

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

JACK HAUGHT, individually and on behalf
of all others similarly situated,

Plaintiff,

v.

MOTOROLA MOBILITY, INC., a Delaware
corporation,

Defendant.

Case No.

CLASS ACTION COMPLAINT AND JURY DEMAND

Plaintiff Jack Haught (“Plaintiff”) brings this Class Action Complaint against Defendant Motorola Mobility, Inc. (“Defendant” or “Motorola”) based upon its false and misleading representations and omissions of material fact made to Plaintiff and similarly-situated others regarding the capability of its CLIQ XT mobile device to be updated with the newer version of its mobile operating system. Plaintiff, for his Class Action Complaint, alleges as follows upon personal knowledge as to himself and his own acts and experiences and, as to all other matters, upon information and belief, including investigation conducted by his attorneys.

NATURE OF THE CASE

1. In March of 2010, Motorola released the CLIQ XT mobile handset, a device that despite being a brand new product, was based upon the outdated Android 1.5 mobile operating system.

2. In response to consumer inquiry, as well as of its own accord, Motorola made numerous representations over the course of the next ten months that it would upgrade the CLIQ XT’s mobile operating system to the updated Android 2.1 platform. These representations were

widely disseminated to the public through Motorola's own website, its official online customer service forums, and its Twitter account.

3. During these ten months, Motorola failed to inform consumers and actively concealed from them the fact that it never actually intended to upgrade the CLIQ XT. Ultimately, consumers relied upon Motorola's omissions and misrepresentations in purchasing the CLIQ XT and continuing to use the CLIQ XT instead of returning it for a more up-to-date phone.

PARTIES

4. Jack Haught is a natural person and citizen of the State of Ohio.

5. Defendant Motorola Mobility, Inc. is a corporation incorporated and existing under the laws of the State of Delaware with its corporate headquarters and principal place of business located at 600 North US Highway 45, Libertyville, Illinois. Defendant does significant business in this District, throughout the State of Illinois, and nationwide.

JURISDICTION AND VENUE

6. This Court has subject matter jurisdiction over Plaintiff's claims pursuant to 28 U.S.C. § 1332(d), because (a) at least one member of the putative class is a citizen of a state different from Defendant, (b) the amount in controversy exceeds \$5,000,000, exclusive of interest and costs, and (c) none of the exceptions under that subsection apply to this action.

7. The Court has personal jurisdiction over this action and venue is proper here because Defendant is headquartered in this District, and because the improper conduct alleged herein occurred in, was directed from, and/or emanated from this District.

FACTUAL BACKGROUND

8. Defendant Motorola is an international manufacturer of cellular telephones and other mobile devices, with over \$10 billion in revenue reported for fiscal year 2010 alone.

9. While Defendant sells a variety of mobile devices, one of its most popular models in 2010 was the CLIQ XT. Defendant released the CLIQ XT on March 17, 2010, and has since sold hundreds of thousands of units to consumers nationwide.

10. Like dozens of other mobile devices manufactured by numerous companies, the CLIQ XT utilizes the Android operating system created by Internet-giant Google.

11. A mobile device's operating system, not unlike a traditional computer, is at the heart of the device and is a material aspect of a consumer's choice to purchase and use a particular device. The operating system not only acts as the primary interface and point of contact a user has with the device, but also contains all the primary features and operates the primary functions of the device.

12. A material selling point for mobile devices that run the Android operating system is the operating system's ability to run mobile applications.

13. In the mobile industry, operating systems are regularly upgraded to provide additional features and increase overall functionality. This has been a standard practice across all mobile phone manufactures. For example, the Apple iPhone has gone through at least four major upgrades and over two dozen minor upgrades over the last three years.

14. As a phone's operating system is upgraded, third party developers, including mobile application developers, also update their products to function correctly with the new system. Often times, as an operating system becomes more dated, new applications will be unable to function on it and instead, require that the mobile device utilize the most recent version of the operating system. While technology is constantly evolving, a reasonable consumer would expect a mobile device to remain compatible and up to date for at least the two-year span of a standard cellular service contract.

15. At the time of the CLIQ XT's release in March of 2010, it came packaged with version 1.5 of the Android operating system — an outdated version that had been released approximately one year earlier, in May 2009.

16. At the time of the CLIQ XT's release to the public, the most current available version of the Android operating system was version 2.1. Since the release of version 2.1, Google has upgraded its operating system with versions 2.2, 2.3, and eventually to version 4.0. As of March 29, 2012, approximately .4% of all mobile phones utilizing the Android operating system were using version 1.5.

17. Motorola highlights the ability of the Android operating system to run and store applications, and represents through its website and marketing materials that the CLIQ XT would run and store most of the common and widely-used mobile applications through its operating system.

18. The current versions of many of the most popular Android mobile applications available today will not work on Android 1.5, including applications such as Facebook, MySpace, Gmail, Angry Birds, Dropbox, Google Maps, Google Goggles, Kindle, Wells Fargo, USA Today, CNN, Yahoo Mail, YouTube, Groupon, MSNBC, Fox News, NY Times, NPR News, My Verizon, Blockbuster, QuickOffice Pro, and numerous others.

19. Accordingly, any failure to update a device's operating system can significantly hinder the function and capability of the device and quickly make it obsolete.

20. Motorola directly markets and advertises its phones through print, online and television commercials, and additionally promotes its products through its own website, social media, and other mediums where it directly interacts with consumers about its phones' features and benefits. Motorola's statements through its social media accounts and website are meant to

be direct communications with current and prospective customers about its products, and are further meant to induce prospective customers to buy its phones and to encourage current customers to remain.

