

**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:
Matthew Sullivan N.D. Ohio, Case No.
1:09-CV-1993

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 Northern District of Ohio [09-1993 (N.D. Ohio)], 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. In addition to texting alphabetic and numerical characters, the texting of photos and videos is also very popular among cellular subscribers. 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 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. 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 cellular phones on the market, text or receive pictures from other cellular 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 iPhone users 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. Apple purposely emphasized the texting of photos using the iPhone while concealing the disclosure that the service was unavailable to iPhone users from its exclusive network service provider.

9. Defendants' marketing campaign promoted the iPhone operating on AT&T 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. However, the function was purposely disabled for iPhone users. Even though the function was purposely disabled for iPhone users including the Plaintiff and Class Members, AT&T charged Class Members the same price as customers with non-iPhone cellular phones that were provided with fully functional MMS. That is, despite advertisements to the contrary, Class Members paid for something they did not receive.

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

12. Defendants each engaged in conduct that is likely to deceive and has deceived the public through (1) omission, suppression and concealment from the public of material facts related to the iPhone 3G 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

13. Plaintiff Matthew A. Sullivan ("Sullivan") is a resident of Cuyahoga County, Ohio and a citizen of Ohio. In July 2009, Sullivan purchased an iPhone 3G from an AT&T Store located at 267 Crocker Park Blvd., Westlake, Ohio 44145. At the time he purchased his iPhone 3G and AT&T messaging service, Sullivan 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. Prior to purchasing the 3G, Sullivan's Blackberry™ cellular phone had the capability of sending photos via the phone's text messaging function. The ability to send a picture by text message was a material part of the purchase of a cellular phone to Sullivan. Sullivan would not have purchased the 3G if he had known that picture messaging was not available at the time of purchase. Sullivan reasonably relied upon the representations by Apple and AT&T in television commercials referenced in this Complaint and his general understanding of the "revolutionary" nature of the 3G - to believe that his iPhone had the ability to send pictures by the phone's text messaging function.

15. After Sullivan purchased the iPhone 3G and signed up for the messaging unlimited plan, he learned that his iPhone 3G did not have the capacity to send pictures by text message the way his prior cellular phone did.

16. Sullivan has suffered injury in fact and has lost money as a result of the Defendants' unfair competition and unlawful conduct because he paid more for an iPhone 3G than he should have paid and he was charged and paid for a service he did not receive.

17. Defendant AT&T Mobility, L.L.C. (AT&T) is a Delaware limited liability corporation with its principal place of business in Atlanta, Georgia. 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. At all times since the introduction of the iPhone and to present, AT&T has been the exclusive cellular service provider for the iPhone pursuant to an agreement with the Defendant Apple.

18. Defendant Apple, Inc. (Apple) is a California corporation with its principal place of business in Cupertino, California. 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. Apple is the exclusive manufacturer of all models of the iPhone and has reaped great profits from the sale of the iPhone 3G and 3GS as a result of its promotion of the iPhone 3G as a significant advancement from prior iPhone models due to the ability of the iPhone 3G to send photos via the phone's text messaging function, *i.e.* use MMS, unlike previous iPhone models.

19. 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 MMS was included in the price being charged for the messaging plans.

JURISDICTION AND VENUE

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

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

COMMON FACTS

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.

22. 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.

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. With MMS 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 photos and videos sent via MMS 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, that conveyed the same message that its messaging plans allowed customers to send text, pictures and videos over their phones. Typical of the television commercials, is one that featured a mother scolding her children and their grandmother for sending thousands of text

messages in a month. The announcer then cuts in stating, "Now get a texting plan the whole family can N-J-O-Y. AT&T brings your family unlimited messaging to anyone on any network." An orange screen appears showing in large bold print, "UNLIMITED MESSAGING" with words, "Text, Picture, Video, IM" below.

