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11 UNITED STATES DISTRICT COURT
12 SOUTHERN DISTRICT OF CALIFORNIA

13 ARTURO MOLINA, on Behalf of
Himself and All Others Similarly Situated,

14 Plaintiff,

15 vs.

16 APPLE, INC., a California Corporation,
17 and AT&T MOBILITY, L.L.C., a
Delaware Limited Liability Company,

18 Defendants.

Case No. **09 CV 2032** **JLS POR**
CLASS ACTION COMPLAINT

19 DEMAND FOR JURY TRIAL

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1 Plaintiff Arturo Molina ("Plaintiff"), individually and on behalf of the Class as defined
2 herein, brings this action for damages and injunctive relief pursuant to the Consumers Legal
3 Remedies Act, the Unfair Competition Law, and for common law violations against defendants
4 Apple, Inc. ("Apple") and AT&T Mobility, L.L.C. ("AT&T") (hereinafter referred to collectively
5 as "Defendants"):

6 NATURE AND SUMMARY OF THE ACTION

7 1. In 2007, Apple launched its highly anticipated smartphone, the iPhone, a
8 combination of its popular digital music player, the iPod, a mobile phone and a personal digital
9 assistant. Pursuant to an exclusivity agreement signed between Apple and AT&T, AT&T is the
10 sole authorized provider of wireless telephone services to iPhone owners. Both AT&T and
11 Apple sold the iPhone in their respective stores. Despite its exclusive arrangement with AT&T,
12 the iPhone was an immediate success.

13 2. In 2008, Apple released an updated iPhone, called the "3G." It then launched the
14 most recent version, the "3G-S" in 2009. Coinciding with the launch of the 3G-S was an update
15 to the operating system of the 3G, "OS 3.0." Both upgraded versions of the iPhone have been
16 widely popular.

17 3. Multimedia Messaging Services ("MMS") allows mobile device users to send
18 pictures and other media directly to another user's mobile device. Data Tethering allows a user
19 to attach their mobile device to their computer and use that device to connect the computer to the
20 internet. Like most of the smartphone market at the time of their release, the original iPhone and
21 the iPhone 3G lacked the MMS and Data Tethering functions. By the time Apple announced it
22 was planning on launching the 3G-S, however, Data Tethering and MMS were widely available
23 on other smartphones, even other smartphones that used the AT&T network.

24 4. Apple prominently advertised that with the launch of the 3G-S and the upgrade of
25 the 3G's operating system iPhone users would gain MMS and Data Tethering functionality. For
26 example, videos located on Apple's website and the advertising package provided to consumers
27 prominently show images of an iPhone with the MMS messaging services.

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1 is the exclusive provider of wire and data telephone services to iPhone customers. AT&T also
2 markets and sells the iPhone.

3 FACTUAL ALLEGATIONS

4 A. Defendants Advertise the Availability of MMS and Data Tethering for the 5 iPhone 3G and 3G-S

6 14. Since its original launch, the iPhone has been only capable of transmitting
7 Single Messaging Service. Single Messaging Service ("SMS") is a communication service
8 standardized in the OSM mobile communication system, using standardized communications
9 protocols allowing the interchange of short text messages between mobile telephone devices.

10 15. MMS is a telecommunications standard for sending messages that include
11 multimedia objects (images, audio, video, and rich text). MMS is an extension of the SMS
12 standard, allowing longer message lengths and allowing the transmission of multimedia files
13 such as photographs.

14 16. At first, the inability of the iPhone to provide MMS messaging services was
15 not a significant disadvantage for the iPhone. When the iPhone was first launched, few
16 smartphones could provide MMS messaging services at the same price point as the iPhone while
17 providing the same functionality.

18 17. In the last two years, however, MMS has become practically standard on all
19 smartphones other than the iPhone. As such, in order to maintain its competitive position in the
20 market, Defendants knew that they needed to provide or at least promise pre-existing and
21 potential smartphone consumers that the MMS was an upcoming feature of the 3G and 3G-S.
22 Defendants also represented Data Tethering, another common function on smartphones other
23 than the iPhone, as a promised feature with the launch of the 3G-S and OS 3.0. In advance of the
24 launch of the 3G-S and OS 3.0, Defendants advertised heavily that the 3G and the 3G-S would
25 allow MMS messaging and Data Tethering. Defendant Apple's print and video advertisements
26 on television, the Internet, the radio, newspapers, and direct mailers all touted these features.

27 18. In the spring of 2009, Defendants began an aggressive sales drive to sell its
28 older 3G models in preparation for the launch of the 3G-S. In particular, Defendant AT&T

1 agreed to subsidize the cost of acquiring a 3G so that consumers would pay less than \$100 to buy
2 a phone.

