

**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:
Gerard Padden E.D. New York
Case No. 1:10-128

JUDGE BARBIER
MAG. JUDGE WILKINSON

FIRST AMENDED AND SUPPLEMENTAL COMPLAINT

Plaintiff, by and through their undersigned counsel, individually and on behalf of all others similarly situated, for their First Amended and Supplemental Complaint against Defendants, which fully supplements and amends the Original Complaint filed in the Eastern District of New York [10-128 (E.D. NY)], on information and belief, and personal knowledge, states as follows:

JURISDICTION

1. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1332, because the amount in controversy as to the Plaintiff and each member of the Plaintiff Class exceeds \$75,000.00, exclusive of interest and costs, and because Defendants are incorporated in and have their principal places of business in states or countries other than the state in which the named individual and representative Plaintiff resides.

2. This Court had further jurisdiction over this action pursuant to the Class Action Fairness Act, because at least one member of the class is a citizen of a different state than the

Defendants and the aggregate amount in controversy exceeds \$5,000,000.00, exclusive of interest and costs.

NATURE OF THE CASE

3. Plaintiff, on behalf of himself and certain purchasers of iPhone 3G and 3G-S cellular telephones, as further defined below, bring this consumer rights class action against defendants, Apple, Inc. ("Apple") and AT&T Mobility, LLC ("AT&T").

4. 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.

5. On or around the time the Defendants began their launch of the new generation of the 3G iPhones, 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.

6. 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.

7. 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.

8. 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 3G-S phones could not, contrary to almost all other phones on the market, text or receive pictures from other phones.

9. AT&T made a decision to let all of its customers, except iPhone customers, have access to its network to text pictures.

10. 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.

11. While AT&T allowed customers other than iPhone 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 consumers for that service and represented to the iPhone users that the service included pictures.

12. 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.

13. Defendants' marketing campaign promoted the iPhone operating on AT&T 3G and 3G-S 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 3G-S and AT&T's messaging service plans.

14. 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.

15. AT&T breached its contracts with Plaintiff and the Plaintiff 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 Plaintiff Class members.

16. 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 3G-S 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.

17. The aforementioned actions and/or omissions of the Defendants AT&T and Apple were false, misleading and deceptive and, as a result, Plaintiff and the Plaintiff Class members suffered damages.

18. Consequently, Plaintiff and all Plaintiff Class members seek damages as a result of their purchase of 3G and/or 3G-S iPhones and messaging plans.

PARTY PLAINTIFF

19. Plaintiff, GERARD PADDEN, is a resident of the United States of America, State of New York, County of Kings.

20. Plaintiff, GERARD PADDEN, purchased an iPhone 3-G from Apple and a messaging service from AT&T in November 2008.

21. Plaintiff, GERARD PADDEN, purchased the iPhone primarily for personal, family, or household purposes.

22. Plaintiff, GERARD PADDEN, was unable to send and/or receive MMS messages on his iPhone in November 2008 and thereafter because the iPhone did not have MMS functionalities and/or capabilities as marketed, promoted and/or advertised by APPLE and AT&T.

PARTY DEFENDANTS

23. Defendant Apple is a California corporation with its principal place of business in Cupertino, California.

24. Upon information and belief, Defendant, Apple has transacted and conducted business in the State of New York.

25. Upon information and belief, Defendant, Apple, has derived substantial revenue from goods and products used or in the State of New York.

26. Upon information and belief, Defendant, Apple, expected or should have expected its acts to have consequences within the State of New York, and derived substantial revenue from interstate commerce within the United States, and New York in particular.

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

28. Upon information and belief, Defendant, AT&T has transacted and conducted business in the State of New York.

29. Upon information and belief, Defendant, AT&T, has derived substantial revenue from goods and products used or in the State of New York.

30. Upon information and belief, Defendant, AT&T, expected or should have expected its acts to have consequences within the State of New York, and derived substantial revenue from interstate commerce within the United States, and New York in particular.

31. Defendants, Apple & AT&T, each participated in advertising campaigns designed to promote the iPhone 3G and 3G-S 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 3G-S believed texting photos or MMS was included in the price being charged for the messaging plans.

COMMON FACTS

32. This section sets forth Defendants' specific representations and/or 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.

33. 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.

34. 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.

35. 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.

36. 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.

37. 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.

38. MMS provides added benefits to the consumer, including advantages over email. No separate charge for a data plan for e-mail service is required. MMS allows consumers to make full use of the cell phones’ camera and video functions and then send the pictures or video utilizing the mobile phone number. Sending text, pictures and videos via a mobile phone’s messaging function is faster and simpler; and MMS’s can be sent to and from most mobile phones, even those that do not have email functionality.

3G

39. 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 commercial, 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.

40. 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.

41. 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.

42. 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.

43. 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.

44. 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.