21. On or around March 31, 2010, and no later than April 13, 2010, Defendant announced on its website, through an upgrade chart, that, as it applied to the CLIQ XT, “Upgrade to Android 2.1 planned for Q2,” with the second quarter ending June 30, 2010. (*See* “Motorola Android Software Upgrade News” website screenshots, true and accurate copies of which are attached as Exhibit A). Defendant’s statement was a representation of a then existing material fact, and Defendant knew it to be false at the time it made the statement.

22. This chart also listed several other Motorola devices, and their accompanying upgrade statuses, including “Upgrade to Android 2.1 for select countries/carriers is currently rolling out in stages,” “Upgrade to Android 2.1 planned for Q3” and “*Upgrade under evaluation.*” (*See* Exhibit A) (emphasis added).

23. While the webpage containing the upgrade chart may have included purportedly disclaiming language regarding a CLIQ XT upgrade, any such text—if it was displayed at all—would have appeared at the very bottom of the webpage. Because all of the other information regarding the CLIQ XT appeared at the top of the chart, and numerous phones appeared below it, any purportedly disclaiming language was fully “below the fold” and out of sight from the consumer.

24. Accordingly, in order to actually view any language, a consumer would need to scroll down through multiple pages of other phones. However, as there was no visible indication at the top of the page that the language existed, and no reason was provided to consumers viewing the page to scroll down to its very bottom, the likelihood of a consumer who was

seeking information about the CLIQ XT ever seeing the disclaiming language (if it existed at all) was limited to no more than a chance encounter.

25. Defendant intentionally and deceptively placed any type of disclaiming language in a difficult to find and unlikely to be viewed location so that consumers would not see it and therefore, would understand Defendant's representations about impending upgrades as fact and not opinion or predictions.

26. On March 30, 2010, through Defendant's customer support forum,² a consumer asked, "I was just wondering if there is any update coming out for the xt or will we be getting the same 2.0 update as the cliq soon." In response, Defendant stated through a Forum Manager, "This just in. CLIQ XT made it," followed by a link to the update chart referenced above. (*See* Defendant's Support Forum Posts, true and accurate copies of which are attached as Exhibit B).

27. By June 17, 2010, Defendant's website still listed the CLIQ XT for a planned upgrade in the second quarter. (*See* Exhibit A). Defendant's statement was a representation of a then existing material fact, and Defendant knew it to be false at the time it was made.

28. On June 30, 2010, Defendant stated through its official Twitter account: "Continuing work on an upgrade for CLIQ/CLIQ XT to deliver even better experience and will

² Defendant hosts and operates a customer support forum at: <https://supportforums.motorola.com>. Within the support forums are several "threads" devoted to Defendant's statements related to its general failure to provide an Android 2.1 update for the CLIQ XT. One such thread was entitled "CLIQ XT 2.1 T-Mobile upgrade – News" and had 1,020,233 views and 5,586 comments (taking up 373 pages) before it was locked down due to its size, and a new thread was created in its place entitled "CLIQ XT 2.1 T-Mobile upgrade – News (Second Edition)," which itself presently has 222,400 views, 3,248 comments and occupied 217 pages. (*See* supportforums.motorola.com/thread/31532 & supportforums.motorola.com/thread/41889). These forums are moderated and controlled by "Forum Managers" who periodically respond to consumer comments and make statements on the forums on behalf of Defendant. During the relevant time period, the forum mangers were named "Mark" and "Matt."

update on timing when we can.”³ (See “Motorola Twitter Posts,” true and accurate copies of which are attached at Exhibit C).

29. On August 20, 2010, Defendant announced through its customer support forum that it was working on the 2.1 upgrade for the CLIQ XT and that it anticipated “providing the upgrade on each of these devices in the late Q3/early Q4 timeframe.” (Exhibit B). Additionally, Defendant stated through its customer support Forum Manager: “we’ve made a decision to take more time on the release to optimize the experience in some key areas. We will continue to work to deliver it as soon as possible and apologize that we have been unable to provide an upgrade to these users in Q2 as planned...” (Exhibit B).

30. On September 23, 2010, Defendant stated through its official Twitter account: “The CLIQ XT upgrade is slated for late Q3/early Q4.” (Exhibit C). Defendant’s statement was a representation of a then existing material fact, and Defendant knew it to be false at the time it was made.

31. On October 4, 2010, Defendant stated through its official Twitter account: “We are currently working to upgrade CLIQ and CLIQ XT to Android 2.1 in Q4. Apologies for any confusion.” (Exhibit C).

32. On October 26, 2010, Defendant stated through its customer support Forum Manager: “CLIQ XT rollout now Q4. We’ll let you know when it goes into pre-release status.” (Exhibit B). Defendant’s statement was a representation of a then existing material fact, and Defendant knew it to be false at the time it was made.

³ Defendant maintains an official Twitter account as a means to communicate with its customers and market its products to the public at <http://twitter.com/Motorola>. The account presently has 56,822 consumers following its posts and is publically available to consumers even without a Twitter account.

33. On November 10, 2010, Defendant stated through its customer support Forum Manager: “We attempted to offer the upgrade in Q2 *but an opportunity to further optimize the upgrade arose late in Q2* which delayed this to Q3 and then several factors in Q3 after OpenGL and JIT compiler implementation required our additional attention... Again we attempted to offer the upgrade in Early Q4 (October) but several circumstances have further contributed to a delay. We’re getting closer. I don’t have a definite date yet but we’re close to pending approval from our business partners.” (Exhibit B) (emphasis added). Defendant’s statement was a representation of a then existing material fact, and Defendant knew it to be false at the time it was made.