3 19. Further, on its website, Defendant Apple posted under the heading "iPhone OS
4 3.0 Software Update" that MMS would be available for iPhone customers and that customers
5 could "send MMS messages and include photos, audio, and contact info. Even tap to snap a
6 picture right inside Messages." The following graphic showed the familiar iPhone message
7 screen with pictures inserted in the text area, an indication of MMS availability:



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18 20. On March 17, 2009, Apple previewed a beta version (working version) of the
19 OS 3.0. The preview stated, "Apple also announced over 100 new features that will be available
20 to iPhone and iPod touch users this summer including, cut, copy and paste, MMS ... " and other
21 features.

22 21. The preview further states, "The new iPhone OS 3.0 will be available to iPhone
23 and iPod touch users this summer with over 100 new features including cut, copy and paste
24 which can be done within or across applications; MMS to send and receive photos, contacts,
25 audio files and locations with the Messages app; and the ability to capture and send audio
26 recordings on the go with the new Voice Memo app."

27 22. In a footnote, the preview included the following additional note, "MMS
28 messaging is available only on iPhone 3G; fees may apply. MMS may not be available in all

1 areas." This is misleading as it implies that there are some areas where MMS may be available.
2 The reality is that MMS is not available anywhere in the United States.

3 23. On June 8, 2009, Apple reiterated in its advertising materials that, "With
4 iPhone 3G-S you can send photos and video by email or MMS and post them to MobileMe or
5 YouTube with just one tap."

6 24. In June of 2009, immediately prior to the launch of the 3G-S and OS 3.0,
7 Apple's website included an approximately ten minute advertising video at
8 <http://www.apple.com/iphone/guidedtour/> discussing the upcoming features for the 3G-S and the
9 OS 3.0 operating system. MMS is prominently discussed as an available feature on the 3G and
10 3G-S. The video does not mention that MMS would not be supported at the time the 3G-S and
11 OS 3.0 launched later that month. Apple's website even included a video specifically regarding
12 SMS and MMS at <http://www.apple.com/iphone/iphone-3gs/messages.html#video>.

13 25. MMS is prominently displayed in the advertising packaging that comes with
14 the purchase of an iPhone. The advertising material in the iPhone box advertises the availability
15 of MMS.

16 26. Apple also advertised the availability of MMS on its website, stating:

17 ***Send MMS***

18 *Take a photo or shoot some video, then send it via*
19 *Messages. You can also send audio recordings from within*
20 *Messages, information from Contacts, and directions from*
21 *Maps.*

22 27. A Pop-Up window on Apple's website reads:

23 **Sending Photos and Videos**

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

27 28. AT&T's website advertises MMS messaging in several locations:

28 Messages

Use message to send text, photos, audio, video and
more. Forward a whole message or just the important
parts.

Messages

1 Send messages with text, video, photos, audio, locations,
2 and contact information. You can even forward one or
3 more messages to others.

3 SendMMS

4 Take a photo or shoot some video, then send it via
5 Messages. You can also send audio recordings from Voice
6 Memos, contact information from Contacts, and locations
7 from Maps.

6 29. Data Tethering is also advertised prominently on the Apple website as follows:

7 Internet [Data] Tethering

8 Surf the web from practically anywhere. Now you can
9 share the 3G connection on your iPhone with your Mac
10 notebook or PC laptop.

10 30. More than a month after the iPhone 3G-S was launched, Defendants still
11 misrepresented the availability and functionality of MMS. During an earnings conference call on
12 July 21, 2009, Peter Oppenheimer, CFO of Apple, misrepresented that the release of OS 3.0
13 included the new feature of MMS. Peter Oppenheimer never corrected his statement during the
14 conference call or attempted to qualify it in any manner.

15 31. Despite their comprehensive advertising campaign, Defendants knew all along
16 that the iPhone would not have the promised MSS and Data Tethering capabilities. In fact,
17 Defendants attempted to exculpate themselves from liability for their misrepresentations with
18 fine print language found only on Apple's website that was put up after the launch of the iPhone
19 3G-S. Apple stated that MMS functionality would be available by "late summer," which has
20 already come and gone. However, consumers are not required to look beyond misleading
21 representations to discover the truth in fine print. AT&T now claims that MMS will be available
22 by September 25, 2009, months after the launch of OS 3.0 and 3G-S. Further, Defendants have
23 never stated when the promised Data Tethering services will become available.

24 32. Apple continues to deceptively advertise both MMS and Data Tethering as
25 promised functions for the 3G and 3G-S.

