

**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:
Francis P. Monticelli S.D. New York
Case No. 1:09-CIV-9505

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 New York [09-9505 (S.D. NY)], 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 iPhone, a grave complication developed. Sending pictures by text took considerably more capacity than sending a written text message, and AT&T realized that its entire network would be overloaded if millions of new iPhone users began texting pictures on the 3G iPhone.

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

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

7. AT&T made a decision to let all of its customers, except iPhone customers, have access to its network to text pictures. AT&T promoted and sold unlimited texting plans to all its customers, called "Messaging Unlimited" which gave its customers the ability to send unlimited messages to any wireless phone in the United States for \$19.99 per month. Promoting its Messaging Unlimited MMS capabilities, AT&T advertised and represented to consumers, including Plaintiff, that its Messaging Unlimited plan "included text, picture, video and IM." AT&T also offered unlimited "Family Plans" for \$30.00 per month. While AT&T allowed customers other than iPhones users to text pictures, AT&T intentionally barred iPhone users from having the same ability given its network limitations. However, AT&T continued to charge the consumers for that service and represented to the iPhone users that the service included pictures.

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

about when the service was available, intentionally designed so that consumers would not see or understand them.

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

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

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

12. Defendants each engaged in conduct that is likely to deceive and has deceived the public through (1) omission, suppression and concealment from the public of material facts related to the iPhone 3G 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 Francis P. Monticelli (“Plaintiff”) is a resident of New York County, and a citizen of the State of New York. In March, 2009, Plaintiff went into an AT&T store located in New York City, and was interested in purchasing a cell phone with MMS functionality. The store representative misrepresented and/or concealed, suppressed, or omitted material facts as to the iPhone having MMS functionality. Plaintiff purchased the iPhone 3G from AT&T along with the messaging service plan from AT&T. At the time he purchased his iPhone 3G and AT&T messaging service, Plaintiff expected that the iPhone 3G 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, Plaintiff owned an iPhone 2G. Upon purchasing the iPhone 3G, Plaintiff reasonably expected that the newer iPhone model would have the capacity and ability to send picture messages. The ability to send a picture by text message was a material part of the purchase of the iPhone 3G to Plaintiff. At the time he purchased his iPhone 3G, Plaintiff relied upon the Defendants’ false advertisements promoting the picture texting feature and service. He believed he would have the ability to text pictures on his iPhone 3G and have picture messaging as part of his AT&T messaging plan.

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

16. After Plaintiff purchased the iPhone, within a few days, he learned that his iPhone 3G did not have the capacity to send pictures by text message. Plaintiff attempted unsuccessfully to send and receive pictures by upgrading the software on his iPhone 3G but was still unable to send and receive pictures by text message. He contacted Defendants’ representatives to determine whether there was some additional software that needed to be downloaded, or some function which was not activated on his iPhone 3G only to be informed by the Defendants’ representatives that MMS would not be available for several more months.

17. Plaintiff 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.

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

19. Defendants each participated in advertising campaigns designed to promote the iPhone 3G 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

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

21. Apple is a resident of the United States District Court for the Northern District of California, and Apple and AT&T each have ongoing and systematic contacts with residents of New York. Defendants have at all relevant times engaged in the manufacturing, distributing, marketing, promoting and selling of iPhones and 3G, 3GS and MMS messaging services to residents of the U.S. and the State of New York.

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 iPhones 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. 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.

24. 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.

25. 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.

26. 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.

27. MMS provides added benefits to the consumer, including advantages over email. No separate charge for a data plan for e-mail service is required. Rather, 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 by way of a mobile phone’s messaging function is faster and simpler, and MMS’ can be sent to and from most mobile phones, even those that do not have email functionality.

28. 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.

29. 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.

30. 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.

31. 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.

32. 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.

33. 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.

34. 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.

35. 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

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, 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 an 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.

38. On March 17, 2009, Apple gave a presentation to the media about the upcoming release of the new 3GS iPhone, 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.