34. On December 16, 2010, in reference to the 2.1 update, Defendant stated through its customer support Forum Manager: “Just for fun (no money), my bet is that the update WILL COME BEFORE CHRISTMAS!” (Exhibit B).

35. On December 22, 2010, Defendant changed its Software Update page to state, as it pertained to the CLIQ XT carried by T-Mobile, “Upgrade to Android 2.1 – additional testing in process; more details when available.” (Exhibit A).

36. On January 25, 2011, CLIQ XT owners received an email offering “Upgrade your Motorola CLIQ XT now!” While most consumer’s believed this to be the long awaited upgrade to Android 2.1, in fact it was a marketing email promoting the release of Defendant’s CLIQ 2 mobile device, the successor to the CLIQ XT. This new device came with Android 2.2.

37. On February 3, 2011, approximately ten months after the CLIQ XT was released and the first upgrade announcement was made, Defendant stated through its customer service Forum Manager, “... we have concluded that this device will remain on Android 1.5.” (Exhibit B).

38. In the ten months spanning March 2010 to February 2011, during which Defendant continued to release regular updates promising that the upgrade would happen soon, Defendant knew, or should have known, that the information was false and the upgrade would not likely occur.

34. As of the date of this filing, Defendant has not upgraded the CLIQ XT operating system above Android 1.5.

FACTS RELATING TO PLAINTIFF HAUGHT

35. Plaintiff Jack Haught purchased a Motorola CLIQ XT for approximately \$100 in or around June 30, 2010. At the time of purchase, Plaintiff was aware that his purchase was subject to a 30-day return period in which he could get a full refund or exchange the CLIQ XT for a different phone. Plaintiff was additionally aware of and viewed representations regarding the CLIQ XT's technical features and capabilities, including Motorola's representations that the CLIQ XT would run and store most commonly used mobile applications through its Android operating system.

36. Within one day of Plaintiff's purchase of the CLIQ XT, he created a "MOTOBLUR" account through his phone and through Motorola's website to provide services through his CLIQ XT. MOTOBLUR is a consumer service provided by Motorola that is essential to the functioning of Defendant's phones.

37. Additionally, Plaintiff's CLIQ XT was under warranty with Motorola.

38. Through the process of setting up his MOTOBLUR account while on Defendant's website, Plaintiff sought out information about the CLIQ XT and was directed to Motorola's online forums. While there, Plaintiff viewed specific representations, inclusive of those described in this Complaint, made by Defendant's forum managers, "Matt" and "Mark," regarding the

imminent upgrade of the CLIQ XT set to occur in the second quarter of 2010, which ended on June 30th. Plaintiff additionally viewed the upgrade chart substantially similar to the charts described in this Complaint, which was linked from Defendant's forum posts that confirmed that the upgrade was set to occur in the second quarter of 2010. Defendant's statements were representations of then existing material facts, and Plaintiff understood them to mean that the CLIQ XT would, without question, be upgraded, and that the only remaining issue was exactly when the upgrade would occur. Plaintiff was acting reasonably under the circumstances and based on the information presented to him by Defendant.

39. Plaintiff Haught relied on the online representations related to the upgrade and CLIQ XT's features and capabilities in choosing not to return the CLIQ XT during the return period.

40. Because Defendant's representations and omissions were made to Plaintiff during his return period, they were one and the same with any statements made and relied upon at the time Plaintiff purchased the phone.

41. Plaintiff's CLIQ XT eventually malfunctioned and it was replaced directly by Motorola per the CLIQ XT's warranty.

42. By purchasing a Motorola brand phone, and contractually engaging each other through MOTOBLUR, Plaintiff's warranty, and generally through the information and services provided by Motorola's website, Plaintiff and Motorola entered into a business-to-consumer relationship.

43. But for the representations made by Defendant related to the upgrade to Android 2.1 and the CLIQ XT's ability to run and store commonly used applications, Plaintiff Haught

would have returned the CLIQ XT and received a full refund or exchanged it for a different phone.

44. Within one year of Plaintiff purchasing the CLIQ XT, his phone became outdated and incompatible with a variety of popular mobile applications. Specifically, Plaintiff wanted to, but could not, use such applications as Chase Bank (where Plaintiff had his primary checking accounts), KeyRing, Fifth Third Bank, Mint.com, The Weather Channel, AccuWeather, KAYAK, AMEX, Discover, Multiple Sclerosis Diagnosis, Columbus Dispatch, apps related to airlines such as United Airlines and Delta, and various hockey related apps, including NHL Game Center. By December 2010, almost all of the mobile applications that Plaintiff wanted to use were incompatible with his CLIQ XT, and throughout 2011, Plaintiff's CLIQ XT failed to provide almost any of the promised and expected features beyond its basic functionality.

45. Plaintiff was injured and lost money in the form of the fee paid to purchase his CLIQ XT, by not returning the phone during his return period, by paying more for a phone than he otherwise would have had he known the CLIQ XT would never receive an upgrade, and paying for a phone that did not perform and provide the services Plaintiff was promised.

CLASS ALLEGATIONS

46. Plaintiff Haught brings this action pursuant to Fed. R. Civ. P. 23(b)(2) and (b)(3), on behalf of himself and a class of similarly situated individuals (the "Class") defined as follows:

All individuals and entities in the United States who purchased a Motorola CLIQ XT prior to February 2, 2011.