45. 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.

46. 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.

3G-S

47. The most recent version of the iPhone, launched in June 2009, is called the “3G-S.” The iPhone 3G-S sold over one million units in its first three days on the market, which included the best sales day in Apple history.

48. 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 3G-S. Following the previous formula of falsely advertising MMS capabilities and messaging plans that included MMS, in March of 2009 Defendants began promoting the iPhone 3G-S claiming it had an MMS feature. On March 17, 2009, Apple issued a press release relating to the iPhone 3G-S, 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.

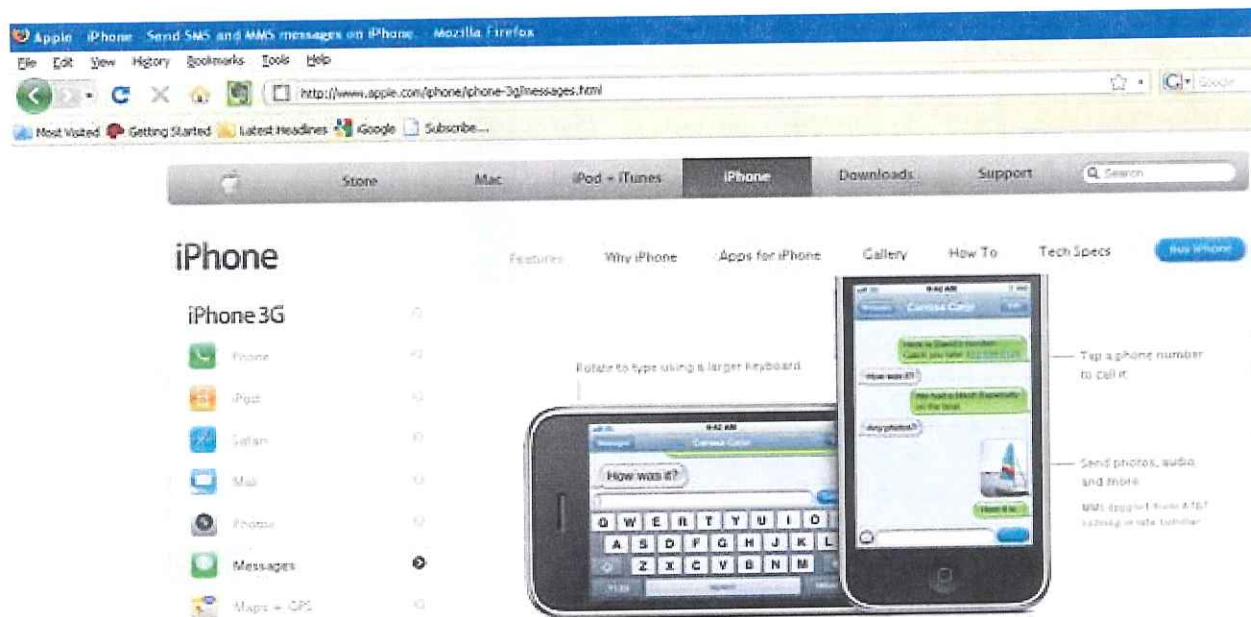
49. On March 17, 2009, Apple gave a presentation to the media about the upcoming release of the new 3G-S, including a video presentation by Scott Forstall, Apple’s Senior VP for iPhone software, where he stated, “But the big news for the messages application is we’re adding support for MMS. So this, 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.

50. While Apple was promoting the 3G-S'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 3G-S purchasers.

51. 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.

