Roy A. Katriel, (SBN 265463)
THE KATRIEL LAW FIRM
4225 Executive Square, Suite 600
La Jolla, California 92037
Telephone: 858-242-5642
Facsimile: 858-430-3719
Email: rak@katriellaw.com

Counsel for Plaintiff Adrienne Moore

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

ADRIENNE MOORE, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED,

Plaintiff,

v.

APPLE INC.

Defendant.

Case No.: 5:14-CV-02269-LHK

PLAINTIFF'S OPPOSITION TO DEFENDANT APPLE INC.'S MOTION TO DISMISS CLASS ACTION COMPLAINT

Hearing Date: November 13, 2014
Time: 1:30 pm
Place: Courtroom 8, 4th Floor
Judge: Honorable Lucy H. Koh

Dockets.Justia.com

TABLE OF CONTENTS

INTRODUCTION, FACTUAL BACKGROUND, AND SUMMARY OF ARGUMENT……….1

ARGUMENT…………………………………………………………………………..……..4

I. TORTIOUS INTERFERENCE WITH CONTRACT IS PROPERLY PLED ………………4

A. Moore Pled A Valid Contract Between Verizon And Her. ….…………………….…….4

B. Moore Pled Apple's Knowledge Of The Contract………………………………………6

C. Moore Pled Apple's Intentional Acts That Disrupted The Contract…………………..…9

D. Moore Has Properly Alleged An Actual Contractual Breach Or Disruption…………...10

E. Moore Pled Damages Resulting From The Tortious Interference………………………11

II. MOORE HAS STANDING TO PLEAD AND HAS PLED A CLRA CLAIM…………..…11

A. iMessage Is Not Merely Software, And Is Reachable By The CLRA…………………..12

1. iMessage Is A "Service" Within The Meaning Of The CLRA………………..12

2. iMessage Also Meets The CLRA Definition Of A "Good."…………………..…15

B. Moore Did Not Obtain iMessage For Free…………………………………………………16

C. Moore Has Pled An Actionable Omission Under The CLRA…………………………..17

1. Apple's Omission Was Actionable Because It Occurred Before Moore Downloaded iMessage…………………………………………………..…….18

2. Apple Had A Duty To Disclose……………………………………………..…19

a. The Omission Was Contrary To Apple's Partial Representation…………….…20

b. Apple Had A Duty To Disclose Due To Its Exclusive Knowledge………….22

III. MOORE PLED A VIABLE UCL CLAIM………………………………………………….23

IV. THE CAC SATISFIES THE PARTICULARITY PLEADING REQUIREMENT………...24

CONCLUSION…………………………………………………………………………….……..25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

Cases:

AGA Shareholders, LLC v. CSK Auto, Inc.,
2007 WL 2320532 (D. Ariz. Aug. 10, 2007)……………………………………...……..……5

Ashcroft v. Iqbal,
556 U.S. 662 (2009)…………………………………………………………….………8

Baba v. Hewlett-Packard Co.,
2011 WL 317650 (N.D. Cal. Jan. 28, 2011)……………………………………….…..19

Bardin v. Daimlerchrysler Corp.,
136 Cal. App.4th 1255 (2006)………………………………………………………..22

Bell Atlantic v. Twombly,
550 U.S. 544 (2007)…………………………………………………………….………8

Benson v. JP Morgan Chase Bank, NA,
2010 WL 1526394 (N.D. Cal. Apr. 15, 2010)……………………………………….…….7

Blizzard Entertainment Inc. v. Ceiling Fan Software LLC,
2013 WL 5511596 (C.D. Cal. Sept. 23, 2013)…………………………………….…...23

Catch Curve v. Venali, Inc.,
519 F. Supp.2d 1028 (C.D. Cal. 2007)…………………………………………….………5

Chaganti v. i2Phone Int'l, Inc.,
635 F. Supp.2d 1065 (N.D. Cal. 2007)……………………..…………………….………11

Elias v. Hewlett-Packard Co.,
2014 WL 493034 (N.D. Cal. Feb. 5, 2014)………………………………………20, 22, 23

GHK Associates v. Mayer Group, Inc.,
224 Cal. App.3d 856(1990)…………………………………………………………..……11

Gray v. Toyota Motor Sales, USA,
2012 WL 313703 (C.D. Cal. Jan. 23, 2012)……………………………...……………22

Image Online Design, Inc. v. ICANN,
2013 WL 489899 (C.D. Cal. Feb. 7, 2013)………………………………………….…..6

In re Apple and AT&T iPad Unlimited Data Plan Litig.,
802 F.Supp.2d 1070 (N.D. Cal. 2013)……………………………………………………12

In re Apple In-App Purchase Litig.,
855 F. Supp.2d 1030 (N.D. Cal. 2012)……………………………………….………14

In re iPhone Application Litig.,
2011 WL 4403963 (N.D. Cal. Sept. 20, 2011)……………………..………..…………13

In re Sony PS3 Other OS Litig.,
No. 11-18066, 551 Fed. Appx. 916 (9th Cir. Jan. 6, 2014)…………………………..…..17

Jewelry 47, Inc. v. Biegler,
2008 WL 4642903 (E.D. Cal. Oct. 16, 2008)……………………..……………..………8

Keegan v. American Honda Motor Co.,
838 F. Supp.2d 929 (C.D. Cal. 2012)…………………………………………..………..8

Khoday v. Symantec Corp.,
858 F. Supp.2d 1004 (D. Minn. 2012)…………………………..……………………14

Kowalsky v. Hewlett-Packard Co.,
771 F. Supp.2d 1138 (N.D. Cal. 2010)……………………………...……….………19

LiMandri v. Judkins,
52 Cal. App.4th 326 (1997)………………………………………………………………..22

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992)…………………………………………………………..…………1

MacDonald v. Ford Motor Co.,
2014 WL 1340339 (N.D. Cal. Mar. 31, 2014)…………………………………..……..23

Mui Ho v. Toyota Motor Corp.,
931 F. Supp.2d 987 (N.D. Cal. 2013)…………………………………………………….20

Oracle Corp. v. DrugLogic Inc.,
807 F. Supp.2d 885 (N.D. Cal. 2011)…………………………………………..………..8

Pacific Gas & Elec. Co. v. Bear Stearns & Co.,
50 Cal. 3d 1118 (1990)……………………………………………………………….10, 11

Perrine v. Sega of America,, Inc.,
2013 WL 6328489 (N.D. Cal. Oct. 3, 2013)………………………..……………..14, 15

Piping Rock Partners, Inc. v. David Lerner Assocs., Inc.,
946 F. Supp.2d 957 (N.D. Cal. 2013)………………………………...……………4, 9

Quelimane Co. v. Stewart Title Guaranty Co.,
19 Cal. 4th 26 (1998)…………………….………………………….………………..……4, 9

Reeves v. Hanlon,
33 Cal. 4th 1140 (2004)………………………………………..…………………10

Semegen v. Weidner,
780 F.2d 727 (9th Cir. 1985)……………………………………………………………23

Swingless Golf Club Corp. v. Taylor,
679 F. Supp.2d 1060 (N.D. Cal. 2009)……………………………………………………….8

Wofford v. Apple Inc.,
2011 WL 5445054 (S.D. Cal. Nov. 9, 2011)…………………………………………..…….17

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28

Defendant Apple Inc.'s ("Apple" or "Defendant") motion to dismiss Plaintiff Adrienne Moore's ("Plaintiff" or "Moore") Class Action Complaint ("CAC") is without merit and should be rejected out of hand.