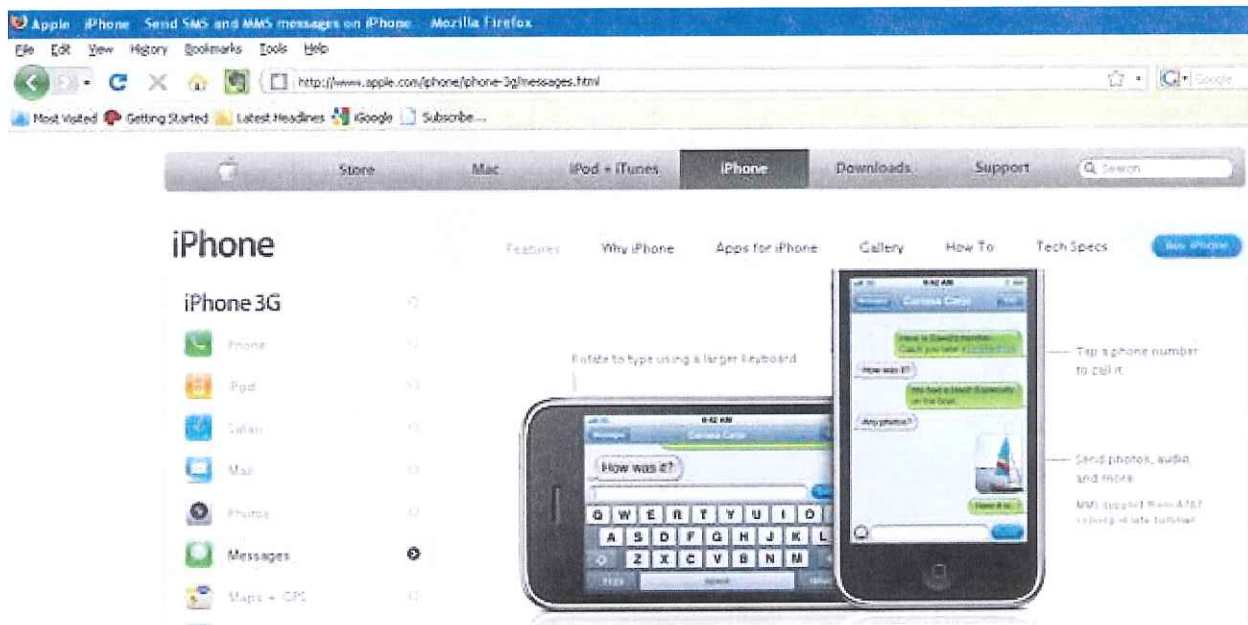
39. While Apple was promoting the 3GS's MMS feature, AT&T continued marketing its messaging plans claiming they included MMS capability, when, in fact, that was not the case for its current 3G iPhone users and was not going to be the case for the new 3GS iPhone purchasers.

40. 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.

41. 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.

42. 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.

43. At pertinent 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."



44. 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.

45. The false advertising regarding the MMS feature and messaging service plan was also reinforced by Apple's Guided Tour for the 3GS iPhone. This Guided Tour

has an entire section devoted to the iPhone's camera and claims that the user can "MMS" pictures:



46. Several minutes into Apple's Guided Tour for the 3GS iPhone, there is a section devoted to MMS where the announcer claims that the "messaging application on iPhone 3GS now supports MMS."



47. On its website, Apple represented the following at all pertinent 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.

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

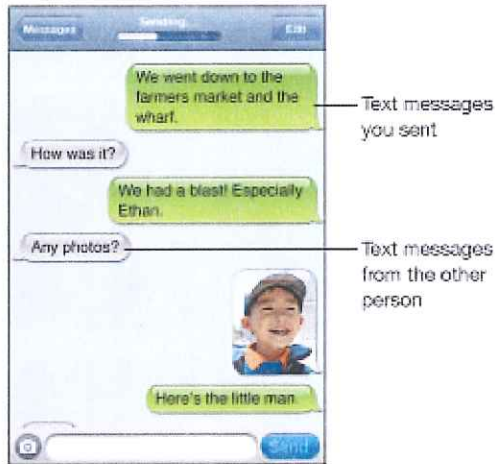
Sharing Photos and Videos

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.