Excluded from the Class are (1) Defendant, its legal representatives, assigns, and successors, and any entity in which Defendant has a controlling interest, (2) the Judge or Magistrate Judge to whom this case is assigned and the Judge's or Magistrate Judge's immediate family, (3) persons who execute and file a timely request for exclusion, (4) persons whose claims in this matter have

been finally adjudicated on the merits or otherwise released, and (5) the legal representatives, successors, or assigns of any such excluded person.

47. **Numerosity:** The exact number of Class members is unknown and not available to Plaintiff, but on information and belief, Defendant has sold its CLIQ XT to thousands of Class members throughout the country, making joinder of each individual member impracticable. Ultimately, Class members can be identified through Defendant's records.

48. **Typicality:** Plaintiff's claims are typical of the claims of the other members of the Class, as Plaintiff and the other members sustained damages arising from Defendant's uniform wrongful conduct, based upon the same types of transactions that were made repeatedly with Plaintiff and the members of the Class.

49. **Adequate Representation:** Plaintiff will fairly and adequately represent and protect the interests of the Class, and has retained counsel competent and experienced in class actions. Plaintiff has no interest antagonistic to those of the Class, and Defendant has no defenses unique to Plaintiff.

50. **Commonality and Predominance:** There are many questions of law and fact common to the claims of Plaintiff and the Class. Those questions predominate over any questions that may affect individual members of the Class. Common questions for the Class include, but are not necessarily limited to the following:

- a) Whether Defendant intentionally misrepresented and/or concealed the fact that it would not offer an operating system upgrade for the CLIQ XT;
- b) Whether Defendant's conduct described herein constitutes a violation of the Illinois Consumer Fraud and Deceptive Business Practices Act (815 ILCS § 505/1, *et seq.*);

- c) Whether Defendant's conduct described herein constitutes fraud by omission; and
- d) Whether Defendant's conduct described herein resulted in unjust enrichment to Defendant.

51. **Superiority:** This class action is appropriate for certification because class proceedings are superior to all other available methods for the fair and efficient adjudication of this controversy and joinder of all members of the Class is impracticable. The damages suffered by the individual members of the Class will likely be small relative to the burden and expense of individual prosecution of the complex litigation necessitated by Motorola's wrongful conduct. Thus, it would be virtually impossible for the individual members of the Class to obtain effective relief from Motorola's misconduct. Even if members of the Class could sustain such individual litigation, it would not be preferable to a class action because individual litigation would increase the delay and expense to all parties due to the complex legal and factual controversies presented in this Complaint. By contrast, a class action presents far fewer management difficulties and provides the benefits of single adjudication, economy of scale, and comprehensive supervision by a single court. Economies of time, effort, and expense will be fostered and uniformity of decisions will be ensured.

52. **Policies Generally Applicable to the Class:** This class action is also appropriate for certification because Motorola has acted or refused to act on grounds generally applicable to the Class, thereby requiring the Court's imposition of uniform relief to ensure compatible standards of conduct toward the members of the Class, and making final injunctive relief appropriate with respect to the Class as a whole. Motorola's policies challenged herein apply and affect members of the Class uniformly and Plaintiff's challenge of these policies hinges on

Motorola's conduct with respect to the Class as a whole, not on facts or law applicable only to Plaintiff. Motorola has acted and failed to act on grounds generally applicable to Plaintiff and the other members of the Class, requiring the Court's imposition of uniform relief to ensure compatible standards of conduct toward members of the Class.

53. Plaintiff reserves the right to revise the foregoing "Class Allegations" based on facts learned in discovery.

FIRST CAUSE OF ACTION
Violation of the Illinois Consumer Fraud and Deceptive Business Practices Act
(815 ILCS §§ 505/1, *et seq.*)

54. Plaintiff incorporates by reference the foregoing allegations as if fully set forth herein.

55. The Illinois Consumer Fraud and Deceptive Business Practices Act ("ICFA") (815 ILCS § 505/1, *et seq.*) protects both consumers and competitors by promoting fair competition in commercial markets for goods and services.

56. The ICFA prohibits any unlawful, unfair, or fraudulent business acts or practices including, the employment of any deception, fraud, false pretense, false promise, false advertising, misrepresentation, or the concealment, suppression, or omission of any material fact.

57. The ICFA applies to Defendant's actions and conduct as described herein because it protects consumers in transactions that are intended to result, or which have resulted, in the sale of goods or services.

58. Defendant is a "person" as defined under section 505/1(c) of the ICFA.

59. Plaintiffs and each member of the Class are "consumers" as defined under section 505/1(e) of the ICFA.

60. The CLIQ XT mobile device is “merchandise” within the meaning of section 505/1(b) and its sale is considered “trade” or “commerce” under the ICFA.

61. Defendant violated the ICFA by representing that it would upgrade the operating system on the CLIQ XT to Android version 2.1, and concealing the fact that it was unwilling or unable to do so.

62. An upgraded operating system for the CLIQ XT is and was a material selling point of the mobile device, and a primary reason to continue to use the device over other alternatives. Plaintiff and Class Members relied on the representations made by Defendant about the impending upgrade to Android 2.1 when purchasing and/or not returning the CLIQ XT.

63. Defendant’s misrepresentations were such that a reasonable consumer would have considered them to be material in deciding whether to purchase Defendant’s CLIQ XT mobile device, whether to return an already purchased CLIQ XT, or to pay a lesser price. Had Plaintiff and the Class known of Defendant’s inability or unwillingness to upgrade the CLIQ XT operating system to Android 2.1, they would not have purchased the CLIQ XT, would have returned their CLIQ XT for a refund, or would have paid less for it.