INTRODUCTION, FACTUAL BACKGROUND, AND SUMMARY OF ARGUMENT

Moore pleads a straightforward narrative by which Apple equipped its iPhone devices with a service known as iMessage that enables Apple device users to send text messages to other Apple device users without incurring wireless service charges. *See* CAC, at ¶ 1. Unbeknownst to Moore, however, once an Apple user switches her telephone to a non-Apple device, as Ms. Moore did, that very same Apple iMessage service prevents her from receiving text messages that are sent by other Apple devices to the user's new non-Apple phone. *Id*. at ¶ 13. So when Ms. Moore switched her iPhone 4 to a Samsung phone, she was unable to receive any text messages that were sent to her from Apple devices—and this was all due to an undisclosed feature of Apple's iMessage service that Apple encouraged her to download on her old iPhone. *Id*. at ¶¶ 5,13-15. Moore's experience is hardly anomalous—countless of former Apple device users nationwide have experienced the same fate, being unable to receive text messages from Apple users once they switch their wireless service to a non-Apple device. *Id*. at ¶¶ 24-26, and Ex. 1 to CAC.

If proven true, Moore's allegations plainly state a claim against Apple for tortious interference with contract. Moore has a wireless service contract with Verizon that allows her to receive calls and text messages on her new Samsung phone. Yet, solely as a result of Apple's intermeddling through its iMessage service, Moore is prevented from receiving the very text messages that her wireless service contract entitles her to obtain. Like any victim of a tortious interference with contract, Moore has been damaged by not being able to receive the benefits of her existing contract (i.e., paying for a wireless service contract that Apple prevents her from fully enjoying) as a direct result of the defendant's interference with that contractual relationship. And, regardless of whether she will ultimately prevail at trial, her allegations assuredly suffice to demonstrate Article III standing because she has pled an actual injury-in-fact proximately caused by Apple's conduct that can be redressed through a Court judgment in her favor. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (detailing elements of standing at the pleadings stage).

Moore's first and principal claim is one for tortious interference of contract. *See* CAC, at Count I. Yet, Apple does not even address this principal count until the *last two pages* of its brief, and then only in conclusory fashion. *See* Apple's Br. at 17:16-19:12. When Apple does finally get around to mentioning Moore's first claim for tortious interference with contract, its arguments are wholly unavailing. Apple falsely claims that Moore failed to identify the contractual terms at issue. *See* Apple's Br. at 18:3-10. This is not so. *See* CAC, ¶¶ 10, 36. Equally wrong is Apple's claim that there is no allegation of interference when, of course, the CAC is replete with descriptions of how the iMessage system prevents Moore and others from receiving the text messages from Apple users that she is entitled to receive under her wireless service contract. *See* CAC, ¶¶ 1, 5, 13-15, 37. Lastly, Apple erroneously claims that Moore's contract with Verizon does not contain a "guarantee" that Moore will receive all her text messages so Apple's intermeddling could not result in a breach of that contract. *See* Apple's Br. at 8:22-9:2. That a contracting party does not expressly guarantee its performance does not excuse a third-party's affirmative intermeddling in a manner that stifles the contractual relationship.

Apple's non-disclosure of the fact that its iMessage service will prevent a user from receiving text messages from Apple senders once that user switches to a non-Apple device also is a material omission that states a claim under the California Consumer Legal Remedies Act ("CLRA"). *See* CAC, at Count II. Apple's claim that the CLRA does not reach its conduct because iMessage is an intangible item of software to which the statute does not apply misses the mark. See Apple's Br. at 16:21-17:15. The iMessage is a service for transmitting text messages between users and hence falls within the scope of the CLRA. It is also independently actionable under the CLRA as a "good" because under Apple's own iOS 5 License Agreement, the owner of an iPhone has the right to use the iMessage service as part of the her ownership of the phone.

Apple's claim that its misdeeds are not actionable under the CLRA because the iMessage service is offered for "free" and hence is not a "sale" under the statute is wrong as well. *Id*. at 15:18-16:7. The iMessage service forming part of Apple's iOS operating system is not provided by Apple as a standalone "free" item to the public at large. Instead, one can only obtain the iMessage service by purchasing an iPhone or Apple device that either is preloaded with the iMessage application, or

by downloading an upgrade that contains this application but only *after one has purchased* an Apple device to which the upgrade applies. Either way, *a purchase* of an iPhone (either preloaded with iMessage or upgradeable to include it) is required in every case.

Moore has pled a material omission within the meaning of the CLRA because Apple failed to disclose that using iMessage would prevent her from receiving text messages sent from Apple devices once she switched away to a non-Apple phone. Apple had a duty to disclose this material consequence both because it contradicts Apple's partial representation about iMessage that Apple made in its iOS 5 License Agreement, and because, as the developer of iMessage, Apple had exclusive knowledge of its functioning and adverse consequences on users like Moore.

Contrary to Apple's suggestion, that Apple's omission happened after Moore had her iPhone 4 in hand does not negate Moore's reliance. *See* Apple's Br. at 16:8-20. Under Apple's License Agreement, Moore's purchase of her iPhone 4 device also entailed and entitled Moore to receive as part of that purchase transaction all upgrades that Apple made available for her iPhone 4, including the iOS 5 upgrade that contained the iMessage service. Because Apple's omission occurred before Moore downloaded iMessages, she could and did rely on Apple's omission in choosing to download iMessage onto her iPhone 4. Moore properly pled that she would not have made that download had Apple disclosed the actual adverse consequences that iMessage would have on her ability to receive text messages.

Misrepresenting Moore's allegations, Apple falsely claims that the CAC admits that Apple advised users to switch off iMessage before switching away from an iPhone to a non-Apple device. *See* Apple's Br. at 4:28-5:2 (citing Ex. 2 to CAC at 2). But this alleged disclosure by Apple was not made until March 2014, well *after* Moore and other consumers had switched away from their iPhone devices and began experiencing problems receiving text messages on their non-Apple devices. *See* Ex. 2 to CAC at 3 (documenting that Apple's website posting was last modified on March 10, 2014). Further, Apple neglects to mention that, in any event, its supposed fix does not prevent or solve the problem because even when consumers switch off their iMessage application, they still are unable to receive text messages on their new non-Apple phones. *See* CAC, at p.10 (news article in which Apple admits that "[t]here are no reliable solutions right now" and "[t]he engineering team is

working on it but is apparently clueless as to how to fix it.”).

Apple’s attack on Moore’s Unfair Competition Law (“UCL”) claim (Count III) fails for the same reasons that Apple’s challenge to Moore’s CLRA claim fails. In addition, having stated viable claims for tortious interference with contract and for CLRA violations, Moore has pled a sufficient basis for her UCL “unlawful business practice” claim. Moreover, because Moore provided detailed allegations of what, when, and how Apple failed to disclose, she has satisfied any particularity pleading requirements that may be applicable to some of her CLRA and UCL claims.

For all the foregoing reasons, as detailed below, Apple’s motion should be denied.

ARGUMENT

I. TORTIOUS INTERFERENCE WITH CONTRACT IS PROPERLY PLED.

Moore’s first claim for relief is for tortious interference with contract. *See* CAC, at Count I. Apple ignores this principal claim until the next to last page of its brief, and then makes only conclusory arguments. *See* Apple’s Br. at 17:16:-19:12. As Apple acknowledges, the elements of a tortious interference with contract claim are “(1) a valid contract between plaintiff and a third party; (2) a defendant’s knowledge of this contract; (3) defendant’s intentional acts designed to induce a breach or disruption of this contract; (4) actual breach of disruption of the contractual relationship; and (5) resulting damage.” Apple’s Br. at 17:17-21 (quoting *Piping Rock Partners, Inc. v. David Lerner Assocs., Inc.*, 946 F. Supp.2d 957, 979 (N.D. Cal. 2013) (citing *Quelimane Co. v. Stewart Title Guaranty Co.*, 19 Cal. 4th 26, 55 (1998)). Moore properly alleges each of these.