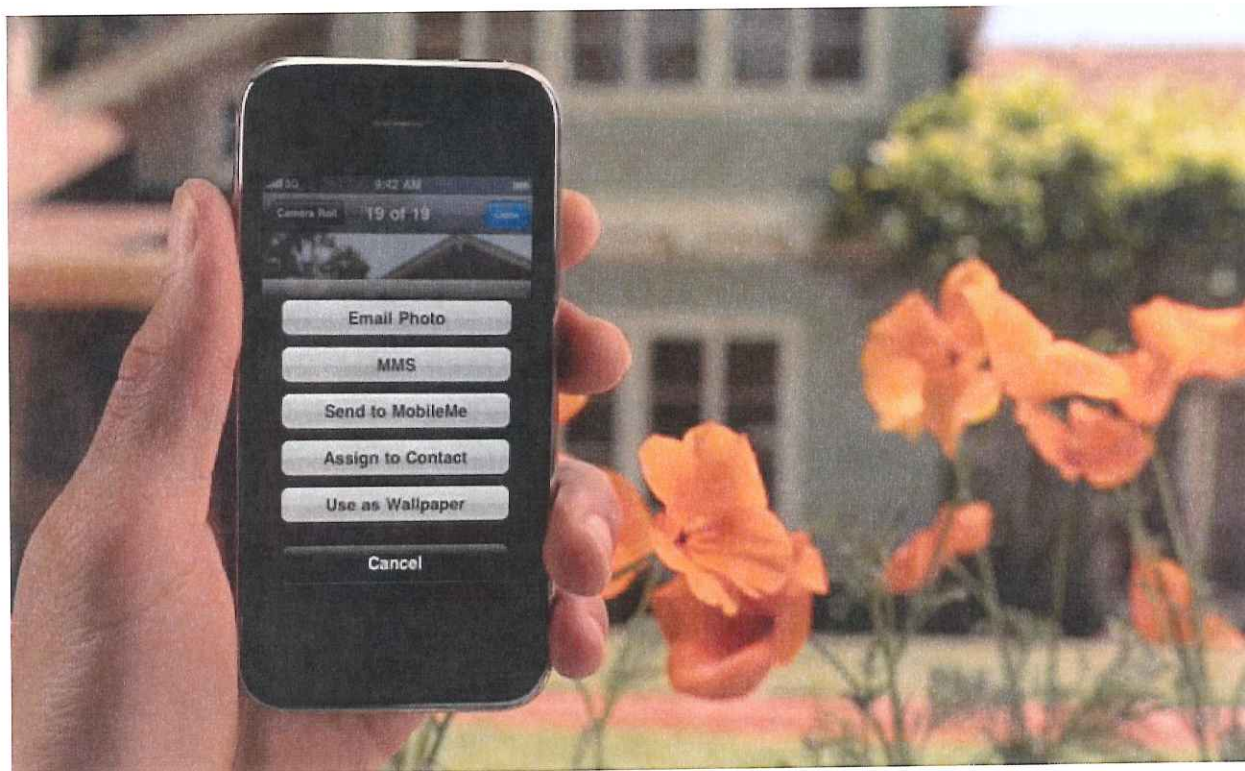
52. On June 10, 2009, AT&T continued to falsely promote the iPhone and its messaging service by advertising on its website, without any late summer disclaimer, that the iPhone 3G-S had MMS functionality.

53. 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.



54. 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." 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 3G-S, 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.

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



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



57. 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.

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

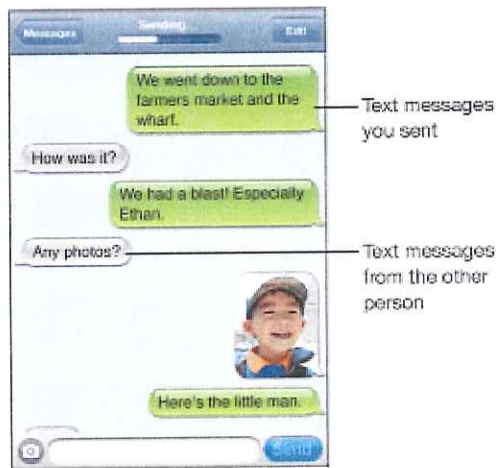
Sharing Photos and Videos

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

59. 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.



60. As a direct result of relying upon the false and deceptive representations and omissions in Defendants' advertisements and promotions, millions of customers, including the named Plaintiff herein, purchased the 3G and 3G-S, reasonably expecting to have the ability to send and receive MMS messages on their iPhone 3Gs and 3G-Ss.

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

62. In furtherance of this false advertising, on July 21, 2009, a month after the launch of the 3G-S, 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.

63. Regardless of whether consumers purchased their iPhone 3Gs or 3G-Ss 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.

64. 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.

65. 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.

66. 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.

67. 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.

68. 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 3G-S. Further, iPhone users had to pay for MMS if they wanted unlimited AT&T messaging plans.

CLASS ALLEGATIONS

69. Plaintiff GERARD PADDEN brings this action as a class action pursuant to the provisions of the Federal Rules of Civil Procedure Rule 23 on behalf of himself, individually, and a class of persons similarly situated. This action satisfies the numerosity, commonality, typicality, adequacy, predominance and superiority requirements of those provisions.

70. The Plaintiff class is defined as follows:

- a. **All New York residents who purchased an iPhone and a text messaging plan from AT&T from July 11, 2008 to September, 2009, primarily for personal, family, or household use.** Excluded from the 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.

- b. Collectively, all of these persons shall be referred to as "Plaintiff" or the "Plaintiff Class" or "Plaintiff Class members".

71. Excluded from the Plaintiff Class are the Defendants herein, any entity in which the Defendants have a controlling interest, and officers, directors and/or employees of the

Defendants, and the legal representatives, heirs, successors, and assignees of the Defendants, and/or its officers, directors, and/or employees. Also excluded from the Plaintiff Class are any judicial officers presiding over this action.

