words, "Text, Picture, Video, IM" below.

27. 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.

28. 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.

29. 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.

30. 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.

31. 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.

32. 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.

33. 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

34. 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.

35. 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.

36. 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.

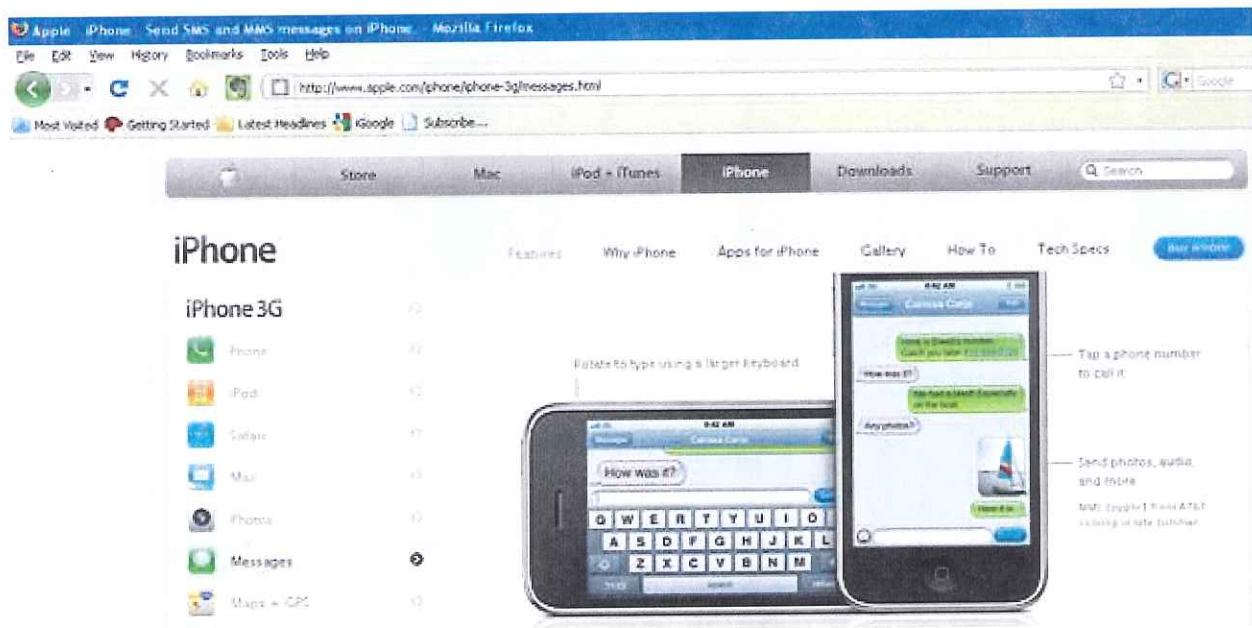
37. While Apple was promoting the 3GS’s MMS feature, AT&T continued marketing its messaging plans claiming they included MMS capability, when, in fact, that was not the case for its current 3G users and was not going to be the case for the new 3GS purchasers.

38. 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.

39. 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.

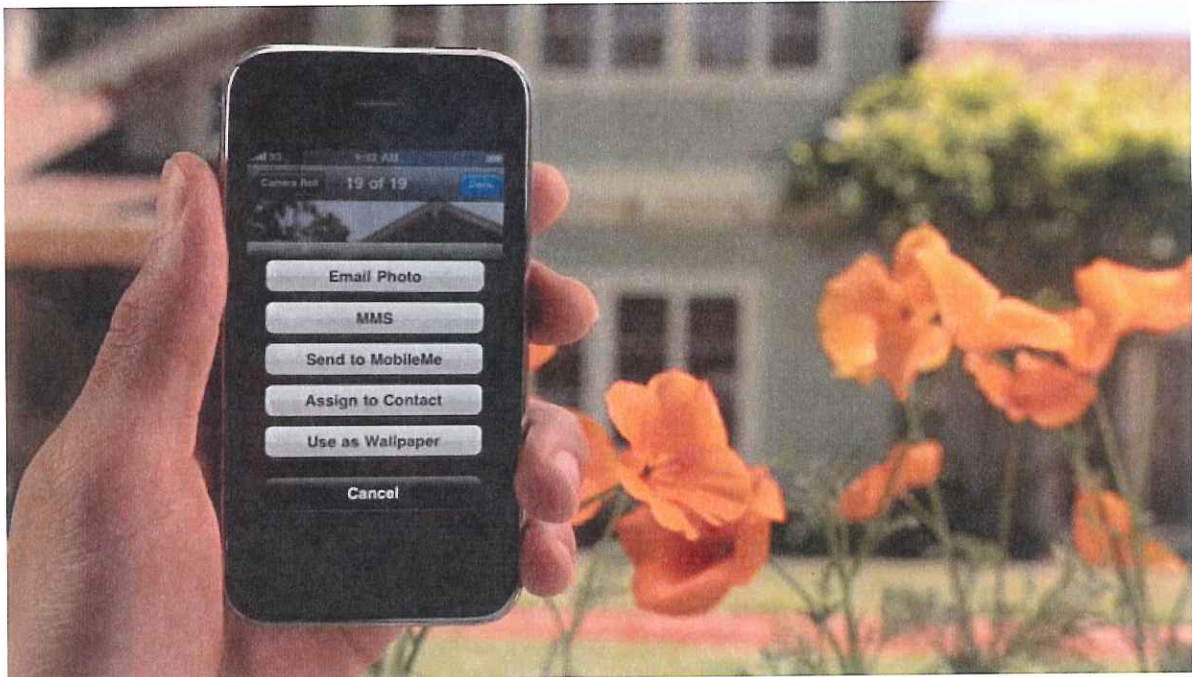
40. Likewise, furthering this false advertising campaign to promote the iPhone and messaging plan, Apple posted on its website, on the “iPhone OS 3.0 Software Update” page, that MMS would be available, so that customers could “send MMS messages and include photos, audio, and contact info. Even tap to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