A. Moore Pled A Valid Contract Between Verizon And Her.

Apple concedes, as it must, that Moore “alleges that she had a contract with her wireless carrier.” Apple’s Br. at 18:3-4. Moore assuredly did so. *See* CAC, at ¶¶ 5, 15, 17, 36. Despite this, Apple claims that Moore “does not allege facts sufficient to identify the specific terms of any particular agreement(s) that were breached by Apple’s interference.” Apple’s Br. at 18:4-6. This is inaccurate. Moore not only alleged that she had a contract for wireless service with Verizon, but also specifically pointed out the contractual term at issue that was adversely impacted by Apple’s conduct. She pled that, “Plaintiff was an owner of an iPhone 4 device and subscribed to Verizon

Wireless for her cellular telephone needs. As part of her cellular service, she was entitled to obtain, *inter alia*, voice telephone calls and text messages for a monthly fee."). CAC, at ¶ 5; *see also id*. at ¶ 15 ("Apple's iMessage and Messages service and application prevent these users from receiving the text messages that they are entitled to receive as part of their wireless service contracts with their wireless providers (Verizon Wireless, in the case of Plaintiff). Count I of the CAC details that:

> Plaintiff and the class members are subscribers to wireless cellular service who *have a contractual relationship with a wireless carrier or service provider (Verizon Wireless, in the case of Plaintiff) to receive cellular service on their non-Apple cellular telephone or other wireless devices (the Samsung S5, in Plaintiff's case). As part of that contract, Plaintiff and the class members are entitled to, inter alia, send and receive text messages in exchange for the monthly fee and charges they pay to their wireless carrier*.

CAC, at ¶ 36 (emphasis added).

Contrary to Apple's self-serving accusation, Moore has not only generally pled the existence of her contract with Verizon, but also has identified the specific provision at issue (the ability to receive text messages) within that contract that was adversely impacted by Apple's actions. This is all that is required to state the first element of a tortious interference with contract claim.

A tortious interference with contract claim is subject only to notice pleading under Federal Rule of Civil Procedure 8. A plaintiff is therefore not required to identify, as Apple would have it do, the specific contractual document or language that was allegedly impacted by the defendant's actions. Once the existence of the contractual duty at issue is pled, that allegation suffices at the pleadings stage, and the precise phrasing of the contractual term may be obtained through discovery. *See Catch Curve v. Venali, Inc.*, 519 F. Supp.2d 1028, 1039 (C.D. Cal. 2007) ("In the complaint, Venali did not identify the particular contract(s) with which Catch Curve allegedly interfered. . . . Through discovery and the parties' supplemental responses, Venali has now identified these contracts. As the notice pleading standard under the Federal Rules of Civil Procedure is liberal, the Court finds that Catch Curve will not be prejudiced if the tortious interference claim is permitted to remain."); *see also AGA Shareholders, LLC v. CSK Auto, Inc.*, 2007 WL 2320532, at *4 (D. Ariz. Aug. 10, 2007) (finding that the "the complaint states a claim for tortious interference under traditional notice pleadings standards" where it pled the existence of a contract and the described the

contractual term that was interfered with).[1]

B. Moore Pled Apple's Knowledge Of The Contract.

Moore also has pled that Apple knew of the existence of this contract, thereby satisfying the second element of her tortious interference claim. *See* CAC, at ¶ 38. And far from merely doing so in conclusory fashion, Moore's pleading explains *why* it is plausible to allege that Apple knew of this contractual relationship between Moore and Verizon:

> Apple was aware of the existence of the wireless service contract between, on the one hand, Plaintiff or the class members and, on the other hand, the class members' wireless service providers because these same class members were Apple device owners whose wireless accounts were updated by the wireless service provider to reflect that they no longer were to receive their wireless service on their former Apple devices, but instead, were to have their wireless service be provided on non-Apple devices that the class members had chosen as replacements for their Apple devices.

CAC, at ¶ 38.

Further buttressing Moore's allegation of Apple's knowledge is the fact that Apple's own declarant whose testimony Apple advanced in support of its motion to dismiss, admitted that:

> Apple maintains information related to purchases of Apple's iPhones. I access and review those records in the normal course of my duties for Apple. I reviewed Apple's internal records regarding Adrienne Moore's purchases of iPhones. Those records show that Ms. Moore purchased an iPhone 4 in March 2011.

Declaration of Jeffrey Kohlman in Support of Apple's Mtn. To Dismiss [Dkt. No. 18-1], at ¶ 2.

Apple's dealings with Verizon and other wireless service providers through which it

---

[1] Apple's attempted reliance on *Image Online Design, Inc. v. ICANN*, 2013 WL 489899, at *9 (C.D. Cal. Feb. 7, 2013) (cited in Apple's Br. at 18:6-10), to urge a different result is unavailing. In *Image Online*, the district court found the plaintiffs' allegations insufficient because that plaintiff merely pled that it had "contractual relationships with its customers" generally without identifying or describing a specific contract or contractual duty that was interfered with by the defendant's actions. *Id*. at *9. By contrast, Moore has identified: a specific contract (her wireless service agreement with Verizon); the contracting parties (Verizon and Moore); the specific contractual term that Apple interfered with (Moore's ability to receive text messages as part of her Verizon wireless service agreement); and, how Apple interfered with or disrupted that contractual relationship (by having its iMessage application prevent the delivery text messages sent by Apple users to Moore once she switched away from her iPhone device to a non-Apple phone).

receives detailed information as to the device purchases of its users provides sufficient plausibility for a fact-finder to conclude that Apple knew that Ms. Moore was no longer an Apple iPhone user and was to receive text messages (along with all other wireless services) through her contract with Verizon on her new non-Apple device. *See Benson v. JP Morgan Chase Bank, NA*, 2010 WL 1526394, at *5 (N.D. Cal. Apr. 15, 2010) ("Plaintiffs allege that WaMu/JPMorgan knew about the Ponzi scheme because of the close business relationship between WaMu/JPMorgan bank officers and the Ponzi participants . . . . Plaintiffs in the present case have alleged specific facts and details that satisfy the plausibility test of *Twombly* and *Iqbal*."). Apple is free to dispute or disagree with the allegation that it receives updated information from Verizon, but mere disagreement with a factual allegation does not provide the basis for dismissal on the pleadings.

More fundamentally, however, is that Moore expressly pled that she *directly informed* Apple that she no longer was as an iPhone user and was now unable to get text messages on her Samsung device as she was entitled to obtain. In this regard, Moore pled unequivocally that:

> 20. Plaintiff contacted Verizon Wireless again. The personnel at Verizon Wireless informed Plaintiff that this had been an issue when people switch from an Apple iPhone or other Apple device to a non-Apple phone. . . .Verizon Wireless patched Plaintiff to Apple for assistance.
>
> 21. Apple personnel informed Plaintiff that even though she had turned iMessage off in her old iPhone she may still not be receiving all her text messages because some texters using Apple devices may not be using Apple iOS version. Rather than Apple coming up with a solution to a problem created by Apple, Apple's representative instead suggested to Plaintiff that Plaintiff get her text message senders to update their Apple iOS to the latest version, or have them delete an then re-add Plaintiff as their contact, or have Plaintiff and these unsuccessful Apple texters start a new text conversation with Plaintiff.

CAC, at ¶¶ 20-21.