72. The Class is so numerous that the individual joinder of all its members, in this or any action, is impractical. The exact number and identification of Class members are presently unknown to Plaintiff. Published news reports state that more than a million customers purchased the 3G iPhone the day it became available. Many of those customers are located in New York. It is estimated that the Class will be composed of at least 10,000 individuals. Additionally, 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. No attorney would have the financial resources to litigate this case against opposition from the Defendants when the potential for recovery is so small for each class member. Therefore, joinder of all similarly-situated Plaintiffs is appropriate. Class members may be informed of the pendency of this class action by direct mail, internet, or other means.

73. Upon information and belief, Defendants herein have kept detailed records as to the purchasers of all 3G or 3G-S iPhones, including the time period of July 1, 2008 and thereafter.

74. Common questions of fact and law exist as to all members of the Class, which predominate over any questions affecting only individual members of the Class, including, *inter alia*, whether Defendants engaged in deceptions and concealments in making claims that MMS was available on the 3G and 3G-S. These common legal and factual questions, which do not vary from Class member to Class member, include, but are not limited to, the following:

- a. Whether the Defendants each advertised the iPhone 3G and 3G-S 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 Plaintiff Class for a phone that could text pictures when it did not;
- d. Whether Defendants each charged Plaintiff and the Plaintiff 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 3G-S mobile phone had the ability to send and receive pictures by text;
- i. Whether Defendants' conduct is in violation of the consumer protection and other applicable laws of New York; and
- j. Whether the Plaintiff and the Plaintiff Class are entitled to monetary relief, including damages, and the proper measure of that relief.

75. Plaintiff's claim is typical of the claims of the members of the Plaintiff Class as all such claims arise from the purchase of the iPhone 3G or 3G-S and the messaging plans Plaintiff purchased from AT&T.

76. Plaintiff is an adequate representative of the Plaintiff Class because he is a member of the Plaintiff Class and his interest does not conflict with the interests of the members of the Plaintiff Class he seeks to represent. Further, Plaintiff is represented by experienced and able counsel who have litigated numerous other consumer fraud and mass tort class actions, and they intend to prosecute this action vigorously for the benefit of the entire Plaintiff Class. Plaintiff and his counsel will fairly and adequately protect the interests of the members of the Plaintiff Class.

77. A class action is superior to other available methods for the efficient adjudication of this litigation since individual litigation of Plaintiff Class members' claim is impractical. It would be unduly burdensome to the Courts in which individual litigation on the facts of thousands of cases would proceed. Further, individual litigation presents a potential for inconsistent or contradictory judgments. Individual litigation increases the delay and expense to all parties and the Courts in resolving the complex legal and factual issues of these cases, and has the potential for inconsistent or contradictory judgments. By contrast, the class action device presents far fewer management difficulties and provides the benefits of single adjudication, economies of scale, and comprehensive supervision by a single Court. Additionally, notice of the pendency and/or resolution of this class action can be provided to Class members by direct mail, as upon information and belief, Defendants herein have kept detailed records as to the purchasers of all 3G and/or 3G-S iPhones, including the time period of June 2008 and thereafter.

FIRST CAUSE OF ACTION
AS AGAINST THE DEFENDANT

(VIOLATION OF NEW YORK GENERAL BUSINESS LAW §§ 349 AND 350)

78. Plaintiff, GERARD PADDEN, individually and on behalf of all others similarly situated, repeats, reiterates and reallages each and every allegation of this Complaint in each of the foregoing paragraphs inclusive, with the same force and effects as if fully set forth herein.

79. Defendants engaged in consumer-oriented, commercial conduct by selling, marketing and advertising the iPhone, including the 3G and 3G-S iPhones which are the subject of this lawsuit.

80. In the marketing of the iPhone 3G and 3G-S and messaging bundled service plans, Defendants have engaged in consumer fraud and deception as well as false advertising as defined in New York General Business Law (“GBL”) §§§ 349, 350 and 350-a(1).

81. At the time Plaintiff purchased his iPhone, all phones with cameras had the ability to text pictures. Defendants' marketing campaign and sales promotions were likely to deceive Plaintiff and the Class so that they reasonably would believe that the iPhone, as the leader in graphics and with the best camera on the market, could text a picture. Defendants failed to disclose that they would not allow Plaintiff to text pictures because AT&T's network would be over-burdened. Further, Plaintiff was charged by AT&T and paid for messaging plans that included the ability to text pictures and video, but did not receive what he paid for.

82. Defendants misrepresented and omitted material information regarding the iPhone by failing to disclose information regarding its MMS functionalities and/or capabilities.

83. Defendants' misrepresentations, concealment of material facts, and/or omissions constitute unconscionable commercial practices, deception, fraud, false pretenses, misrepresentation, and/or the knowing concealment, suppression, or omission of materials facts with the intent that others rely on such concealment, suppression, or omission in connection with

the sale and advertisement of the subject product, in violation of New York General Business Law (“GBL”) §§ 349 and 350.