64. Defendant further represented that the CLIQ XT would have the characteristic and benefit of being able to run and store commonly used mobile applications through its operating system.

65. As Plaintiff’s CLIQ XT cannot run and store commonly used mobile applications through its operating system, Defendant’s representation was false and misleading and constitutes further violation of the ICFA.

66. By representing that it would upgrade the operating system on the CLIQ XT to Android version 2.1, failing to disclose, and concealing the fact that it was unwilling or unable to

upgrade the operating system on the CLIQ XT to Android version 2.1, and representing that the CLIQ XT had the ability to run and store commonly used mobile applications when it did not, Defendant violated section 510/2(a) of the ICFA. That is, Defendant represented that the CLIQ XT had characteristics and benefits that it did not have, and represented that the CLIQ XT was of a particular standard, quality or grade when it was of another.

67. Based upon Defendant's misrepresentations and omissions described herein, Plaintiff and the Class reasonably expected that the CLIQ XT would be upgraded to the Android 2.1 operating system and would have the ability to run and store mobile applications. These are reasonable and objective consumer expectations for Defendant's mobile devices.

68. Plaintiff and the Class reasonably relied upon Defendant's misrepresentations and omissions by paying to purchase Defendant's CLIQ XT mobile device, not returning the device, and/or not paying a lower price to purchase it.

69. Defendant intended that Plaintiff and the Class would rely on its misrepresentations and omissions when deciding whether to purchase, return, or pay less for a CLIQ XT.

70. Defendant's false representations about the timing and existence of an operating system upgrade for the CLIQ XT was an act likely to mislead Plaintiff and the members of the Class acting reasonably under the circumstances, and constitutes an unfair and deceptive trade practice in violation of the ICFA.

71. Defendant's false representations about the characteristics and benefits of the CLIQ XT was an act likely to mislead Plaintiff and the members of the Class acting reasonably under the circumstances, and constitutes an unfair and deceptive trade practice in violation of the ICFA.

72. Section 510/2 of the ICFA prohibits the use of false advertising. Specifically, it prohibits the advertisement of goods or services with the intent not to sell them as advertised.

73. Defendant engaged in advertising and marketing to the public, and offered for sale the CLIQ XT on a nationwide basis. Defendant publically represented and advertised that it would upgrade the CLIQ XT to the Android 2.1 operating system. Defendant did so with the intent to induce Plaintiff and the Class to purchase and continue using the CLIQ XT.

74. Defendant's advertising and marketing statements were and are untrue or misleading and likely to deceive members of the public in that they portrayed the existence of a technical capability and benefit that Defendant knew or should have known it was unwilling or unable to deliver.

75. Defendant knew or should have known that its statements were false and misleading at the time that it made them and therefore, were in violation of the ICFA.

76. The ICFA also prohibits any other deceptive conduct that creates a likelihood of confusion or misunderstanding.

77. Defendant's representations that the CLIQ XT would be upgraded to the Android 2.1 operating system, when in fact it would not, is deceptive conduct that created confusion and misunderstanding for Plaintiff and the Class.

78. Likewise, Defendant's representations that the CLIQ XT could run and store commonly used mobile applications through its operating system, when in fact it could not, is deceptive conduct that created confusion and misunderstanding for Plaintiff and the Class.

79. As a direct and proximate result of Defendant's violation of the ICFA, Plaintiff and each Class member have suffered harm in the form of monies paid to Defendant. Plaintiff, on behalf of himself and the Class, seeks an order (1) requiring Defendant to cease the unfair

practices described herein; (2) awarding damages, interest, and reasonable attorneys' fees, expenses, and costs to the extent allowable; and/or (3) requiring Defendant to restore to Plaintiff and each Class member any money acquired by means of unfair competition (restitution).

SECOND CAUSE OF ACTION
Fraud by Omission

80. Plaintiff incorporates by reference the foregoing allegations as if fully set forth herein.

81. Based on Defendant's misrepresentations and omissions, Plaintiff and the Class reasonably expected the CLIQ XT to be upgraded to the Android 2.1 operating system. This is a reasonable and objective consumer expectation for Defendant's mobile devices.

82. Defendant knew that it was unable or unwilling to upgrade the CLIQ XT to the Android 2.1 operating system.

83. Defendant concealed from and failed to disclose to Plaintiff and the Class its inability or unwillingness to upgrade the CLIQ XT operating system to Android 2.1.

84. Likewise, Defendant failed to disclose that the CLIQ XT would not run or store commonly used mobile applications through its operating system without such an upgrade.

85. Defendant was under a duty to Plaintiff and the Class to disclose its inability or unwillingness to upgrade the CLIQ XT to Android 2.1, and the device's inability to run or store commonly used mobile applications without the upgrade, because:

- a) Defendant was in a superior position to know the true state of facts about the upgrade ability or potential for the CLIQ XT;
- b) Plaintiff and the Class could not reasonably have been expected to learn or discover that Defendant was unable or unwilling to upgrade the CLIQ

XT's operating system;

- c) Defendant knew that Plaintiff and the Class could not reasonably have been expected to learn or discover the upgrade issues;
- d) Defendant directly marketed and communicated with Plaintiff and the Class through its website, and specifically engaged Plaintiff and the Class for the purpose of inducing prospective customers to purchase a phone and to retain existing customers;
- e) Defendant's omissions made through its website and Twitter account were meant to result in the sale of its CLIQ XT mobile device; and,
- f) Defendant was required by the provisions of the ICFA to honestly and accurately disclose material information related to the CLIQ XT, or, at the very least, not to intentionally conceal it.