Moore's factual allegations, therefore, expressly plead that shortly after she first discovered her inability to obtain text messages on her non-Apple device, Moore directly informed Apple. Thus, Apple was aware not only that Moore was a contractual customer of Verizon, but now specifically knew that Moore was user of a non-Apple device who had been a former Apple iPhone user and was now unable to receive all her text messages as she should be allowed to get under her

wireless service contract. [2]

Underscoring all of this, is the reality that whether Apple knew of Moore's contract with Verizon (which gave her the right to obtain text messages) is a pure question of fact. Apple either was aware of Moore's contractual right or it was not. Even the *Twombly* and *Iqbal* pleading standards make clear that factual allegations of a complaint must still be accepted as true; only legal conclusions that are couched as facts that must be disregarded unless sufficient factual support showing their plausibility is provided. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atlantic v. Twombly*, 550 U.S. 544, 555 (2007)). Because Moore has expressly pled that Apple knew of Moore's contractual relationship with Verizon (and has actually supported that with specific factual allegations), the Court may not disregard that allegation.

Post-*Twombly* and *Iqbal*, this Court and its sister California federal courts have repeatedly found that even bare allegations of a "knowledge" element in a claim for relief is sufficient because an assertion that the defendant had knowledge is an allegation of fact that must be accepted as true at the pleadings stage. *See, e.g., Oracle Corp. v. DrugLogic Inc.*, 807 F. Supp.2d 885, 902-03 (N.D. Cal. 2011) ("By alleging that Oracle was aware of the '091 patent and had 'actual notice' of DrugLogic's infringement claims, DrugLogic has made out a 'bare' factual assertion that Oracle had knowledge of the '091 patent"); *Swingless Golf Club Corp. v. Taylor*, 679 F. Supp.2d 1060, 1067 (N.D. Cal. 2009) (*Iqbal* standard met by allegation that defendants "had knowledge that the representations were false due to an evident motive for making such false misrepresentations."); *Keegan v. American Honda Motor Co.*, 838 F. Supp.2d 929, 961, n.85 (C.D. Cal. 2012) ("Although defendants complain that plaintiffs allege defendants' knowledge of the defect at the time they

[2] Apple's reliance on *Jewelry 47, Inc. v. Biegler*, 2008 WL 4642903, at *3-*4 (E.D. Cal. Oct. 16, 2008) (cited in Apple's Br. at 18:16-20) is misplaced. In *Biegler*, the district court found the pleadings were insufficient to allege the defendant's knowledge of the contract at issue because while, on the one hand, the plaintiff pled that the defendant had "reason to know" of the contract, the pleading "also alleges that Defendant Biegler told Defendants Tillman & Elohim that Plaintiff lacked the [contractual] authority to sell." *Biegler*, 2008 WL 4642903, at *4. The district court merely held that "[a]ny reasonable inference that Defendants Tillman & Elohim had knowledge of Plaintiff's contractual relationship with Defendant Biegler is negated by Defendant Biegler's alleged false statement." *Id*. Here, however, there is no such contradictory allegation of Apple's knowledge.

purchased their vehicles only on "information and belief," *Twombly's* "plausibility standard ... does not prevent a plaintiff from 'pleading facts alleged "upon information and belief" ' . . . Plaintiffs identify the sources of defendants' purported knowledge—pre-release testing data, early consumer complaints and testing conducted in response to early complaints.").

C. Moore Pled Apple's Intentional Acts That Disrupted The Contract.

Moore also satisfies the third element of a tortious interference with contract claim. Apple does not even contest this. The third element of the claim requires an allegation of "defendant's intentional acts designed to induce a breach or disruption of this contract." *Piping Rock Partners*, 946 F. Supp.2d at 979. A plaintiff need not prove that the defendant's primary motive or purpose was to disrupt a contract; it suffices if this contractual disruption is an incidental but known consequence of his action even though the act was undertaken for an independent purpose:

> Moreover, the tort of intentional interference with performance of a contract does not require that the actor's primary purpose be disruption of the contract. As explained in comment j to section 766 of the Restatement Second of Torts: The rule stated in this Section is applicable if the actor acts for the primary purpose of interfering with the performance of the contract, and also if he desires to interfere, even though he acts for some other purpose in addition. The rule is broader, however, in its application than to cases in which the defendant has acted with this purpose or desire. It applies also to intentional interference, as that term is defined in § 8A, in which the actor does not act for the purpose of interfering with the contract or desire it but knows that the interference is certain or substantially certain to occur as a result of his action. *The rule applies, in other words, to an interference that is incidental to the actor's independent purpose and desire but known to him to be a necessary consequence of his action*.

Quelimane, 19 Cal.4th at 56 (internal quotations omitted, emphasis added).

Moore pled that Apple designed the iMessage application and that it knew that iMessage, though serving to send text messages between Apple device users without incurring wireless service fees, also had the undesirable consequence of preventing users from receiving text messages sent from Apple devices once the user switched to a non-Apple device. CAC, at ¶ 16. (Since Apple indisputably was the designer of the iMessage application it is not implausible to allege that Apple knew how the application worked or what effects it generated.). Beyond that, the CAC also attaches a news article where Apple personnel admit that this is a consequence of

the iMessage application:

> Now an Apple customer support employee had admitted to Lifehacker's Adam Pash that, in fact, 'a lot' of users have this problem: If you switch from an iPhone to an Android, iMessage won't deliver texts from iPhone users to your new Android phone.

CAC, at ¶ 26 (quoting Ex. 1 to CAC, at 1-2).

D. Moore Has Properly Alleged An Actual Contractual Breach Or Disruption.

Moore properly pled the fourth element of a tortious interference with contract claim. That element calls for allegations of an "actual breach or disruption of the contractual relationship." *Piping Rock Partners*, 946 F. Supp.2d at 979. Moore's entire CAC is replete with allegations detailing how she (and class members) were unable to receive text messages from Apple senders after switching away from an Apple device, thereby disrupting or breaching their contractual relationship with Verizon.. *See* CAC, at ¶¶ 1, 5, 13-15, 37.

Apple nevertheless contends that although iMessages may have prevented Moore from receiving text messages after she switched away from her Apple iPhone, this still does not state a contractual interference because the Verizon contract did not "guarantee" that she would receive "every text message" sent to her. Apple's Br. at 18:26-28. This argument is groundless. That a contracting party does not expressly guarantee its performance does not excuse a third-party's affirmative intermeddling with the contract in a manner that stifles the contractual relationship.

Unsurprisingly, Apple fails to cite even a single authority in support of its proposition. The pertinent cases hold the precise opposite of Apple's position. The case law unequivocally holds that even where a contract permits a contracting party *to refrain* from performing, there is still a viable tortious interference claim to be stated where the acts of a third-party caused the non-performance. As the California Supreme Court has explained:

> May the tort of interference with contractual relations be predicated upon interference with an at-will contract? Historically, the answer is yes. A third party's 'interference with an at-will contract is actionable interference with the contractual relationship' because the contractual relationship is at the will of the parties, not at the will of outsiders.

Reeves v. Hanlon, 33 Cal. 4th 1140, 1148 (2004) (quoting *Pacific Gas & Elec. Co. v. Bear Stearns &*

Co., 50 Cal. 3d 1118, 1127 (1990)); *see also Chaganti v. i2Phone Int'l, Inc.*, 635 F. Supp.2d 1065, 1074 (N.D. Cal. 2007) ("The fact that the relationship between an attorney and client is 'at-will' does not prevent an inducement to terminate the contractual relationship from being actionable, irrespective of whether the agreement was written or oral.").

As the foregoing authorities make clear, that Verizon did not absolutely "guarantee" that it would successfully deliver "every text message" sent to Moore does not excuse Apple from tortious interference liability if the failure to deliver the text messages is the result of Apple's affirmative intermeddling. As put by the California Supreme Court, even if the Verizon-Moore contract was performed "at will" (and it was not), "the contractual relationship is at the will of the parties, not at the will of outsiders." *Reeves*, 33 Cal. 4th at 1148. The lack of a Verizon guarantee does not afford Apple a shield from liability for its own actions that disrupted the Verizon-Moore contract.