49. 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.



50. 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 iPhone, reasonably expecting to have the ability to send and receive MMS messages on their iPhones.

51. Contrary to Defendants’ advertising claims, AT&T’s iPhone mobile phone messaging service did not support MMS during the Class period.

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

53. 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.

54. 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.

55. 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.

56. 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.

57. 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.

58. 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

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

All New York 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 New York 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.

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

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

- a. Whether the Defendants each advertised the iPhone 3G and 3GS as having the ability to text pictures;

- b. Whether the Defendants each advertised that the messaging plans included the ability to text pictures;
- c. Whether the Defendants each charged Plaintiff and the Class for a phone that could text pictures when it did not;
- d. Whether Defendants each charged Plaintiff and the Class for messaging service plans that 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 New York General Business Law §§349 and 350;
- j. Whether Defendants' conduct is in violation of the consumer protection laws of other states; and
- k. Whether the Class is entitled to monetary relief, including damages, and the proper measure of that relief.

62. 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.

63. Plaintiffs and their counsel do not envision any unusual difficulty in the management of this action as a class action.

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

65. 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.

66. 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.

67. 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

Deceptive and Fraudulent Trade and Business Practices

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:

68. Plaintiffs incorporate paragraphs 1 through 67 by reference, as though fully set forth herein.

69. This count is brought pursuant to New York General Business Law §§349 and 350 by Plaintiff, individually, and on behalf all others similarly situated against Defendants.

70. New York General Business Law §349(a) provides, in pertinent part, that “deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful.”

71. Furthermore, New York General Business Law §349(h) provides, in pertinent part, that “any person who has been injured by reason of any violation of this section may bring an action in his own name to enjoin such unlawful act or practice, and action to recover his actual damages.....The Court may award reasonable attorney’s fees to a prevailing plaintiff.”

72. In addition, New York General Business Law §350 provides that “False advertising in the conduct of any business, trade or commerce or in the furnishing of any service in this state is hereby declared unlawful.” Under Section 350-a of the New York General Business Law, false advertising is defined as “advertising, including labeling, of a commodity, or of the kind, character, terms or conditions of any employment opportunity if such advertising is misleading in a material respect. In determining whether any advertising is misleading, there shall be taken into account (among other

things) not only representations made by statement, word, design, device, sounds or any combination thereof, but also the extent to which the advertising fails to reveal facts materials in the light of such representations with respect to the commodity or employment to which the advertising relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual.”

73. Defendants engaged in commercial conduct by advertising and selling the iPhone 3G and 3GS.

74. At the time Plaintiff purchased his iPhone, all phones with cameras had the ability to text pictures. Defendants’ marketing campaign and sales promotions were deceptive to Plaintiff and the Class in that they reasonably believed 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.

75. Further, Plaintiff was charged by AT&T and paid for a messaging plan that included the ability to text pictures and video, but did not receive what he paid for.

76. Plaintiff 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.

77. Plaintiff purchased the 3G iPhone and messaging service plan under the impression 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 have such ability.

78. 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.

79. Defendants have wrongfully retained monies 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.

80. At all pertinent times, Defendants misrepresented and omitted material information regarding the iPhone, and engaged in false advertising with respect to the iPhone to the public at large.

81. Defendants engaged in the deceptive acts and practices alleged herein in order to sell the iPhone to the public, including the Plaintiff and Class members.

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, which constitutes unconscionable commercial practices, deception, fraud, false pretenses, misrepresentation, and /or the knowing concealment, suppression, or omission of material facts with the intent that others rely on such concealment, suppression, or omission in connection with the sale and advertisement of the iPhone.

83. 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.