26 **B. MMS and Data Tethering Were Not Available at Launch of the 3G-S**

27 33. As a result of Defendants' knowing, false and deceptive representations and
28 omissions, millions of customers either purchased the 3G or 3G-S or agreed to continue to

1 remain loyal Apple and AT&T customers by renewing their contracts with AT&T. Indeed,
2 Apple proudly announced that in the first three days the 3G-S was available, Apple sold over a
3 million phones.

4 34. However, after owners of the 3G or 3G-S downloaded the new OS 3.0, they
5 soon learned that MMS remained unavailable.

6 35. The Apple troubleshooting page provided the following information:

7 To send and receive MMS messages on your iPhone 3G, do
8 the following:

9 Verify that your iPhone and wireless carrier meet the system requirements.

10 To use MMS you need:

- 11 1. - iPhone as 3.0 installed on iPhone 3G. The
12 original iPhone does not support sending or
13 receiving MMS messages. Install iPhone as 3.0 if
14 necessary.
15 - A wireless carrier that supports MMS.
16 - A coverage area in which you can place and
17 receive a call, and access the internet using Safari
18 on your iPhone (30 network coverage
19 recommended).
- 20 2. If this article shows that your carrier supports
21 MMS, you should see MMS Messaging in the
22 Settings>Messages>General screen as shown
23 below.

24 36. This information is false and misleading because Defendants cannot and do not
25 provide MMS for the iPhone and remain unable to do so. Unbeknownst to consumers, AT&T
26 has never upgraded its towers to support the functionality necessary for MMS.

27 37. Defendants' deceptive advertising and marketing campaign is designed to cause
28 consumers to buy the iPhone 3G-S and the iPhone 3-G. As a result of this campaign, Defendants
have sold millions of iPhones. As stated by Apple's Chief Financial Officer in an earnings
conference call on July 21, 2009, "[r]esponse to the new iPhone 3G-S has been tremendous
bus[iness] with over 1 million 3G-S handsets sold by the third day after its June 19th launch."
During the third quarter of 2009, Apple bragged that "[t]he sales volume iPhone sold during the
quarter was \$2.9 billion."

CLASS ACTION ALLEGATIONS

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2 38. This action is brought by Plaintiff, individually and on behalf of all others
3 similarly situated, pursuant to Rules 23(b)(2) and (3) of the Federal Rules of Civil Procedure.

4 The Class is defined as follows:

5 All persons or entities residing in the United States who
6 purchased or otherwise acquired an iPhone 3G or iPhone 3G-S
7 from either AT&T or Apple for personal, family, or household
8 use. Also included are all persons or entities residing in the
9 United States who owned an iPhone 3G whose contract with
10 AT&T expired between June 19, 2009 to the present and either
11 entered into a new contract with AT&T or otherwise agreed to
12 continue utilizing AT&T's wireless telephone services. Excluded
13 from the Class are Defendants herein, members of their
14 immediate families and their legal representatives, parents,
15 affiliates, heirs, successors, or assigns and any other person who
16 engaged in the improper conduct described herein.

17 39. Plaintiff seeks to recover restitution, damages, and other equitable for himself
18 and the Class for violations of the Unfair Business Practices Act, Cal. Bus. & Prof. Code
19 §§17200, *et seq.*; Consumers Legal Remedies Act, California Civil Code §1750 *et seq.*; breach of
20 express warranty; and unjust enrichment. Plaintiff also seeks an injunction prohibiting
21 Defendants from continuing to engage in the practices described herein and to engage in a
22 corrective advertising campaign to correct the false and misleading perception it has created in
23 the minds of consumers.

24 40. The Class is so numerous that joinder of all members is impracticable.
25 Defendant Apple announced that between June 19, 2009 and June 21, 2009, it sold over one
26 million iPhone 3G-S models over the initial three day period and that over six million people
27 downloaded the OS 3.0 operating system over that same time period. While the exact number of
28 Class members is unknown at this time, Plaintiff is informed and believes that the number is in
the millions.