E. Moore Pled Damages Resulting From The Tortious Interference.

Lastly, Moore has also pled damages resulting from Apple's tortious interference with her contract with Verizon. See CAC, at ¶ 40. She has explicitly alleged that Apple's tortious interference that caused the breach in her (and class members') contractual relationship with Verizon (and other wireless carriers) deprived class members from "receiving the full benefit of their contractual bargain in that, inter alia, text messages that they should have been receiving as part of their wireless service contracts were not delivered to them." *Id*. Under California law, this contractual "benefit of the bargain" measure of damages applicable to breach of contract claims is also proper states a damages claim as redress for a tortious interference with contract cause of action. *See GHK Associates v. Mayer Group, Inc.*, 224 Cal. App.3d 856, 877 (1990) (affirming trial court's use of same measure of damages for breach of contract and tortious interference claims).

Because Moore has properly and sufficiently pled all the requisite elements of a tortious interference with contract claim, Apple's motion to dismiss Count I of the CAC should be denied.

II. MOORE HAS STANDING TO PLEAD AND HAS PLED A CLRA CLAIM.

Apple's omissions about the adverse impact of the use of its iMessage service on users, like Moore, who switch away from an Apple device gives rise to CLRA and UCL liability. Moore has adequately pled the elements of these statutory causes of action, and has standing to do so.

A. iMessage Is Not Merely Software, And Is Reachable By The CLRA.

Apple attempts to re-define iMessage as merely a software item that is outside the reach of the CLRA. The attempt is unsuccessful. The CLRA proscribes "unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer are unlawful." Cal. Civ. Code § 1770(a). Apple argues that because iMessage is an item of "software" or "software application," it falls outside the definition of "goods" or "services" that are within the ambit of the statute. *See* Apple's Br. at 16:21-17:15. The argument is unavailing because, far from being merely a standalone intangible software program, iMessage is a service of transmitting text messages between its users akin to text messaging services offered by wireless service providers like Verizon, AT&T, and other mobile carriers. Aside from that, because, once downloaded, the iMessage application becomes part and parcel of the iPhone or iPad device, it also qualifies as a tangible good.

1. iMessage Is A "Service" Within The Meaning Of The CLRA.

Apple's attempted redefinition of iMessage to be merely an intangible software item does not hold up. The CLRA defines "services" to "mean[] work, labor, and services for other than a commercial or business use, including services furnished in connection with the sale or repair of goods." Cal Civ. Code, § 1761(b). The California Legislature expressly mandated that the CLRA's statutory terms be "liberally construed and applied to promote its underlying purposes, which are to protect consumers against unfair and deceptive business practices and to provide efficient and economical procedures to secure such protection." Cal. Civ. Code, § 1760.

iMessage is not merely a standalone software item or computer program. Instead, what Apple offers is a service for sending and receiving text messages through an application that it calls "iMessage" that offers an alternative to traditional fee-incurring text messaging service offered by wireless carriers like Verizon. It would be nonsensical to suggest that when Verizon transmits text messages to or from its wireless service customers it is not offering a "service." Unsurprisingly, this Court has found the CLRA applicable to such wireless transmission services (of which iMessage is an alternative example). *See In re Apple and AT&T iPad Unlimited Data Plan Litig.*, 802 F.Supp.2d 1070, 1075-76 (N.D. Cal. 2013) (holding alleged misrepresentations about AT&T's data plan

transmission for Apple devices stated CLRA claim).

Underscoring that iMessage is a service that is made available once Apple's iOS software system is downloaded, as opposed to a mere intangible computer program, Apple's own licensing agreement defines iMessage as a service:

> (e) iMessage. The messaging feature of the iOS Software ("iMessage") may not be available in all countries or regions. Your use of iMessage is subject to your compliance with Section 2(e) above. In order to set up iMessage, and to initiate and receive iMessages between you and other iOS Device users, certain unique identifiers for your iOS Device and account are needed. These unique identifiers may include your email address(es), the Apple ID information you provide, a hardware identifier for your iOS Device, and your iPhone's telephone number. By using the iOS Software, you agree that Apple may transmit, collect, maintain, process and use these identifiers *for the purpose of providing and improving* ***the iMessage service***. ***The iMessage service*** *requires a Wi-Fi or cellular data connection*. To facilitate delivery of your iMessages and to enable you to maintain conversations across your devices, Apple may hold your iMessages in encrypted form for a limited period of time. If your message cannot be sent as an iMessage, your message may be sent as an SMS or MMS message, for which carrier messaging rates may apply. You understand that your iPhone's telephone number will be displayed to the other party (even if you have a blocked number) or your email address will be shown, depending on what setting you choose. If you are using an iMessage-capable iPad or iPod touch your email address will be displayed to the other party. *You may turn off* ***the iMessage service*** by going to the Messages setting on your iOS Device.

Ex. 1 to Plf's Req. for Judicial Notice [Apple iOS License Agreement], at p.5, ¶ 4(e).

That Apple's iMessage service may rely in part on its Apple's iOS software to undertake some of its functions does not undermine the natural conclusion that transmitting text message communications between wireless device users is a service, as opposed to a mere intangible item of software. For this reason, Apple's reliance on *In re iPhone Application Litig.*, 2011 WL 4403963, at *10 (N.D. Cal. Sept. 20, 2011) is misplaced. Therein, the Court merely held that a CLRA claim was not viable "to the extent that Plaintiffs' allegations are based *solely* on software.") (emphasis added). Moore's CLRA allegations are not based on iMessage being an item of software, much less being "solely" an item of software. Rather, although the CAC makes reference to iOS being operating software system, it also distinguishes iMessage as an application that provides a transmission *service* for text messages. *See* CAC, at ¶¶ 1 ("Plaintiff Adrienne Moore . . . brings this action on behalf of herself and all other similarly situated persons within the United States who

obtained wireless cellular service on an Apple iPhone or iPad device that was *equipped with Apple's iMessage service*."); ¶ 5 ("As part of one of those updates, her iPhone 4 began *using by default the iMessage service* to route text messages from and to her through Apple's Messages application when those text messages involved other Apple device *users that had the Apple iMessage service*."); id. ("Unbeknownst and undisclosed to Plaintiff, however, once she decided to replace Apple iPhone 4 device with a Samsung Galaxy S5, ... *Apple's iMessage service and Message application still acted so as not to deliver incoming text messages*."); *id*. at ¶ 23 ("Plaintiff as well as other putative class members, now have text messages that are routinely not delivered to them . . . solely because they deigned to use Apple's iMessage and Message service and application, but ultimately chose to replace their Apple devices with a non-Apple phone or device.") (emphasis added).

This Court and others have upheld CLRA claims that involved services much more intertwined with software programs than the iMessage service. *See Perrine v. Sega of America,, Inc.*, 2013 WL 6328489, at *4 (N.D. Cal. Oct. 3, 2013) (sustaining CLRA claim over alleged misrepresentations involving computer video games over defendant's argument that games were "software" or "computer programs" not subject to the CLRA and holding that "in certain circumstances, computer programs and software may be considered tangible goods or tangible personal property."); *In re Apple In-App Purchase Litig.*, 855 F. Supp.2d 1030, 1038-39 (N.D. Cal. 2012) (upholding CLRA claim alleging misrepresentations in connection with Apple's offering of gaming "apps" to Apple device users—i.e., the downloading of software that provided games for Apple device users); *Khoday v. Symantec Corp.*, 858 F. Supp.2d 1004, 1012-13 (D. Minn. 2012) (antivirus program is a "service" under California's CLRA because program performs the service of searching through the owner's computer files for viruses).

What Moore complains of is the non-delivery of text messages once she switched away from an Apple device—something that was not disclosed to her. There is no doubt that the offending act—the misdelivery of text messages—is a service. Apple's attempt to escape CLRA liability by couching iMessage solely as an item of software and not a service (a definition that contradicts the manner in which Apple's own License Agreement defined iMessage) is unavailing.