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 iPhone 3G was designed to work with AT&T's newly developed 3G network that enabled faster data transmission necessary for sending photos and video via text messaging. AT&T's 3G network offered significant advantages over the 2G network. The 3G or 3rd Generation network, 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, AT&T's 3G network 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 to

this Complaint 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, Defendants 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. Of Course AT&T's statement only created additional confusion for Class Members. After all, the iPhone 3G was an MMS capable device and Class Members were paying AT&T for MMS service. Thus, this message did not appear to be applicable to Class Members who owned an iPhone 3G or 3GS. However, AT&T was, in fact, instructing customers, including iPhone 3G and 3GS customers, interested in MMS to access a website from a computer to view text messages containing a photo sent from one mobile phone to Class Members' iPhones, 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, "MMS available only on the iPhone 3G..." Of course this press release 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.

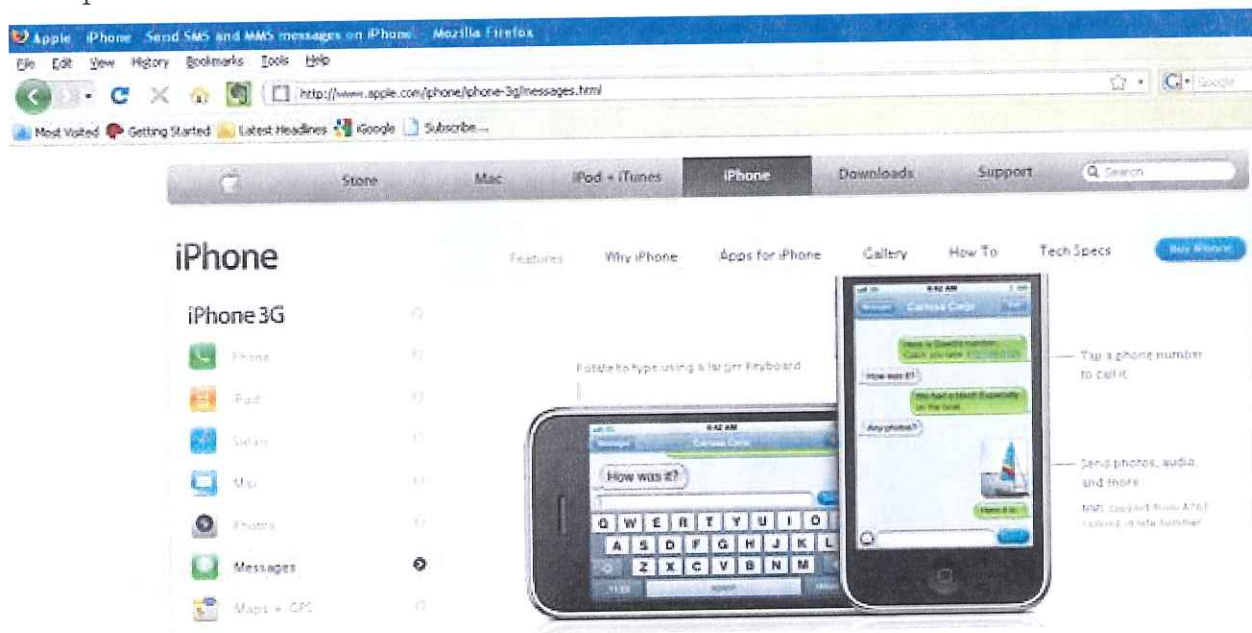
39. On June 10, 2009, AT&T continued to falsely promote the iPhone and its messaging service by advertising on its website, without any late summer disclaimer, that the iPhone 3GS had MMS functionality.