86. The facts concealed or not disclosed by Defendant to Plaintiff and the Class are material in that a reasonable consumer would have considered them to be important in deciding whether to purchase Defendant's CLIQ XT mobile device, whether to return an already purchased CLIQ XT, or whether to pay a lesser price for it.

87. Had Plaintiff and the Class known of Defendant's inability or unwillingness to upgrade the CLIQ XT operating system to Android 2.1, and that the CLIQ XT would be unable to run or store commonly used mobile applications without such an upgrade, they would not have purchased the CLIQ XT, would have returned an already purchased CLIQ XT, or would have paid less for it.

88. Defendant concealed or failed to disclose the true nature of its ability or willingness to upgrade the CLIQ XT operating system to Android 2.1 in order to induce Plaintiff and the Class to act thereon.

89. Plaintiff and the Class justifiably relied on Defendant's omissions to their detriment by purchasing the CLIQ XT, not returning the CLIQ XT, and/or not paying a lesser price for it.

90. As a direct and proximate result of Defendant's misconduct, Plaintiff and the Class have suffered actual damages in the form of monies paid to purchase the CLIQ XT, as well as the difference in value between a CLIQ XT with Android 2.1 and one with Android 1.5.

THIRD CAUSE OF ACTION
Restitution/Unjust Enrichment

91. Plaintiff incorporates by reference the foregoing allegations as if fully set forth herein.

92. Plaintiff and the Class have conferred a benefit upon Defendant. Defendant has received and retained money belonging to Plaintiff and the Class as a result of its unlawful and deceptive practices alleged herein.

93. Defendant appreciates or has knowledge of said benefit.

94. Under principles of equity and good conscience, Defendant should not be permitted to retain the money belonging to Plaintiff and the Class that it unjustly received as result of its actions.

95. Plaintiff and the Class have suffered financial loss as a direct result of Defendant's conduct.

96. Plaintiff, on his own behalf and on behalf of the Class, seeks restitution and disgorgement of the monies Defendant received as a result of its conduct described herein, as well as interest, to the extent allowable.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Jack Haught, on behalf of himself and the Class, respectfully requests that this Court issue an order:

- a. Certifying this case as a class action on behalf of the Class defined above, appointing Jack Haught as class representative, and appointing his counsel as class counsel;
- b. Declaring that Defendant's actions, as set out above, constitute violations of the ICFA (815 ILCS §§ 505/1, *et seq.*), fraud by omission, and unjust enrichment;
- c. Awarding Plaintiff and the Class all appropriate damages;
- d. Awarding the injunctive relief necessary to ensure that Defendant's conduct alleged herein does not continue into the future;
- e. Awarding Plaintiff and the Class restitution in the form of complete disgorgement of all revenue derived from sales of the CLIQ XT mobile device;
- f. Awarding Plaintiff and the Class their reasonable litigation expenses and attorneys' fees;
- g. Awarding Plaintiff and the Class pre- and post-judgment interest, to the extent allowable;
- h. Entering such other injunctive and/or declaratory relief as necessary to protect the interests of Plaintiff and the Class; and
- i. Awarding such other and further relief as equity and justice may require.

JURY TRIAL

Plaintiff demands a trial by jury for all issues so triable.

Respectfully submitted,

Dated: April 5, 2012

JACK HAUGHT, individually and on behalf of all
others similarly situated,

By: /s/ Christopher L. Dore
One of Plaintiff's Attorneys

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EXHIBIT A

APRIL 13, 2010

Region/Country	Update Status
DRROID by Motorola (USA)	The DRROID by Motorola over-the-air software upgrade to 2.1 is completed**
MILESTONE (Europe)	Upgrade to Android 2.1 for select countries/cameras* is currently rolling out in stages
MILESTONE (Latin America)	Upgrade to Android 2.1 for select countries/cameras* is currently rolling out in stages
MILESTONE (Asia-Pacific)	Upgrade to Android 2.1 for select countries/cameras* is currently rolling out in stages
MILESTONE (Canada)	Upgrade to Android 2.1 is currently rolling out in stages
BACKFLIP (USA)	Upgrade to Android 2.1 planned for Q3
BACKFLIP (Asia-Pacific)	Upgrade under evaluation
BACKFLIP (Canada)	Upgrade under evaluation
BACKFLIP (Europe)	Upgrade under evaluation
BACKFLIP (Latin America)	Upgrade under evaluation
DROID (USA)	Upgrade to Android 2.1 planned for Q3
DROID (USA)	Upgrade to Android 2.1 planned for Q3
DEVOUR (USA)	Upgrade under evaluation
DEXT (Europe)	Upgrade under evaluation
DEXT (Asia-Pacific)	Upgrade to Android 2.1 planned for Q3
DEXT (Latin America) and Mexico	Upgrade under evaluation
QUENCH (Asia-Pacific)	Upgrade under evaluation
QUENCH (Canada)	Upgrade under evaluation
QUENCH (Latin America and Mexico)	Upgrade under evaluation

Q2 = Second Quarter of 2010

Q3 = Third Quarter of 2010

* Some countries/camera combinations in the region are still under evaluation for an update

** Over-the-air in the U.S. and have not upgraded to Android 2.1 can initiate the upgrade by going to Menu > Settings > About phone > System updates or the DRoid and following the instructions to download and install. For help, please visit: www.motorola.com/updates