2. iMessage Also Meets The CLRA Definition Of A "Good."

Apple's attempted re-definition of iMessage as solely an intangible software program also independently fails for the separate reason that iMessage falls within the CLRA definition of a "good." The statute defines "goods" to "mean[]tangible chattels bought or leased for use primarily for personal, family, or household purposes, including certificates or coupons exchangeable for these goods, and including goods that, at the time of the sale or subsequently, are to be so affixed to real property as to become a part of real property, whether or not they are severable from the real property." Cal. Civ. Code, § 1761(a).

In construing this CLRA definition of "goods," this Court has held that, "in certain circumstances, computer programs and software may be considered tangible goods or tangible personal property." *Perrine*, 2013 WL 6328489, at *4. This Court looked to the California Commercial Code's treatment of software to discern when software items would qualify as tangible goods. *Id*. (citing Cal. Comm. Code, §9102(a)(44)). The California Commercial Code, in turn, provides that even software is to be defined as a "tangible good" in the following circumstances:

> 'Goods' means all things that are movable when a security interest attaches. . . . *The term also includes a computer program embedded in goods and any supporting information provided in connection with a transaction relating to the program if (i) the program is associated with the goods in such a manner that it customarily is considered part of the goods, or (ii) by becoming the owner of the goods, a person acquires a right to use the program in connection with the goods.* The term does not include a computer program embedded in goods that consist solely of the medium in which the program is embedded.

Cal. Comm. Code, §9102(a)(44) (emphasis added).

Perrine held that a computer video game played on a video console met the foregoing definition of "goods" and thus should be considered as a tangible good for purposes of the CLRA. *Perrine*, 2013 WL 6328489, at *4. The same logic compels the same result here.

Even if the iMessage service were thought of as being only an item of software (and it is not), it would still fall within the definition of "goods" because "by becoming the owner of the goods, a person acquires a right to use the program in connection with the goods." Cal. Comm. Code, § 9102(a)(44)(ii) *supra*. That is, by purchasing an iPhone or iPad device (the good), a consumer acquires a right to use Apple's iOS operating system program that contains the iMessage

service and application. This much is made expressly clear in Apple's own License Agreement, which provides that, "[s]ubject to the terms and conditions of this License, you are granted a limited non-exclusive license to use the iOS Software on a single Apple-branded iOS Device." Ex. 1 to Katriel Decl. [Apple's iOS License Agreement], at p.1, ¶ 2(a).

B. Moore Did Not Obtain iMessage For Free.

Apple also is wrong in arguing that Moore may not avail herself of the CLRA because she did not pay separately for iMessage, as it and its downloads "were available for free." Apple's Br. at 15:21. This is incorrect.

As borne out by Apple's own iOS License Agreement, in order to obtain iMessage as part of the iOS 5 download, a consumer must first pay for and own an iPhone or other Apple device. In Moore's case, her purchase of the iPhone 4 for money entitled her to also obtain all upgrade and enhancement features, including the iMessage service that formed part of the iOS 5 download she made. Moore could not have downloaded iOS 5 or otherwise obtained iMessage unless she first paid for and owned an iPhone or iPad for which she paid money to buy. Apple's iOS 5 License Agreement provides:

> Subject to the terms and conditions of this License, you are granted a limited non-exclusive license to download iOS Software Updates that may be made available by Apple *for your model of the iOS Device to update or restore the software on any such iOS Device that you own or control. This License does not allow you to update or restore any iOS Device that you do not control or own*.

Ex. 1 to Pltf's Req. for Jud. Notice, at p.1., § 2.1(b) (emphasis added).

Apple's License Agreement makes clear, therefore, that part of what Moore got when she paid for her iPhone 4 was the right to download the upgrade that loaded the iMessage service on her phone. Had she not paid for and bought an iPhone or iPad, she would not have been entitled or able to obtain the download (because the "License does not allow you to update or restore any iOS Device that you do not control or own." *Id*.).

There is no dispute that Moore purchased an iPhone 4—i.e., it was not "free." *See* Declaration of Jeffrey Kohlman in Support of Apple's Mtn. To Dismiss [Dkt. No. 18-1], at ¶ 2 ("Those records show that Ms. Moore *purchased* an iPhone 4 in March 2011.") (emphasis added). [3]

Moore's claim is consistent with the Ninth Circuit's holding earlier this year in *In re Sony PS3 Other OS Litig.*, No. 11-18066, 551 Fed. Appx. 916 (9th Cir. Jan. 6, 2014). There, the Ninth Circuit reversed this Court's dismissal of the plaintiffs' CLRA claims. The plaintiffs, purchasers of a Sony PS3 video game system, were allegedly injured within the meaning of the CLRA because representations Sony made about the dual-system functionality of its video game system at the time of its *original* sale later turned out to be deceptive as a result of a *subsequent free update* to the video game through which Sony "*later* restricted users to using either the Other OS feature or accessing the PSN feature, but not both." *Id*. at 921 (emphasis added). The subsequent update download to the video game, which caused Sony's pre-sale representations to allegedly be deceitful, was held sufficient to state a CLRA claim even though the optional free update was done years later, well after the sale of the game for which the consumers paid money had transpired. *See In re Sony PS3 Other OS Litig.*, 828 F. Supp.2d 1125, 1128 (N.D. Cal. 2011) (district court's description of subsequent optional free upgrade that occurred in 2010, after actual purchase of the game in 2006).

Because Moore paid money for her iPhone 4 and it was that purchase that entitled her to obtain the iMessage service through a download, she did engage in an actual transaction for money with Apple so as to come within the ambit of the CLRA. Apple's claim that Moore and all consumers obtained iMessage for free, without any payment to Apple, is wrong.

C. Moore Has Pled An Actionable Omission Under The CLRA.

Apple's next attack on Plaintiff's CLRA (and UCL) claim is that there is no actionable omission or misrepresentation alleged on which Moore could have relied because iMessage was not offered for sale at the time that Moore purchased her iPhone. *See* Apple's Br. at 7:18-8:20. Put

---

[3] *Wofford v. Apple Inc.*, 2011 WL 5445054 (S.D. Cal. Nov. 9, 2011), on which Apple relies to argue that the iMessage download was "free" and hence not subject to the CLRA, is distinguishable and not controlling here. *Wofford* did not quote or discuss *any* of the Apple License Agreement language before concluding that the upgrade download at issue in that case (which was a different upgrade than the one at issue here) was a free transaction separate from the purchase of the phone.

differently, Apple argues that the only pertinent misrepresentations or omissions are ones that would have been made prior to Moore's purchase of her iPhone 4. Because iMessage did not become available until after that purchase as part of an upgrade download to Moore's iPhone 4, Apple maintains that any omissions or misrepresentations that Apple would have made as to the iMessage service could not have impacted Moore's earlier purchase of the iPhone 4.

Apple's all-too-facile argument misstates both the nature of the transaction and the case being pled. For starters, Moore pleads that Apple engaged in a material omission when it offered its iOS 5 download that contained the iMessage application. CAC, at ¶ 16. Specifically, Moore charges that Apple failed to disclose that by downloading the iMessage application, this would result in Moore not being able to receive text messages from Apple device users if she ever switched away to a non-Apple phone. *Id*. Moore would not have downloaded and used iMessage had she been advised of this material consequence, meaning she relied on that omission to her detriment. *Id*. As detailed in Section II.C.2 *infra*, Apple had a duty to disclose iMessage's actual adverse impact both because it was contrary to a representation made in Apple's own License Agreement, and also because it involved a material consequence that was within Apple's exclusive knowledge.