84. New York has enacted statutes to protect consumers from deceptive, fraudulent, and unconscionable trade and business practices. Defendants violated these statutes by knowingly and falsely representing that the subject product could text a picture even though Defendants knew it could not. Defendants further violated these statutes by failing to inform the Plaintiff and the Plaintiff Class that the subject product could text a picture even though Defendants knew it could not.

85. Defendants engaged in the deceptive acts and practices alleged herein in order to sell the subject product to the public, including Plaintiff, and increase profit.

86. As a direct and proximate result of Defendants’ violations of GBL §§349 and 350 Plaintiff, GERARD PADDEN, and Plaintiff Class Members have suffered damages, for which they are entitled to compensatory damages, statutory damages, equitable and declaratory relief, punitive damages, costs and reasonable attorneys’ fees.

87. As a direct and proximate result of Defendants’ violations of GBL §§349 and 350 Plaintiff, GERARD PADDEN, and Plaintiff Class Members have suffered injury in fact and have lost money or property. Plaintiff and Plaintiff Class members purchased 3G and 3G-S iPhones under the impression that they would be able to text pictures. During the Class period Plaintiff and Plaintiff Class Members 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 and Plaintiff Class members did not have such ability.

88. By reason of the foregoing, Plaintiff and the Plaintiff Class have been damaged as against the Defendant in the sum of FIFTY MILLION DOLLARS (\$50,000,000.00).

SECOND CAUSE OF ACTION
AS AGAINST THE DEFENDANT
(BREACH OF CONTRACT/AGREEMENT)

89. Plaintiff, GERARD PADDEN, individually and on behalf of all others similarly situated, repeats, reiterates and reallages each and every allegation of this Complaint in each of the foregoing paragraphs inclusive, with the same force and effect as if fully set forth herein.

90. Defendant AT&T required Plaintiff and the Plaintiff Class to enter into an agreement for wireless service in exchange for the “privilege” of purchasing an iPhone.

91. Specifically, Plaintiff and Plaintiff 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.

92. Part of the two year service agreement for Plaintiff and Plaintiff Class included the purchase of messaging plans which were marketed and sold both as “unlimited messaging” and as messaging bundles.

93. Plaintiff and Plaintiff 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.

94. Defendant AT&T expressly and/or impliedly promised Plaintiff and Plaintiff Class members that the iPhone 3G and 3G-S 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.

95. 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.

96. 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.

97. 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 3G-S and messaging plans.

98. In return for this promise, Plaintiffs and Plaintiff Class members paid AT&T for messaging plans reasonably expecting these plans to include the ability to send picture messages.

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

100. As a direct and proximate result of Defendants’ breach of contract or agreement, Plaintiff, GERARD PADDEN, and Plaintiff Class Members have suffered injury in fact and have lost money or property.

101. As a direct and proximate result of Defendants’ breach of contract or agreement, Plaintiff, GERARD PADDEN, and Plaintiff Class Members have suffered damages, for which they are entitled to compensatory damages, statutory damages, equitable and declaratory relief, punitive damages, costs and reasonable attorneys’ fees.

102. By reason of the foregoing, Plaintiff and the Plaintiff Class have been damaged as against the Defendant in the sum of FIFTY MILLION DOLLARS (\$50,000,000.00).

THIRD CAUSE OF ACTION
AS AGAINST THE DEFENDANT
(FRAUDULENT CONCEALMENT)

103. Plaintiff, GERARD PADDEN, individually and on behalf of all others similarly situated, repeats, reiterates and reallages each and every allegation of this Complaint in each of the foregoing paragraphs inclusive, with the same force and effect as if fully set forth herein.

104. At all times during the course of dealing between Defendants and Plaintiff and Plaintiff Class members and/or the general public, Defendants fraudulently concealed the following material facts in connection with the sale and advertisement of iPhone 3G, iPhone 3G-S and messaging plans to Plaintiff and Plaintiff Class members:

- a. AT&T had not upgraded its network to support MMS, and, therefore, MMS would be unavailable on iPhones until the network was upgraded;
- b. AT&T would not have its network upgraded for many months; and
- c. The 3.0 Software Upgrade would not, by itself, solve the problem and make MMS available on the phone

105. At all times during the course of dealing between Defendants and Plaintiff and Plaintiff Class members and/or the general public, Defendants fraudulently concealed and intentionally omitted to Plaintiff and Plaintiff Class members, as well as the general public, the fact that MMS on 3G and 3G-S iPhones was not functional or effective as marketed, advertised and promoted by Defendants.

106. Defendants knew or were reckless in not knowing that their representations were false.

107. Defendants were under a duty to disclose to Plaintiff and Plaintiff Class members and the general public, the defective nature of the 3G and 3G-S iPhones.