JUNE 17, 2010

Region/Country	Update Status
DRROID by Motorola (USA)	The DRROID by Motorola over-the-air software upgrade to 2.1 is completed**
MILESTONE (Europe)	Upgrade to Android 2.1 for select countries/cameras* is currently rolling out in stages
MILESTONE (Latin America)	Upgrade to Android 2.1 for select countries/cameras* is currently rolling out in stages
MILESTONE (Asia-Pacific)	Upgrade to Android 2.1 for select countries/cameras* is currently rolling out in stages
MILESTONE (Canada)	Upgrade to Android 2.1 is currently rolling out in stages
BACKFLIP (USA)	Upgrade to Android 2.1 planned for Q3
BACKFLIP (Asia-Pacific)	Upgrade under evaluation
BACKFLIP (Canada)	Upgrade under evaluation
BACKFLIP (Europe)	Upgrade under evaluation
BACKFLIP (Latin America)	Upgrade under evaluation
DROID (USA)	Upgrade to Android 2.1 planned for Q3
DROID (USA)	Upgrade to Android 2.1 planned for Q3
DEVOUR (USA)	Upgrade under evaluation
DEXT (Europe)	Upgrade under evaluation
DEXT (Asia-Pacific)	Upgrade to Android 2.1 planned for Q3
DEXT (Latin America) and Mexico	Upgrade under evaluation
QUENCH (Asia-Pacific)	Upgrade under evaluation
QUENCH (Canada)	Upgrade under evaluation
QUENCH (Latin America and Mexico)	Upgrade under evaluation

Q2 = Second Quarter of 2010
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* Some countries/camera combinations in the region are still under evaluation for an update
** Over-the-air in the U.S. and have not upgraded to Android 2.1 can initiate the upgrade by going to Menu > Settings > About phone > System updates or the DRoid and following the instructions to download and install. For help, please visit: www.motorola.com/updates

Motorola update list

Screen shot 2010-06-17 at 1:45:22 PM

DECEMBER 22, 2010

Phone Model*	Timeline
USA	
BACKFLIP MB300	Upgrade to Android 2.1 now available here .
CLIQ MB200	Upgrade to Android 2.1 now available here .
CLIQ XT MB501 (T-Mobile)	Upgrade to Android 2.1 - additional testing in process - more details when available.
CLIQ XT MB501 (Wal-Mart)	Will remain on Android 1.5.
DEVOUR A555	Will remain on Android 1.6.
DROID A855	Upgrade to Android 2.2 is complete**.
DROID X MB810	Upgrade to Android 2.2 available (Menu > Settings > About phone > System updates).
MILESTONE A804	Will remain on Android 2.1.
MILESTONE XT700	Will remain on Android 2.1.

FEBRUARY 22, 2011

Phone Model*	Timeline
USA	
BACKFLIP MB300	Upgrade to Android 2.1 now available here .
CHARM MB502	Will remain on Android 2.1.
CLIQ MB200	Upgrade to Android 2.1 now available here .
CLIQ XT MB501 (T-Mobile)	Will remain on Android 1.5. For info, click here .
CLIQ XT MB501 (Wal-Mart)	Will remain on Android 1.5.
DEVOUR A555	Will remain on Android 1.6.
DROID A855	Upgrade to Android 2.2 is complete**.
DROID X MB810	Upgrade to Android 2.2 available (Menu > Settings > About phone > System updates).
FLIPOUT MB511	Will remain on Android 2.1.
MOTOROLA i1	Will remain on Android 1.5.
MILESTONE A854	Will remain on Android 2.1.
MILESTONE XT720	Will remain on Android 2.1.

EXHIBIT B

CLIQ XT: Upgrade to 2.X?

Answered.



BanR

I was just wondering if there is any update coming out for the xt or will we be getting the same 2.0 update as the cliq soon.

Correct Answer fletch33

we will be getting an update and most of what i read is about it happening in the 2nd quarter of this year so i assume within the next 3 months. it may or may not be the exact same update as the CLIQ since we have some differences already in our phones but it is coming 😊



See the answer in context

Tags: it, mobile, upgrade, cliqxt_mb501



Mark (Forums Manager)

Re: CLIQ XT: Upgrade to 2.X?

This just in. CLIQ XT made it. [Software Upgrade News](#)

Mark
Support Forums Manager



Mark (Forums
Manager)

CLIQ XT: Get an email alert when T-mobile upgrade 2.1 is released

Inspired by Matt and as the result of some wild threads, I've created a way to be alerted when the 2.1 upgrade was released. While the primary notification will be when the upgrade alert pushed to your phone, it is a reasonable request to know when the rollout starts or is announced.

So, when the upgrade timing is announced, I will share it on this thread. However, I am going to lock this thread so you will get no other messages -- no comments and discussion. When the time comes, I will unlock the thread and post the news.

Simple click the "**Receive email notifications**" button there on the right to get the news when it comes.

You can, of course, continue to follow the many other threads that are discussing the upcoming 2.1 upgrade.

To see the latest projected dates for planned upgrades visit our [Motorola Android Software Upgrade News](#)



Matt (Forums Manager)

CLIQ 2.1 upgrade – news

For those asking for an update regarding a software upgrade on CLIQ in the U.S., we've made a decision to take more time on the release to optimize the experience in some key areas. We will continue to work to deliver it as soon as possible and apologize that we have been unable to provide an upgrade to these users in Q2 as planned.

We are working hard to provide an upgrade to Android 2.1 as soon as we can. Our consumers' experience is our first priority and we will provide an upgrade when we can deliver the best possible user experience.