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

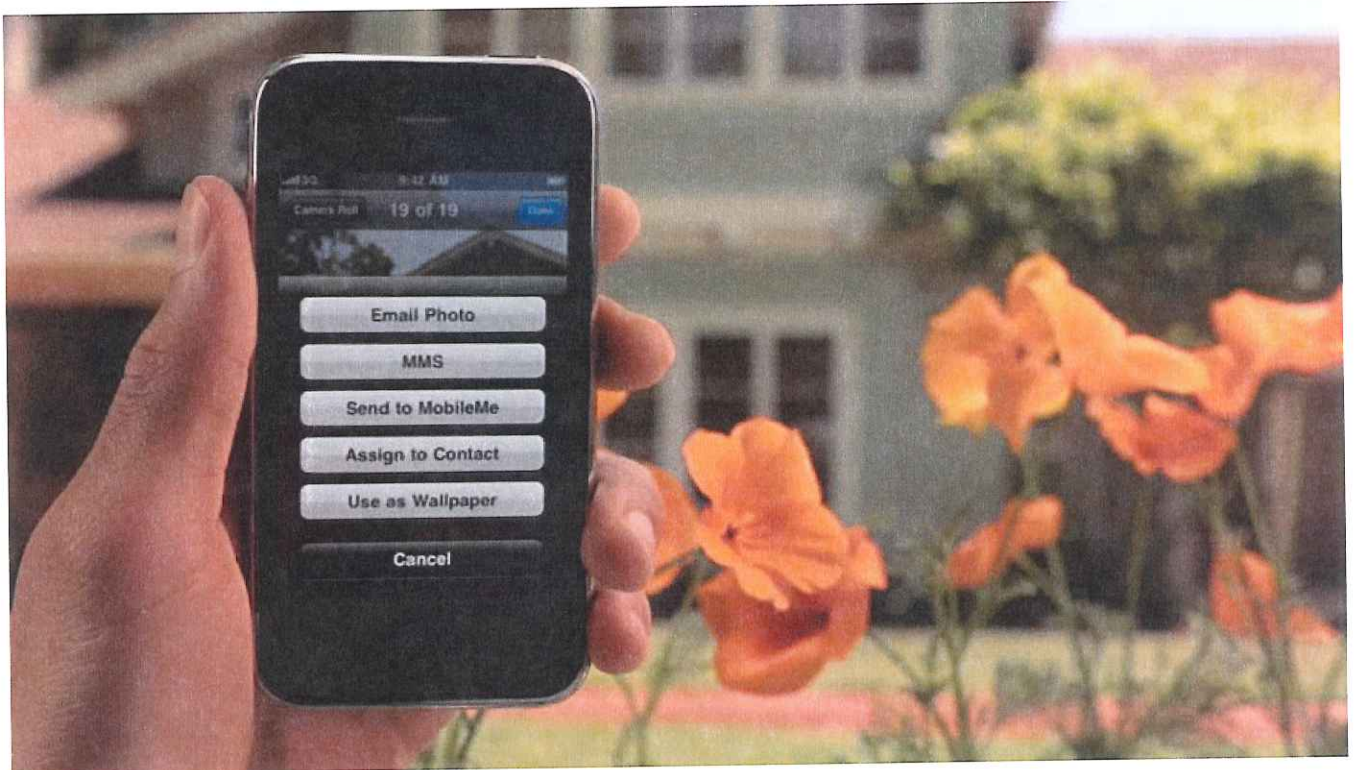
messages and include photos, audio, and contact info. Even tap to snap a picture right inside Messages.” A graphic showed the iPhone text message bubbles with a picture inserted.

41. 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.”

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. 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.

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

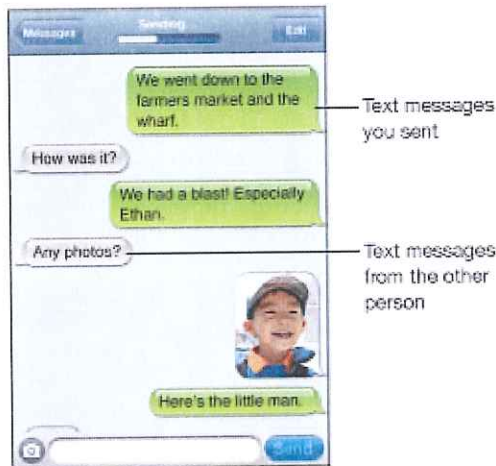
Sharing Photos and Videos

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, reasonably expecting to have the ability to send and receive MMS messages on his iPhone 3G.

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

50. 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.

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

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. 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.

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 as were charged non-iPhone users who actually had functional MMS.