Moore's CLRA claim, at least in its present form, is one only seeking injunctive relief as opposed to money damages. *See* CAC, at ¶ 45. She has been injured after downloading the iMessage service because, *inter alia*, she now is unable to receive text messages sent by Apple device users to her non-Apple phone. Injunctive relief that would order Apple to disable or otherwise fix its iMessage service so as to prevent this text message interruption from continuing to occur would be an available remedy for Moore's CLRA injunctive relief claim.

1. Apple's Omission Was Actionable Because It Occurred Before Moore Downloaded iMessage.

Apple's fallback position is that any omission about the iMessage would have occurred after Moore already had her iPhone 4 in hand, and hence could not have been relied upon by Moore to consummate her phone purchase transaction. *See* Apple's Br. at 12:4-13:2. That argument, however, ignores that, as evidenced by Apple's License Agreement, Moore's initial purchase of the iPhone 4 entitled her to receive, *as part of that purchase of the device*, any future upgrade downloads that Apple made available for her iPhone 4. As a result, Moore's download of the iMessage service,

though happening after she had her iPhone 4 in hand, was still part of her purchase transaction of the iPhone from Apple. Any material omission, therefore, that Apple made prior to Moore's download of the iMessage and iOS 5 upgrade was an omission that was made *prior to* the consummation of Moore's transaction with Apple, and therefore would be actionable under the CLRA.

Apple's License Agreement in place for the version of the iOS software that was in place when Moore purchased her iPhone 4 provided that:

> Subject to the terms and conditions of this License, ***you are granted a limited nonexclusive license to download iPhone Software Updates that may be made available by Apple for your model of the iPhone to update or restore the software on any such iPhone that you own*** or control.

Ex. 2 to Request for Judicial Notice [Apple's iOS 4 License Agreement].

The License Agreement shows that part of Apple's obligation and Moore's entitlement as part of Moore's purchase transaction was for Moore to receive any downloadable updates made available by Apple for her iPhone 4. Because Apple's alleged omission regarding the iMessage service occurred before Moore downloaded her iOS 5 upgrade that contained the iMessage service application, the omission occurred before Moore concluded her contractual purchase transaction. Because the purchase transaction of the iPhone 4 also provided Moore with the right to obtain upgrade downloads for her phone from Apple, she is entitled to premise her CLRA (and UCL) reliance on omissions that Apple made prior to making its iMessage application available for download, even if this omission occurred after Moore had her iPhone 4 in hand. For this reason, Apple's rote citation and reliance on cases holding that misrepresentations made after the purchase transaction concluded are inapplicable and irrelevant to Moore's case. *See* Apple's Br. at 16:10-16 (citing *Kowalsky v. Hewlett-Packard Co.*, 771 F. Supp.2d 1138, 1152 (N.D. Cal. 2010) and *Baba v. Hewlett-Packard Co.*, 2011 WL 317650, at *2 (N.D. Cal. Jan. 28, 2011)).

2. Apple Had A Duty To Disclose.

Apple's omission regarding the iMessage service acting to prevent Moore from receiving text messages from Apple device users once she switched to a non-Apple phone is actionable under the CLRA. Under California law, Apple had a duty to disclose this material feature of iMessage both because its omission was contrary to an actual representation that Apple made about iMessage

in its License Agreement and because Apple, as the developer of iMessage, had exclusive knowledge of the service's workings.

A CLRA violation may be premised on misrepresentations as well as material omissions. *See Mui Ho v. Toyota Motor Corp.*, 931 F. Supp.2d 987, 996 (N.D. Cal. 2013). An omission is material "if the omitted information would cause a reasonable consumer to behave differently if he or she were aware of it." *O'Shea v. Epson Am., Inc.,* 2011 WL 3299936 (C.D.Cal. July 29, 2011). Here, the omission Moore alleges is that Apple failed to disclose that employ of its iMessage service would render consumers unable to receive text messages from Apple device users once the consumer switched away to a non-Apple phone. *See* CAC, at ¶ 16. Moore has adequately pled the materiality of this omission by alleging that had she and the putative class members been "informed by Apple that iMessage would work in such a fashion. . . , Plaintiff and the putative class members would not have downloaded the iMessage and Messages service and application , or would not have purchased an iPhone or other Apple device in the first instance." CAC, at ¶ 16. This suffices to allege materiality of the omission for CLRA purposes. *See Elias v. Hewlett-Packard Co.*, 2014 WL 493034, at *6 (N.D. Cal. Feb. 5, 2014) (Koh, J.,) ("Plaintiff has adequately pleaded materiality by alleging that he would have acted differently by not purchasing the computer as ordered had he known about the [undisclosed fact].").

"To be actionable, an omission must be "contrary to a representation actually made by the defendant, or an omission of a fact the defendant was obliged to disclose." *Daugherty v. American Honda Motor Co.*, 144 Cal. App. 4th 824, 835 (2006). Apple's omission regarding the iMessages service preventing the receipt of text messages once consumers switched their iPhone for a non-Apple device is actionable under both of these prongs. The omission was both contrary to Apple's representation regarding iMessage that Apple made in its iOS License Agreement and it is also independently actionable because Apple had a duty to disclose the omission as it had exclusive knowledge of iMessages' adverse consequences.

a. The Omission Was Contrary To Apple's Partial Representation.

Text messages are traditionally sent through the normal SMS or MMS wireless service protocols offered by cellular carriers like Verizon or AT&T. *See* CAC, at ¶ 9-10. An Apple user

who downloads iMessages, however, has her text messages sent by Apple's proprietary iMessage service application instead when both the text sender and intended recipient own Apple devices equipped with iMessages. *Id*. at ¶¶ 11-12. The manner in which the system is supposed to work is that Apple's "messaging application will send text messages as an iMessage instead of a usual text message *when the text message is being sent between users who have the Apple iMessage service on their devices*." *Id*. at ¶ 12 (emphasis added).

But not all text senders have the iMessage application on their phones—either because they do not have an Apple phone or because their older (pre-OS 5) iPhone is not equipped with iMessages. *See* Apple's Br. at 2:10 (iMessaging does not work with other manufacturers' devices"). In fact, users like Moore who owned an iPhone but traded for a non-Apple phone no longer have iMessages on their new device (even though they did at one time). For these users, when a message is being sent to them, the iMessage application should route any text messages through the traditional SMS/MMS network, as these users' devices no longer have access to iMessaging. And, this is the precise representation that Apple's iOS 5 License Agreement makes about iMessage:

> ***If your message cannot be sent as an iMessage, your message may be sent as an SMS or MMS message, for which carrier messaging rates may apply***.

Ex. 1 to Plaintiff's Request for Judicial Notice, at p.5, ¶ 4(e) (emphasis added).

The representation provides comfort and some assurance to Apple users that if they avail themselves of the iMessages service they will still be able to receive text messages when iMessages is no longer available on their device because the text message "may be sent as an SMS or MMS message." *Id*. Certainly, nothing in Apple's partial disclosure as to how iMessage works would inform a consumer that her use of iMessage while she owns her iPhone would result in her being unable to receive any text messages sent from Apple users once that consumer switched to a non-Apple device. Yet, despite Apple's representation of the iMessage system, Moore alleges that:

> Due to an undisclosed feature in iMessage and Messages service and application, the Apple Message application does not recognize that the same telephone number of the former Apple device user (who, herself, was previously receiving text messages through iMessage) is no longer using an Apple device and hence is no longer using iMessage or Messages. Thus, when a text message is sent from an Apple device user to a person whose telephone number used to be associated with an Apple device but is now used on a non-Apple telephone, the message is

> not delivered to the non-Apple device user on her new non-Apple device. Worse yet, this person receives no notification that a text message directed to her was not delivered.

CAC, at ¶ 14.