84. Defendants' unfair and/or deceptive acts and/or practices violate the New York General Business Law.

85. If the Court determines that New York law should not be applied to Defendants Apple and/or AT&T with respect to all Class members, this count is alternatively brought pursuant to New York law for the portion of the Class and/or with respect to particular Defendants for which this Court determines New York law is applicable and the concomitant consumer protection laws of other states for the remainder of the Class claims against particular Defendants.

COUNT II

Breach of Contract

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

86. Plaintiff incorporate paragraphs 1 through 85 by reference, as though fully set forth herein.

87. 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.

88. 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.

89. 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.

90. 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.

91. 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.

92. 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.

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

94. As a result of Defendants' breach of the agreement 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

Fraudulent Concealment and Conspiracy to Defraud

95. Plaintiff, 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, states as follows:

96. Plaintiff incorporates paragraphs 1 through 95 by reference, as though fully set forth herein.

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

98. At all pertinent times during the course of dealings between Defendants and Plaintiff, members of the Class, and/or the public in general, Defendants misrepresented the functionality of the iPhone for its intended use in making express statements that MMS was available through the iPhone 3G and 3GS versions of the iPhone.

99. At all pertinent times, Defendants acted intentionally and willfully.

100. At all pertinent times, Defendants knew that Plaintiff was relying on the representations and the truth of the representations that MMS would be available on the iPhone 3G and 3GS.

101. At all pertinent times, Defendants knew that the representations were false or would become false.

102. At all pertinent times, Defendants knew that a failure of the representations would injure plaintiff.

103. At all pertinent times, Defendants acted in concert and conspiracy with respect to the dealings with purchasers of the iPhone, including Plaintiff, with the intent to deceive and defraud said purchasers.

104. At all pertinent times, Defendants knew that they would not have the ability to supply MMS for the iPhone sold to Plaintiff and the Class members. Defendants were under a duty to disclose to Plaintiff and the members of the Class that MMS was not available on the 3G and 3GS iPhone.

105. Defendants had sole access to material facts concerning the defective nature of the iPhone.

106. Defendants' concealment and omissions of materials facts concerning, inter alia, the availability of MMS on the iPhone, were made purposefully, willfully, and/or recklessly, to mislead Plaintiff and the members of the Class, to cause them to purchase the iPhone.

107. Defendants knew that Plaintiff and the members of the Class and/or the public had no way to determine the truth behind Defendants' concealments and

omissions, and that these included materials omissions of facts concerning the iPhone, as set forth herein.

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

COUNT IV

Breach of Covenant of Good Faith and Fair Dealing

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:

109. Plaintiffs incorporate paragraphs 1 through 108 by reference, as though fully set forth herein.

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

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

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

COUNT V

Breach of Warranty

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

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

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

115. 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.

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

117. 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.

118. 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 its undersigned counsel, individually and on behalf of all others similarly situated, and for Count VI of their Complaint against Defendants, states as follows:

119. Plaintiff incorporates paragraphs 1 through 118 by reference, as though fully set forth herein.

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

121. 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.

122. Defendants acted with conscious disregard for the rights of Plaintiff and Class members.

123. Plaintiff conferred a benefit upon the Defendants by purchasing the iPhone and paying for a text messaging plan that did not allow for MMS.

124. 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 VII of his Complaint against Defendants, states as follows:

Plaintiff incorporates paragraphs 1 through 124 by reference, as though fully set forth herein.

125. 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.

126. 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.

127. 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.

128. 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.

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

130. Plaintiff reasonably relied on Defendants' representations.

131. Plaintiff's reliance on Defendants' representations was justifiable.

132. 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, Plaintiffs pray:

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

2. That judgment be entered against Defendants for damages, restitution, and punitive damages, 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

Plaintiffs hereby demand a trial by jury.

DATED: June 4, 2010

Respectfully Submitted,

/s/ SCOTT R. BICKFORD
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CERTIFICATE OF SERVICE

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

/s/ SCOTT R. BICKFORD
SCOTT R. BICKFORD