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 as they were 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 Ohio 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 Ohio 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 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 Ohio Consumer Sales Practices Act;
- j. Whether Defendants' conduct is in violation of the Ohio Deceptive Trade Practices Act; and
- k. 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. Plaintiff and his counsel do not envision any unusual difficulty in the management of this action 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, the conduct of the Defendants, 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

VIOLATION OF THE OHIO CONSUMER SALES PRACTICES ACT

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

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

68. This count is brought pursuant to Ohio's Consumer Sales Practices Act, Ohio Revised Code §1345, *et. seq.* (the "CSPA")

69. Plaintiff is a consumer as defined by Ohio Revised Code §1345.01(D).

70. Defendants are a supplier as defined by Ohio Revised Code §1345.01(C).

71. Defendants' conduct described herein involves consumer transactions as defined in Ohio Revised Code §1345.01(A).

72. Defendants violated the CSPA by engaging in the following practices proscribed by the following subsections of Ohio Revised Code §1345.02 in consumer

transactions with the Plaintiff and the Class, which were intended to result in, and did result in, the sale of iPhone 3G and 3GS:

(A) by "commit[ting] an unfair or deceptive act or practice in connection with a consumer transaction";

(B)(1) by representing that the products have "performance characteristics . . . uses, or benefits that [they] do[] not have";

(B)(2) by representing that the products are "of a particular standard, quality, grade, style [or] prescription" when they are not; and

(B)(5) by representing that the products are being "supplied in accordance with a previous representation," when they are not.

73. Defendants violated the CSPA and Ohio Administrative Code through its advertisements for iPhone 3G and 3GS as described above when it knew, or should have known, that the representations and advertisements were unsubstantiated, false and misleading.

74. 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.

75. 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.

76. 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.

77. 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.

78. For the reasons discussed above, Defendants violated Ohio Revised Code §1345.03(A) by engaging in unconscionable acts or practices in connection with consumer transactions with the Plaintiff and the Class, which were intended to result in, and did result in, the sale of iPhone 3G and 3GS.

79. The unconscionable acts or practices include, but are not limited to:

- a. Defendants knew at the time of the consumer transactions with the Plaintiff and the Class were entered into of the inability of the consumer to receive a substantial benefit (the MMS feature) from the subject (iPhone) of the consumer transaction; and,

b. Defendants knowingly made misleading statements of opinion on which the Plaintiff and Class were likely to rely to their detriment.

80. Pursuant to Ohio Revised Code §1345.09(A), Plaintiff and the Class are entitled to rescind the consumer transactions or recover actual damages, including direct, incidental or consequential pecuniary losses, or other appropriate relief under Rule 23 of the Federal Rules of Civil Procedure.

81. Pursuant to Ohio Revised Code §1345.09(B), because Defendants' deceptive and unconscionable acts have been previously declared deceptive or unconscionable, Plaintiff and the Class are entitled to rescind the consumer transactions or recover three times the amount of their actual damages, including direct, incidental or consequential pecuniary losses, or two hundred dollars, whichever is greater, plus an amount not exceeding five thousand dollars in non-economic damages or other appropriate relief under Rule 23 of the Federal Rules of Civil Procedure.

82. Specifically, the Federal Trade Commission (FTC), Ohio courts and the Ohio Attorney General, have all previously declared actions similar or identical to the Defendants' actions complained of herein to be deceptive and illegal. FTC rulings are particularly relevant in assessing whether an action has previously been declared an illegal act. In construing Ohio Revised Code § 1345.02(A), "the court shall give due consideration and great weight to federal trade commission orders, trade regulation rules and guides, and the federal courts' interpretations of subsection 45(a)(1) of the 'Federal Trade Commission Act,' 38 Stat. 717 (1914), 15 U.S.C.A. 41, as amended."

83. Previous rulings of the FTC that have held that acts similar or identical to the Defendants' acts complained of herein were illegal. For example, the FTC brought an action against manufacturer, marketer, distributor, company president, and president's wife and company secretary, claiming defendants marketed a product in a deceptive and misleading manner by representing that the product had qualities it did not possess. *F.T.C. v. QT, Inc.*, 448 F.Supp.2d 908 (N.D. Ill. 2006).

84. Ohio courts have also held that it is a violation of the Ohio Consumer Sales Practices Act, Ohio Rev. Code § 1345.01, *et seq.*, for a seller to engage in acts similar to the Defendants' actions complained of herein.