41. Common questions of law and fact exist as to all Class members and
predominate over questions affecting only individual Class members. These common questions
include:

A. Whether the claims discussed above are true, misleading, or reasonably likely to
deceive.

- 1 B. Whether Defendants engaged in false or misleading advertising.
- 2 C. Whether Defendants' alleged conduct violates public policy.
- 3 D. Whether the alleged conduct constitutes violations of the laws asserted herein.
- 4 E. Whether Defendants engaged in deceptive and misleading business practices by
5 falsely making claims that the MMS and Data Tethering would be available
6 features on the 3G and 3G-S in violation of California statutory and common law.
- 7 F. The extent to which Defendants knew that AT&T lacked the ability to support
8 either the MMS or Data Tethering and when Defendants gained that knowledge.
- 9 G. The extent to which Defendants knew the importance of these features to
10 smartphone customers, in particular pre-existing and potential iPhone customers.
- 11 H. The extent to which Defendants could and should have conducted their
12 advertising campaign in order to accurately represent the services Defendants
13 would and could provide to iPhone consumers and more adequately warn
14 customers of the unavailability of MMS and Data Tethering, the reason for that
15 unavailability and an accurate time line for provision of that service.
- 16 I. The extent to which Defendants marketed and advertised the 3G and 3G-S as
17 supporting MMS with little or no mention of the fact that AT&T, with which
18 Apple has and had an exclusive service agreement, was not equipped to provide
19 MMS.
- 20 J. Whether the conduct complained of herein constitutes deceptive and misleading
21 advertising in violation of Cal. Bus. Business & Prof. Code §§17500, *et seq.*
- 22 K. Whether the conduct complained of herein constitutes an unfair, illegal, and/or
23 fraudulent business practice, in violation of Cal. Bus. & Prof. Code §§17200, *et*
24 *seq.*
- 25 L. Whether the conduct complained of herein constitutes a violation of the
26 Consumers Legal Remedies Act, California Civil Code §1750, *et seq.*
- 27 M. Whether Defendants have been unjustly enriched as a result of the conduct
28 complained of herein.

- 1 N. Whether Defendants' conduct complained of herein is intentional and knowing.
- 2 O. Whether Plaintiff and members of the Class are entitled to damages, restitution,
- 3 disgorgement of profits, declaratory relief, and/or injunctive relief, as a result of
- 4 Defendants' conduct complained of herein.

5 42. Plaintiff's claims are typical of the claims of other members of the Class in that

6 Plaintiff and other Class members were subject to the same claims regarding MMS and Data

7 Tethering on the 3G and the 3G-S. Plaintiff is a member of the Class he seeks to represent and

8 has suffered harm due to the unfair, deceptive, unreasonable, and unlawful practices of

9 Defendants.

10 43. Plaintiff will fairly and adequately represent the interests of the Class; his

11 interests are coincident with, and not antagonistic to those of the Class he seeks to represent.

12 Plaintiff is represented by experienced and able counsel, who intend to prosecute this action

13 vigorously for the benefit of Plaintiff and all Class members. Plaintiff and his counsel will fairly

14 and adequately protect the interests of the Class members.

15 44. Defendants have acted or refused to act, with respect to some or all issues

16 presented in this Complaint, on grounds generally applicable to the Class, thereby making it

17 appropriate to provide relief with respect to the Class as a whole.

18 45. A class action is the best available method for the efficient adjudication of this

19 litigation because individual litigation of Class members' claims would be impracticable and

20 unduly burdensome to the courts, and have the potential to result in inconsistent or contradictory

21 judgments. There are no unusual difficulties likely to be encountered in the management of this

22 litigation as a class action. A class action presents fewer management problems and provides the

23 benefits of single adjudication, economies of scale, and comprehensive supervision by a single

24 court. There are no other pending class actions against Defendants that seek to represent a

25 nationwide Class, and a class action is the only feasible method by which this controversy may

26 be resolved.

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1 CAUSES OF ACTION

2 COUNT I

3 For Violations of the Consumers Legal Remedies Act –
4 Civil Code §1750, et seq. on Behalf of Plaintiff and the Class

5 46. Plaintiff realleges and incorporates by reference the preceding allegations as if
6 fully set forth herein.

7 47. This cause of action is brought pursuant to the Consumers Legal Remedies Act,
8 California Civil Code §1750, et seq. (the "Act"). Plaintiff is a consumer as defined by California
9 Civil Code §1761(d). The iPhone is a good within the meaning of the Act.

10 48. Defendants violated and continue to violate the Act by engaging in the following
11 practices proscribed by California Civil Code §1770(a) in transactions with plaintiff and the
12 Class, which were intended to result in, and did result in, the sale of the iPhone:

13 (5) Representing that [the iPhones have] . . . characteristics, . . . uses [or]
14 benefits . . . which they do not have

15 * * *

16 (7) Representing that [the iPhones] are of a particular standard, quality or
17 grade . . . if they are of another.

18 * * *

19 (9) Advertising goods . . . with intent not to sell them as advertised.

20 * * *

21 (16) Representing that [the iPhones have] been supplied in accordance with a
22 previous representation when [they have] not.