*****Update Aug 20, 2010 10:54 AM*****

CLIQ™, CLIQ XT™ and Backflip™ customers:

The quality of experience for consumers is a top priority in providing upgrades to our current product portfolio. In working through Android 2.1 upgrades for CLIQ™, CLIQ XT™, and Backflip™, certain hardware configurations have been limiting upgrade capabilities. We are currently integrating and testing HW drivers essential for OpenGL functionality for these upgrades. We believe OpenGL, the industry's most widely used, supported and best documented 2D/3D graphics API, is an integral part of our customer experience and we're taking the time to ensure this experience is optimized on these products. Testing continues and we anticipate providing the upgrade on each of these devices in the late Q3/early Q4 timeframe.

Mark
Support Forums Manager

Tags: cliq, android_2.1, upgrade_news



Mark (Forums Manager)

CLIQ XT 2.1 T-Mobile upgrade - News

For those asking for an update regarding a software upgrade on CLIQ™ with MOTOBLUR™/ CLIQ XT™ with MOTOBLUR™ in the US, we've made a decision to take more time on the release to optimize the experience in some key areas. We will continue to work to deliver it as soon as possible and apologize that we have been unable to provide an upgrade to these users in Q2 as planned.

We are working hard to provide an upgrade to Android 2.1 as soon as we can. Our consumers' experience is our first priority and we will provide an upgrade when we can deliver the best possible user experience.

*****Update Aug 20, 2010 10:54 AM*****

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*****October 26th 4:00 PM*****

CLIQ XT rollout now Q4. We'll let you know when it goes into pre-release status.

Mark
Support Forums Manager

Motorola Android Software Upgrade News



Mark (Forums Manager)

Re: CLIQ XT 2.1 upgrade - News

@hughh2d2

1. There was never any plan to put Android 1.6 on CLIQ XT. This was mis-information not based on any fact.
2. We attempted to offer the upgrade in Q2 but an opportunity to further optimize the upgrade arose late in Q2 which delayed this to Q3 and then several factors in Q3 after OpenGL and JIT compiler implementation required our additional attention. We communicated this June 30th(root post of this thread).
3. Again we attempted to offer the upgrade in Early Q4 (October) but several circumstances have further contributed to a delay. As this information was made available it was posted on the upgrade news site. (August 20th) and (October 26th).
4. We're getting closer. I don't have a definite date yet but we're close to pending approval from our business partners. Once that is in place I expect we'll announce a soak opportunity [here](#).

Mark
Support Forums Manager



Re: CLIQ XT 2.1 T-Mobile upgrade - News (Second Edition)

Hey Folks,

Couple updates here for you.

1. No upgrade this week.
2. Sorry about the forum notifications not being delivered. I am looking into it.

Can everyone tell me what the last notification was that they received?

<https://supportforums.motorola.com/message/298151#298151>

December 11th is the last day I received notifications from this thread. The below message was the last one I received. If anyone still has their notifications and can see the gap, I would appreciate it.

CLIQ XT 2.1 T-Mobile upgrade - News (Second Edition)

reply from @b0bdw01 in *CLIQ XT™ with MOTOBLUR™* - view the full discussion

Just for fun(no money), my bet is that the update WILL COME BEFORE CHRISTMAS!

On Dec 11, 2010 11:26 AM, "rangus" <

Mark
Support Forums Manager



CLIQ XT 2.1 T-Mobile upgrade - News (Second Edition)

Today we posted this statement on our [Software Upgrade News](#) page. "After comprehensive testing of the Android 2.1 upgrade for the CLIQ XT, we have concluded that this device will remain on Android 1.5. We realize many of you were anxiously awaiting this upgrade, but we aim to deliver software upgrades only when it will provide a better customer experience."

For many of you on our forums, I know this is disappointing news. Mark and I were optimistic about the outcome of the CLIQ XT development process and were also disappointed in the final result.

Our product team members worked for months to attempt to create a version of Android 2.1 that would perform well on the CLIQ XT. When the software could not meet the basic performance standards required, they went back to the drawing board multiple times. They gave it everything they had. We even took the unprecedented step of investigating the benefits of code provided by the independent developer community to try to improve XT performance. In the end, we were not able to develop a version of Android 2.1 for CLIQ XT that would deliver an optimal customer experience.

Some of you will wonder why we didn't announce this sooner. For one, we didn't learn about this all that long ago. Then, it has taken some time to coordinate with T-Mobile and alert our call center agents and others of the decision.

We recognize that many of you will be frustrated by this news. As always, you are free to post your comments, but please keep them civil and within the bounds of our [SITE RULES](#).

EXHIBIT C



Motorola

Continuing work on upgrade for CLIQ/CLIQ XT to deliver even better experience and will update on timing when we can.



Motorola

@ Testing for the CLIQ/CLIQ XT update is still in progress - As soon as we have a release date, we'll share it here!



Motorola

@ We're currently testing 2.1 for the CLIQ/CLIQ XT - As soon as we have any news re: release timing, we'll share it here!



Motorola

@ Hi - The CLIQ XT upgrade is slated for late Q3/early Q4. For more info, please see:



Motorola

@ @ As soon as we have specific details to share about the CLIQ XT upgrade timing, we'll share it here.



Motorola

@ @ @ We are currently working to upgrade CLIQ and CLIQ XT to Android 2.1 in Q4. Apologies for any confusion.



Motorola

@ @ @ We are currently working to upgrade CLIQ and CLIQ XT to Android 2.1 in Q4. Apologies for any confusion.