85. The Ohio Attorney General has also declared actions similar to the Defendants' actions complained of herein to be a violation of the Ohio Consumer Sales Practices Act. For example, in *In Re Vonage Holdings Corp*, OAG Public Inspection File No. 10002817 the Ohio Attorney General's Office took action against a telecommunications supplier for misrepresenting the nature of the telecommunications service that it agreed to provide.

86. Pursuant to Ohio Revised Code §1345.09(D), Plaintiff and the Class seek an order enjoining the above described wrongful acts and practices of the Defendants and for restitution and disgorgement.

87. Pursuant to Ohio Revised Code §1345.09(E), Plaintiff will direct the clerk of court to immediately mail a copy of this Complaint to the Ohio Attorney General.

88. Pursuant to Ohio Revised Code §1345.09(F)(2), Plaintiff and the Class are entitled to a reasonable attorney's fee because the Defendants have knowingly committed an action or practice that violates Chapter 1345 of the Ohio Revised Code.

COUNT II

OHIO DECEPTIVE TRADE PRACTICES ACT

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

89. Plaintiff restates each and every paragraph of this Complaint as if fully rewritten herein.

90. Defendants are a person as defined in Ohio Revised Code §4165.01(D).

91. For the reasons discussed above, Defendants have engaged in unfair, deceptive, untrue and misleading advertising in violation of the following subsections of Ohio's Deceptive Trade Practices Act §4165.02 in that the acts of the Defendants in connection with the sale of the iPhone 3G:

(A)(3) "Causes likelihood of confusion or misunderstanding as to the source, sponsorship, approval, or certification of goods. . . "

(A)(4) "Uses [and has used in the past] deceptive representations. . . in connection with goods";

(A)(7) "Represents that goods. . . have sponsorship, approval, characteristics, ingredients, uses [or] benefits. . . that they do not have. . .";

(A)(9) "Represents that goods. . . with intent not to sell them as advertised."

92. Defendants' conduct caused substantial injury to Plaintiff and the other Class members. Plaintiff has suffered injury in fact and has lost money as a result of Defendants' deceptive conduct.

93. Plaintiff and the Class seek equitable relief and to enjoin Defendants on the terms that the Court considers reasonable.

COUNT III

BREACH OF CONTRACT—AT&T

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

94. Plaintiff restates each and every paragraph of this Complaint as if fully rewritten 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 their 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 IV

BREACH OF CONTRACT—ALL DEFENDANTS

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

103. Plaintiff restates each and every paragraph of this Complaint as if fully rewritten 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 V

BREACH OF WARRANTIES

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

108. Plaintiff restates each and every paragraph of this Complaint as if fully rewritten herein.

109. 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.

110. 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.

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

112. 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.

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

COUNT VI

UNJUST ENRICHMENT

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

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

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

116. 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.

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

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

COUNT VII

NEGLIGENT MISREPRESENTATION

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

119. Plaintiff restates each and every paragraph of this Complaint as if fully rewritten herein.

120. 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.

121. 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.

122. 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.

123. 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.

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

125. 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 defined as set forth above, that Plaintiff be appointed Class Representative 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 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

Liaison Counsel on Behalf of the
Plaintiffs' Steering Committee

**CLIMACO, WILCOX, PECA
TARANTINO & GAROFOLI CO., L.P.A.**

John R. Climaco (0011456)

jrcrim@climacolaw.com

John A. Peca (0011447)

japeca@climacolaw.com

Patrick G. Warner (0064604)

pgwarn@climacolaw.com

55 Public Square, Suite 1950

Cleveland, Ohio 44113

216/621-8484 (Telephone)

216/771-1632 (Facsimile)

PISCITELLI LAW FIRM

Frank E. Piscitelli, Jr. (0062128)

Frank@feplaw.com

55 Public Square, Suite 1950

Cleveland, Ohio 44113

216/931-7000 (Telephone)

216/931-9925 (Facsimile)

SCOTT KALISH CO., L.L.C.

D. Scott Kalish (0063002)
scottkalishcollc@cs.com
James L. Deese (0024699)
1468 West 9th Street, Suite 405
Cleveland, Ohio 44113
216/502-0570 (Telephone)
216/502-0569 (Facsimile)

Counsel for the Representative Plaintiff Mathew
Sullivan

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