41. 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.”



42. 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.

43. 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:



44. 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."



45. ring 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.

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

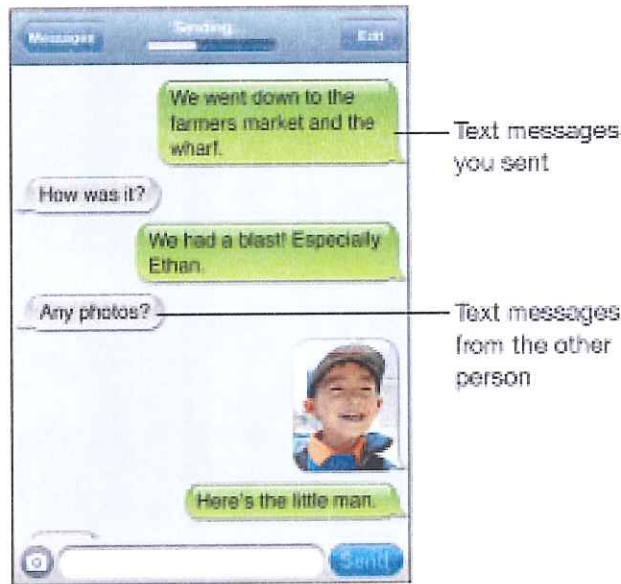
Sharing Photos and Videos

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.

47. 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.



48. 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.

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

50. 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.

51. 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.

52. 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.

53. 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 certain Class members.

54. For example, customers received statements that indicated MMS was included in the messaging plan. Specifically, the portion of 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

55. 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.

56. 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.

57. 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

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

All Minnesota 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 Minnesota 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.

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

60. 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 members of the Class for a phone that could text pictures when it did not;
- d. Whether Defendants charged Plaintiff and members of 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 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 Minnesota Prevention of Consumer Fraud Act;
- j. Whether Defendants' conduct is in violation of the Minnesota Unlawful Trade Practices Act;
- k. Whether Defendants' conduct is in violation of the Minnesota Uniform Deceptive Trade Practices Act; and

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

61. 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.

62. The trial and the litigation of Plaintiff's claims are manageable as a class action.

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

64. 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 Plaintiff purchased from AT&T.

65. 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.

66. 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

BREACH OF CONTRACT – AGAINST DEFENDANT AT&T

67. Plaintiff incorporates by reference the allegations contained in the preceding paragraphs of this Complaint.

68. 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.

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

70. 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.

71. 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.

72. 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.

73. 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.

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

75. 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 II

MINNESOTA PREVENTION OF CONSUMER FRAUD ACT

76. Plaintiff incorporates by reference the allegations contained in the preceding paragraphs of this Complaint.

77. This count is brought pursuant to the Minnesota Prevention of Consumer Fraud Act, Minn. Stat. §325F.69 ("MPCFA") by Plaintiff Irving individually and on behalf of the Class against Apple and AT&T.

78. The MPCFA laws govern Defendants' conduct.

79. Minn. Stat. §325F.69, subdivision 1 (2008) provides:

The act, use, or employment by any person of any fraud, false pretense, false promise, misrepresentation, misleading statement or deceptive practice, with the intent that others rely thereon in connection with the sale of any merchandise, whether or not any person has in fact been misled, deceived, or damaged thereby, is enjoined as provided in section 325F.70.