23 49. Defendants violated the Act by representing through their advertisements of
24 iPhone products as described above when they knew, or should have known, that the
25 representations and advertisements were unsubstantiated, false and misleading.

26 50. Pursuant to §1782 of the Act, Plaintiff notified Defendants in writing by certified
27 mail of the particular violations of §1770 of the Act and demanded that Defendants rectify the
28

1 problems associated with the actions detailed above and give notice to all affected consumers of
2 their intent to so act. A true and correct copy of the letter is attached hereto as Exhibit A.

3 51. Pursuant to California Civil Code §1782(d), Plaintiff and the Class seek a Court
4 order enjoining the above-described wrongful acts and practices of Defendants and for restitution
5 and disgorgement.

6 52. If Defendants fail to rectify or agree to rectify the problems associated with the
7 actions detailed above and give notice to all affected consumers within 30 days of the date of
8 written notice pursuant to §1782 of the Act, Plaintiff will amend this Complaint to add claims for
9 actual, punitive and statutory damages, as appropriate.

10 COUNT II

11 **Unlawful Business Acts and Practices in Violation of California Business and** 12 **Professions Code Section 17200, et seq. on Behalf of Plaintiffs and the Class**

13 53. Plaintiff realleges and incorporates by reference the preceding allegations
14 contained in the paragraphs above, as if fully set forth herein.

15 54. California Business and Professions Code §17200 prohibits any "unfair,
16 deceptive, untrue or misleading advertising." For the reasons discussed above, Defendants have
17 engaged in unfair, deceptive, untrue and misleading advertising in violation of California
18 Business & Professions Code §17200.

19 55. California Business & Professions Code §17200 also prohibits any "unlawful . . .
20 business act or practice." Defendants have violated §17200's prohibition against engaging in
21 unlawful acts and practices by, *inter alia*, making the representations and omissions of material
22 facts as set forth more fully herein and violating California Civil Code §§1572, 1573, 1709,
23 1710, 1711, 1770, Business & Professions Code §17200 *et seq.*, Business & Professions Code
24 §17500 *et seq.*, the Federal Communications Act, 47 U.S.C. §201 *et seq.*, and the common law.

25 56. Plaintiff and the Class reserve the right to allege other violations of law which
26 constitute other unlawful business acts or practices. Such conduct is ongoing and continues to
27 this date.

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1 57. California Business & Professions Code §17200 also prohibits any "unfair . . .
2 business act or practice."

3 58. Defendants' acts, omissions, misrepresentations, practices and non-disclosures as
4 alleged herein also constitute "unfair" business acts and practices within the meaning of Business
5 & Professions Code §17200 et seq. in that their conduct is substantially injurious to consumers,
6 offends public policy, and is immoral, unethical, oppressive, and unscrupulous as the gravity of
7 the conduct outweighs any alleged benefits attributable to such conduct.

8 59. As stated in this Complaint, Plaintiff alleges violations of consumer protection,
9 unfair competition and truth in advertising laws in California and other states resulting in harm to
10 consumers. Plaintiff asserts violation of the public policy of engaging in false and misleading
11 advertising, unfair competition and deceptive conduct towards consumers. This conduct
12 constitutes violations of the unfair prong of California Business & Professions Code §17200, *et*
13 *seq.*

14 60. There were reasonably available alternatives to further Defendants' legitimate
15 business interests, other than the conduct described herein.

16 61. Business & Professions Code §17200 also prohibits any "fraudulent business act
17 or practice."

18 62. Defendants' claims, nondisclosures and misleading statements, as more fully set
19 forth above, were false, misleading and/or likely to deceive the consuming public within the
20 meaning of Business & Professions Code §17200.

21 63. Defendants' conduct caused and continues to cause substantial injury to Plaintiff
22 and the other Class members. Plaintiff has suffered injury in fact and has lost money as a result
23 of Defendants' unfair conduct.

24 64. Defendants have thus engaged in unlawful, unfair and fraudulent business acts
25 and practices and false advertising, entitling Plaintiff to judgment and equitable relief against
26 Defendants, as set forth in the Prayer for Relief.

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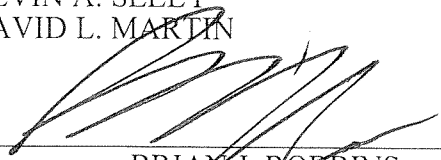
G. For such additional or further relief as the Court finds just and appropriate.

JURY DEMAND

Plaintiff demands a trial by jury of all issues which are subject to adjudication by a trier of fact.

DATED: September 17, 2009

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