Apple's partial representation about iMessage is that if iMessage is unavailable, the text message may still be sent as a traditional SMS or MMS transmission. As Moore alleges, however, what Apple failed to disclose is the material fact that iMessage is unable to detect that the iMessage service is no longer available to users who had used the iMessage service on their iPhones but then switched to a non-Apple device. This omission is, of course, material and contrary to the meaning of the partial representation because if the iMessage system is unable to detect the unavailability of iMessage for class members' text messages, it will never resort to sending the text message as a traditional SMS or MMS transmission, and the message will never be delivered.

Courts have found a duty to disclose arising from omissions being contrary to the actual representations made by the defendant "in cases where, as alleged here, Defendants 'gave information of other facts which could have the likely effect of misleading the public for want of communication of' the alleged omissions." *Gray v. Toyota Motor Sales, USA*, 2012 WL 313703, at *3 (C.D. Cal. Jan. 23, 2012) (quoting *Bardin v. Daimlerchrysler Corp.*, 136 Cal. App.4th 1255 (2006)). Having made the partial disclosure in its iOS 5 License Agreement that iMessages may send a text message as an SMS or MMS transmission instead when iMessaging is unavailable, Apple was also under a duty to disclose that its iMessage system could not detect that former Apple iMessage users who had switched to a non-Apple phone no longer had iMessages available. Its failure to do so breached Apple's duty to disclose and is actionable under the CLRA and UCL.

b. Apple Had A Duty To Disclose Due To Its Exclusive Knowledge.

Apple also had an independent duty to disclose because, as the developer of iMessages, it had the exclusive knowledge of the working of the service and the adverse consequences it would bring to those users who switched away from an Apple device. *See Elias*, 2014 WL 493034, at *9 ("An actionable omission may arise 'when the defendant had exclusive knowledge of material facts not known to plaintiff.'") (quoting *LiMandri v. Judkins*, 52 Cal. App.4th 326, 337 (1997)). iMessage "was developed by Apple." CAC, ¶ 5. As the entity that developed iMessages, Apple had exclusive

knowledge as to the operations, functioning, and consequences of use of its service. *Id*. at ¶ 16 ("Apple knew but never disclosed" the consequences of using iMessages once users switched to a non-Apple phone); *see also* Ex. 1 to CAC at 1-2 (news article documenting that "Apple customer support had admitted to Lifehacker's Adam Pash that, in fact, 'a lot' of users have this problem."). Certainly, neither Moore nor any of the putative class members could reasonably be expected to know the inner workings of iMessage or its adverse consequences (which they would not experience or know about until after they switched to a non-Apple device. *See Elias*, 2014 WL 493034, at *9 ("Customers cannot "be expected to seek facts which they h[ave] no way of knowing exist[ ].") (quoting *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices & Products Liab. Litig.,* 754 F.Supp.2d 1208, 1227–28 (C.D.Cal.2010)).

Apple's exclusive knowledge of the workings and adverse effects of using iMessages meant that it had a duty to disclose these material consequences to customers like Moore and the putative class members. Apple's failure to do so renders its omission actionable under the CLRA.

III. MOORE PLED A VIABLE UCL CLAIM.

Apple's attack on Moore's separate UCL claim is largely repetitive and co-extensive with Apple's failed arguments with respect to Moore's CLRA claim. *See* Apple's Br. at 9-13 (raising same arguments against both CLRA and UCL claims at the same time). That attack fails for the same reason that Apple's failed challenge to Moore's CLRA claim also fails.

Further, because Moore has pled viable claims for tortious interference with contract (*see* Count I of CAC and Sections I.A – D *supra*) and for Apple's violations of the CLRA (see Count II of CAC and Sections II.A-C *supra*), these claims are proper predicates for Moore's UCL claim. *See Blizzard Entertainment Inc. v. Ceiling Fan Software LLC*, 2013 WL 5511596, at *7 (C.D. Cal. Sept. 23, 2013) ("A claim under the UCL unlawful prong may be premised upon the unlawful actions that constitute tortious interference with contractual relations."); *Herron v. Best Buy Co. Inc.*, 924 F. Supp.2d 1161, 1177 (E.D. Cal. 2013) ("CLRA violations may serve as the predicate for "unlawful" business practice actions under the UCL. Since Plaintiff has pled a CLRA claim against Best Buy, *see supra,* Plaintiff states a claim for unlawful conduct under the UCL against Best Buy as well.") (internal citations omitted).

IV. THE CAC SATISFIES THE PARTICULARITY PLEADING REQUIREMENT.

Aside from the failed substantive challenges to the CAC, Apple also charges that Moore's pleading is procedurally flawed because she failed to plead her fraud-based allegations with sufficient particularity. *See* Apple's Br. at 9-13. That argument is also meritless. For starters, the particularity requirement is not even applicable to many of Moore's claims. The tortious interference claim (Count I), as well as the UCL claim premised on Apple's tortious interference are subject only to notice pleading requirements. *See Catch Curve*, 519 F. Supp.2d at 1039 (tortious interference claim is subject to notice pleading).

To the extent that Moore's omission-based CLRA and UCL claim were subject to a particularity pleading requirement, moreover, she has readily satisfied that standard. "[A] pleading is sufficient under Rule 9(b) if it identifies the circumstances constituting fraud so that the defendant can prepare an adequate answer from the allegation." *Semegen v. Weidner*, 780 F.2d 727, 734-35 (9th Cir. 1985). "Typically, '[a]verments of fraud must be accompanied by 'the who what when where, and how' of the misconduct charged,' but claims based on an omission 'can succeed without the same level of specificity required by a normal fraud claim.'" *MacDonald v. Ford Motor Co.*, 2014 WL 1340339, at *6 (N.D. Cal. Mar. 31, 2014) (quoting *Cooper v. Pickett,* 137 F.3d 616, 627 (9th Cir.1997)). "This is because a plaintiff alleging an omission-based fraud will 'not be able to specify the time, place, and specific content of an omission as would a plaintiff in a false representation claim.'" *MacDonald*, 2014 WL 1340339, at *6 (quoting *Baggett v. Hewlett-Packard Co.*, 582 F. Supp.2d 1261, 1267 (C.D. Cal. 2007)).

In any event, Moore has pled the requisite particulars of her allegation. She has alleged that Apple ("the who") failed to inform consumers that its iMessage service would prevent them from receiving text messages from Apple users once these consumers switched to a non-Apple phone ("the what") (*see* CAC, at ¶ 16), and that this omission was left out of any disclosure when Apple invited Moore to download iOS 5 which contained the iMessage service starting in October 5, 2011 ("the when"). CAC, at ¶ 11. She also documented how this fraudulent omission adversely impacted her (by making unable to receive text messages from Apple users on her Samsung S5 phone, thereby preventing her from obtaining the full services of her current wireless service

contract). *See* CAC, at ¶¶ 15, 37. This more than suffices to satisfy any particularity requirement that may be applicable to any of Moore's claims. *See MacDonald*, 2014 WL 1340339, at *6 (plaintiffs satisfied particularity requirement for CLRA omission-based claim by alleging what Ford failed to disclose).

CONCLUSION

For all the foregoing reasons, Apple's motion to dismiss the CAC should be denied. In the event the Court were inclined to grant Apple's motion in any respect, Moore respectfully requests leave to file an amended pleading to address any deficiencies referenced in the Court's Order.

Dated: August 21, 2014

Respectfully submitted,

_/s/_Roy A. Katriel________________

Roy A. Katriel, (SBN 265463)
THE KATRIEL LAW FIRM
4225 Executive Square, Suite 600
La Jolla, California 92037
Telephone: 858-242-5642
Facsimile: 858-430-3719
Email: rak@katriellaw.com

Counsel for Plaintiff Adrienne Moore