108. Defendants had sole access to material facts concerning the defective nature of the 3G and 3G-S iPhones.

109. Defendants' concealment and omissions of material facts concerning, inter alia, the MMS functionalities and/or of the 3G and 3G-S iPhones were done purposefully, willfully, wantonly, and/or recklessly, to mislead Plaintiff and Plaintiff Class members, and the general public into reliance, continued use of the 3G and 3G-S iPhones, and actions thereon, and to cause them to purchase the product and/or use the product.

110. Defendants knew that Plaintiff and Plaintiff Class members, and/or the general public had no way to determine the truth behind Defendants' concealment and omissions, and that these included material omissions of facts surrounding the 3G and 3G-S iPhones, as set forth herein.

111. Plaintiff and Plaintiff Class members, and/or the general public relied on facts revealed which negligently, fraudulently and/or purposefully did not include facts that were concealed and/or omitted by Defendants.

112. By reason of the foregoing, and as a direct and proximate result of Defendants' fraudulent concealment, Plaintiff, GERARD PADDEN, and Plaintiff Class members have suffered injury in fact and have lost money or property.

113. As a direct and proximate result of Defendants' fraudulent concealment, Plaintiff, GERARD PADDEN, and Plaintiff Class members have suffered damages, for which they are entitled to compensatory damages, statutory damages, equitable and declaratory relief, punitive damages, costs and reasonable attorneys' fees.

114. By reason of the foregoing, Plaintiff and the Plaintiff Class have been damaged as against the Defendant in the sum of FIFTY MILLION DOLLARS (\$50,000,000.00).

FOURTH CAUSE OF ACTION
AS AGAINST THE DEFENDANT
(FRAUDULENT MISREPRESENTATION)

115. Plaintiff, GERARD PADDEN, individually and on behalf of all others similarly situated, repeats, reiterates and reallages each and every allegation of this Complaint in each of the foregoing paragraphs inclusive, with the same force and effect as if fully set forth herein.

116. At all times during the course of dealing between Defendants and Plaintiff and Plaintiff Class members and/or the general public, Defendants falsely and fraudulently represented the following material facts in connection with the sale and advertisement of iPhone 3G, iPhone 3G-S and messaging plans to Plaintiff and Plaintiff Class:

- a. AT&T had not upgraded its network to support MMS, and, therefore, MMS would be unavailable on iPhones until the network was upgraded;
- b. AT&T would not have its network upgraded for many months; and
- c. The 3.0 Software Upgrade would not, by itself, solve the problem and make MMS available on the phone

117. At all times during the course of dealing between Defendants and Plaintiff and Plaintiff Class members and/or the general public, Defendants falsely and fraudulently represented to Plaintiff and Plaintiff Class members, as well as the general public, the fact that MMS on 3G and 3G-S iPhones was functional and effective.

118. That representations made by Defendants were, in fact, false.

119. When said representations were made by Defendants, they knew those representations to be false and they willfully, wantonly and recklessly disregarded whether the representations were true.

120. These representations were made by said Defendants with the intent of defrauding and deceiving the Plaintiff and Plaintiff Class members, and the public in general, and were made with the intent of inducing the public in general to purchase said products, the 3G and/or 3G-S iPhones, all of which evidenced a callous, reckless, willful, depraved indifference to the welfare of the Plaintiff and Plaintiff Class members herein.

121. At the time the aforesaid representations were made by the Defendants and, at the time the Plaintiff and Plaintiff Class members purchased and/or used the 3G and 3G-S iPhones, the Plaintiff and Plaintiff Class members were unaware of the falsity of said representations and reasonably believed them to be true.

122. In reliance upon said representations, the Plaintiff and Plaintiff Class members were induced to and did use the 3G and/or 3G-S iPhones, thereby sustaining damages.

123. Said Defendants knew and were aware or should have been aware that the 3G and 3G-S iPhones were defective in nature, in that they did not allow the Plaintiff and Plaintiff Class members to text pictures.

124. Defendants brought the 3G and 3G-S iPhones to the market, and acted fraudulently, wantonly and maliciously to the detriment of the Plaintiff and Plaintiff Class members.

125. By reason of the foregoing, and as a direct and proximate result of Defendants' fraudulent misrepresentation, Plaintiff, GERARD PADDEN, and Plaintiff Class members have suffered injury in fact and have lost money or property.

126. As a direct and proximate result of Defendants' fraudulent misrepresentation, Plaintiff, GERARD PADDEN, and Plaintiff Class members have suffered damages, for which they are entitled to compensatory damages, statutory damages, equitable and declaratory relief, punitive damages, costs and reasonable attorneys' fees.

127. By reason of the foregoing, Plaintiff and the Plaintiff Class have been damaged as against the Defendant in the sum of FIFTY MILLION DOLLARS (\$50,000,000.00).