80. Material omissions stand as violation of Minnesota's consumer protection statutes. Plaintiff and class members need not affirmatively establish subjective reliance upon an omission.

81. Defendants sold smart phones and messaging services, which both fall within the meaning of "merchandise" under Minn. Stat. §325F.68, subd. 2. On or about June 22, 2009, Plaintiff went to the AT&T Store in Apple Valley, Minnesota and purchased an iPhone. Defendants advertised on their website and at their stores that MMS worked with iPhone. On their websites and in their stores, Defendants provided visual demonstration showing how to use MMS on the iPhone, and showing that it in fact worked.

82. 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: (a) money is always material and (b) the services contract obligates AT&T to provide MMS services.

83. 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.

84. As a direct, proximate and foreseeable result of Defendants' conduct, Plaintiff and class members sustained damages and are also entitled to injunctive and equitable relief and an

award of attorneys' fees pursuant to Minn. Stat. §8.31, subd. 3a, as this action benefits the public by asserting claims on behalf of thousands of iPhone users in Minnesota.

85. Causation is established in a consumer fraud action where an omission is deemed material, an objective standard. Defendants' omissions in this case were material because Defendants' marketing materials (and the use of mouse print disclaimers in hard-to-find places) widely touted the iPhone's MMS functionality.

86. Defendants also displayed videos in their U.S. stores promising and demonstrating MMS functionality – even though no U.S. consumer would have MMS functionality if they purchased iPhone. Causation is also presumed where an affirmative statement is materially and blatantly false on its face.

87. 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. Disclosures and disclaimers must be viewed in the context of the marketing campaign itself.

88. 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.

COUNT III

VIOLATIONS OF THE MINNESOTA UNLAWFUL TRADE PRACTICES ACT, MINN. STAT. § 325D.13

89. Plaintiff incorporates by reference the allegations contained in the preceding paragraphs of this Complaint.

90. Minnesota Statutes §325D.13 provides: “No person shall, in connection with the sale of merchandise, knowingly misrepresent, directly or indirectly, the true quality, ingredients or origin of such merchandise.”

91. Defendants misrepresented (*i.e.*, by omission) the true quality of their goods and services, as explained above, constituting unlawful trade practices in violation of Minn. Stat. §325D.13.

92. As a direct, proximate and foreseeable result of Defendants’ conduct in violation of Minnesota’s Unlawful Trade Practices Act, Minn. Stat. §325D.13, Plaintiff and Class members sustained damages, and are also entitled to injunctive and equitable relief and an award of attorneys’ fees pursuant to Minn. Stat. §8.31, subd. 3a.

COUNT IV

VIOLATIONS OF THE MINNESOTA UNIFORM DECEPTIVE TRADE PRACTICES ACT, MINN. STAT. §325D.44

93. Plaintiff incorporates by reference the allegations contained in preceding paragraphs of this Complaint.

94. Minnesota Statutes §325D.44, subd. 1 provides:

A person engages in a deceptive trade practice when, in the course of business, vocation, or occupation, the person:

(5) represents that goods or services have . . . characteristics, ingredients, uses, benefits . . . that they do not have;

(7) represents that goods or services are of a particular standard, quality, or grade . . . if they are of another . . . ;

(9) advertises goods or services with the intent not to sell them as advertised;

(13) engages in any other conduct which similarly creates a likelihood of confusion or of misunderstanding.

95. Defendants misrepresented (by affirmative misrepresentation and omission) the true quality and nature of their iPhone and messaging services, as explained above, in violation of Minn. Stat. §325D.44, and Plaintiff and Class members are thus entitled to injunctive relief. In addition, as a direct, proximate and foreseeable result of Defendants' conduct in violation of Minn. Stat. §325D.44, Plaintiffs and Class members are entitled damages, and an award of attorneys' fees pursuant to Minn. Stat. §8.31, subd. 3a.

96. Because Defendants wilfully engaged in such trade practices knowing them to be deceptive, Plaintiffs and the proposed Class are entitled to recover their costs and attorneys' fees under Minn. Stat. §325D.45, subd. 2.

COUNT VI

Breach of Express and/or Implied Warranty Against Defendants

97. Plaintiff incorporates by reference the allegations contained in preceding paragraphs of this Complaint.

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

99. 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.

100. 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.

101. 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.

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

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

104. 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 VII

UNJUST ENRICHMENT

105. Plaintiff incorporates by reference the allegations contained in the preceding paragraphs of this Complaint.

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

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

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

108. 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
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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