FIFTH CAUSE OF ACTION
AS AGAINST THE DEFENDANT
(NEGLIGENT MISREPRESENTATION)

128. Plaintiff, GERARD PADDEN, individually and on behalf of all others similarly situated, repeats, reiterates and reallages each and every allegation of this Complaint in each of the foregoing paragraphs inclusive, with the same force and effect as if fully set forth herein.

129. Defendants had a duty to represent to the Plaintiff and Plaintiff Class members, and/or the public in general that they could not text pictures on the 3G and/or 3G-S iPhones.

130. The representations made by Defendants were, in fact, false.

131. Defendants failed to exercise ordinary care in their representations regarding the MMS functionalities and/or capabilities of the 3G and/or 3G-S iPhones, while involved in their advertising, marketing, promoting and sale of said products.

132. Defendant breached their duty in representing the MMS functionalities and/or capabilities of the 3G and/or 3G-S iPhones to the Plaintiff and Plaintiff Class members and/or the public in general.

133. By reason of the foregoing, and as a direct and proximate result of Defendants' negligent misrepresentation, Plaintiff, GERARD PADDEN, and Plaintiff Class members have suffered injury in fact and have lost money or property.

134. As a direct and proximate result of Defendants' negligent misrepresentation, Plaintiff, GERARD PADDEN, and Plaintiff Class members have suffered damages, for which they are entitled to compensatory damages, statutory damages, equitable and declaratory relief, punitive damages, costs and reasonable attorneys' fees.

135. By reason of the foregoing, Plaintiff and the Plaintiff Class have been damaged as against the Defendant in the sum of FIFTY MILLION DOLLARS (\$50,000,000.00).

SIXTH CAUSE OF ACTION
AS AGAINST THE DEFENDANT
(BREACH OF EXPRESS WARRANTY)

136. Plaintiff, GERARD PADDEN, individually and on behalf of all others similarly situated, repeats, reiterates and reallages each and every allegation of this Complaint in each of the foregoing paragraphs inclusive, with the same force and effect as if fully set forth herein.

137. Defendants expressly warranted and represented to Plaintiff and the Plaintiff class that the iPhone 3G and 3G-S and the messaging plans included MMS.

138. The 3G and/or 3G-S iPhones and messaging plans did not conform to these express representations because they did not include MMS.

139. Plaintiff and Plaintiff Class members did rely on the express warranties of the Defendants herein.

140. The Defendants herein breached the aforesaid express warranties, as their iPhones and messaging plans were defective.

141. Defendants expressly represented to Plaintiff and Plaintiff Class members, and/or the general public that the 3G and 3G-S iPhones were fit for use for the purposes intended.

142. Defendants knew or should have known that, in fact, said representations and warranties were false, misleading and untrue in that the 3G and 3G-S iPhones were not fit for use for the purposes intended.

143. By reason of the foregoing, and as a direct and proximate result of Defendants' breach of warranty, Plaintiff, GERARD PADDEN, and Plaintiff Class members have suffered injury in fact and have lost money or property.

144. As a direct and proximate result of Defendants' breach of warranty, Plaintiff, GERARD PADDEN, and Plaintiff Class members have suffered damages, for which they are entitled to compensatory damages, statutory damages, equitable and declaratory relief, punitive damages, costs and reasonable attorneys' fees.

145. By reason of the foregoing, Plaintiff and the Plaintiff Class have been damaged as against the Defendant in the sum of FIFTY MILLION DOLLARS (\$50,000,000.00).

SEVENTH CAUSE OF ACTION
AS AGAINST THE DEFENDANT
(BREACH OF IMPLIED WARRANTIES)

146. Plaintiff, GERARD PADDEN, individually and on behalf of all others similarly situated, repeats, reiterates and reallages each and every allegation of this Complaint in each of the foregoing paragraphs inclusive, with the same force and effects as if fully set forth herein.

147. At all times herein mentioned, the Defendants advertised, promoted, marketed and sold the 3G and 3G-S iPhones and messaging plans as including MMS.

148. At the time Defendants advertised, promoted, marketed and sold the 3G and 3G-S iPhones and messaging plans as including MMS for use by Plaintiff and Plaintiff Class members, Defendant knew that Plaintiff and Plaintiff Class members desired the 3G and 3G-S iPhones and

messaging plans to include MMS and impliedly warranted the product to be of merchantable quality and fit for such use.

149. The Defendants impliedly represented and warranted to the users of the 3G and 3G-S iPhones that the 3G and 3G-S iPhones were of merchantable quality and fit for the purpose for which said product was to be purchased.

150. That said representations and warranties aforementioned were false, misleading, and inaccurate in that the 3G and 3G-S iPhones were not of merchantable quality and defective.

151. Plaintiff and Plaintiff Class members did rely on said implied warranty of merchantability of fitness for a particular use and purpose.

152. Plaintiff and Plaintiff Class members reasonably relied upon the skill and judgment of Defendants as to whether the 3G and 3G-S iPhones were of merchantable quality and safe and fit for their intended use.

153. The Defendant herein breached the aforesaid implied warranties, as their 3G and 3G-S iPhones were not fit for their intended purposes and uses.

154. By reason of the foregoing, and as a direct and proximate result of Defendants' breach of warranty, Plaintiff, GERARD PADDEN, and Plaintiff Class members have suffered injury in fact and have lost money or property.

155. As a direct and proximate result of Defendants' breach of warranty, Plaintiff, GERARD PADDEN, and Plaintiff Class members have suffered damages, for which they are entitled to compensatory damages, statutory damages, equitable and declaratory relief, punitive damages, costs and reasonable attorneys' fees.

156. By reason of the foregoing, Plaintiff and the Plaintiff Class have been damaged as against the Defendant in the sum of FIFTY MILLION DOLLARS (\$50,000,000.00).

EIGHTH CAUSE OF ACTION
AS AGAINST THE DEFENDANT
(UNJUST ENRICHMENT/RESTITUTION)

157. Plaintiff, GERARD PADDEN, individually and on behalf of all others similarly situated, repeats, reiterates and reallages each and every allegation of this Complaint in each of the foregoing paragraphs inclusive, with the same force and effects as if fully set forth herein.

158. As stated with more particularity herein, Defendants, at the time they created, designed, manufactured and/or sold the 3G and/or 3G-S iPhones to the citizens and/or residents of New York, embarked on and carried out a common scheme of falsely and deceptively representing that the iPhone 3G, iPhone 3G-S and messaging plans included MMS.

159. Defendants' practices resulted in Plaintiff and Plaintiff Class members purchasing 3G and/or 3G-S iPhones in order to utilize MMS.

160. Defendants' practices allowed Defendants to unjustly receive a benefit at the expense of Plaintiff and the Plaintiff Class. As a result, the Defendants have been enriched from the selling and manufacturing of a defective product and the Plaintiff and the Plaintiff Class members have been correspondingly impoverished by purchasing or paying for the defective product.

161. The monies paid by Plaintiff and Plaintiff Class members to Defendants in the purchase of 3G and/or 3G-S iPhones and messaging plans conferred substantial benefits upon Defendants. Defendants knew of and appreciated the benefits conferred upon them by Plaintiff and the Plaintiff Class members and accepted and retained these benefits, which, injustice and fairness, should be refunded and paid over to Plaintiff and members of the Class, in an amount to be proved at trial but not less than \$50,000,000.00, not including interest or costs.

162. It would be inequitable for Defendants to retain the money collected from Plaintiff and Plaintiff Class members, in light of their unconscionable acts and practices. There was and/or is no justification or cause for Defendants' enrichment or Plaintiff' and the Plaintiff Class members' resulting impoverishment.

163. Plaintiff demand that Apple Inc, and AT&T Mobility, LLC return all such monies acquired from Plaintiff and the Class through the selling of the 3G and 3G-S iPhones

164. By reason of the foregoing, Plaintiff, GERARD PADDEN, and Plaintiff Class members have suffered injury in fact and have lost money or property.

165. By reason of the foregoing, Plaintiff, GERARD PADDEN, and Plaintiff Class members have suffered damages, for which they are entitled to compensatory damages, statutory damages, equitable and declaratory relief, punitive damages, costs and reasonable attorneys' fees.

166. By reason of the foregoing, Plaintiff and the Plaintiff Class have been damaged as against the Defendant in the sum of FIFTY MILLION DOLLARS (\$50,000,000.00).

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, on behalf of themselves and all others similarly situated, pray for judgment as requested above against Defendants and further prays for:

- (a) An order certifying the Class proposed herein and appointing Plaintiff and their counsel to represent the Class;
- (b) An order directing that appropriate notice to Class members be delivered;
- (c) Restitution to Plaintiff and the Class as provided by law;
- (d) Disgorgement of all monies unjustly received through Defendants' unlawful conduct together with interest;

- (e) Declaration that the actions and/or omissions of Defendants as described herein are unlawful, illegal, and in violation of New York law as set forth herein;
- (f) A permanent injunction against Defendants forbidding them from hereinafter undertaking the unlawful actions and/or omissions described herein;
- (g) Actual damages;
- (h) Exemplary, statutory or punitive damages as provided by law;
- (i) Statutory prejudgment interest;
- (j) Reasonable attorneys' fees and the costs of this action;
- (k) Legal and equitable relief under the causes of action stated herein; and
- (l) Such other relief as this Court may deem just and proper.

DEMAND FOR JURY TRIAL

Plaintiff hereby demands trial by jury as to all issues.

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