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APPLE INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

ADRIENNE MOORE, on behalf of herself and all others similarly situated,

Plaintiffs,

v.

APPLE INC.,

Defendant.

Case No. 5:14-cv-02269 LHK

CLASS ACTION

DEFENDANT APPLE INC.'S REPLY IN SUPPORT OF MOTION TO DISMISS

Date: November 13, 2014
Time: 1:30 p.m.
Place: Courtroom 8
Judge: Hon. Lucy H. Koh

Complaint Filed: May 15, 2014
Trial Date: None Set

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I. INTRODUCTION

Plaintiff's Opposition makes clear that she has no claim against Apple relating to its free iMessage service. Plaintiff does not respond at all to her failure to meet the threshold requirements of standing under Article III, the UCL, and the CLRA. Her general allegations that she failed to receive unspecified text messages are insufficient to demonstrate any actual injury, much less the economic harm required to establish standing under the UCL. Plaintiff's arguments regarding the failure to realize the "full benefit" of her contract with her wireless carrier, Verizon, fare no better. At most, she alleges that Verizon promised to provide her with "wireless services," and that is exactly what she received. Plaintiff cannot allege that Verizon was obligated to deliver iMessages that bypassed Verizon's network entirely and were sent over Apple's proprietary systems.

Moreover, each of Plaintiff's causes of action fails because Plaintiff cannot allege the required elements of her claims. Plaintiff cannot plead the basic elements of her tortious interference with contract claim because there was no breach or disruption of any provision of her contract with Verizon, and Plaintiff fails yet again to identify any provision of such contract. Even if there was such a breach, Plaintiff cannot allege facts showing that Apple knew about the relevant provisions of her contract with Verizon and that Apple intended to induce a breach of those provisions.

Plaintiff's consumer protection claims under the UCL and CLRA are based upon a factual theory that is impossible. In her Opposition, she asserts a new theory that does not appear anywhere in her Complaint, but even this new theory is based on alleged omissions that occurred ***after*** Plaintiff purchased her iPhone 4. Plaintiff's creative argument that her purchase transaction has not consummated and continues in perpetuity should be rejected. By definition, Plaintiff could not have relied on any alleged omissions in connection with her purchase when those omissions did not occur until well after her purchase and when iMessage did not exist in the marketplace at the time of her purchase.

Plaintiff's CLRA claim also fails because Plaintiff cannot allege any predicate "sale or lease" as Plaintiff concedes that she downloaded the iOS 5 software, which included iMessage,

for free. Plaintiff further admits that iMessage is part of a software system. As courts have routinely held, software is neither a good nor service and cannot serve as the basis for a CLRA claim.

Plaintiff's Complaint should be dismissed.

II. ARGUMENT

A. Plaintiff Lacks Standing to Bring Her Claims

Plaintiff does not meet the Article III standing or UCL/CLRA standing requirements because she does not allege a cognizable injury. (*See* Mot. at 6:17-9:2.) Plaintiff effectively concedes that she cannot allege an injury-in-fact (Article III), lost money or property as a result of unfair competition (UCL), or a tangible increased cost or burden (CLRA) based on any purported misrepresentations or omissions by Apple. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000) (Article III Standing); *Rubio v. Capital One Bank*, 613 F.3d 1195, 1203 (9th Cir. 2010) (UCL standing); *In re Sony Gaming Networks & Customer Data Sec. Breach Litig.*, 903 F. Supp. 2d 942, 965 (S.D. Cal. 2012) (CLRA standing).

Plaintiff seemingly tries to assert two possible theories of injury to support her assertion of standing: (1) she claims she did not realize the full benefit of her "contractual bargain" with her ***wireless carrier*** because Apple allegedly interfered with that contract (Opp. at 11:12-24); and (2) she claims she did not receive certain, unspecified text messages from current Apple device users (*id.* at 18:16-21). Neither purported injury confers standing.

Wireless Contract: Plaintiff ***generally*** alleges that she contracted with Verizon to "receive cellular service," including the "ability" to send and receive text messages. (Compl. ¶¶ 1, 36-37.) Plaintiff does not allege that Verizon guaranteed that she would receive every text message sent to her. Nor does she allege that Verizon failed to supply any services because of Apple's alleged conduct. Essentially, she received what she contracted for. Although Plaintiff claims that she did not receive unspecified iMessages that she expected to receive from current Apple users, she does not allege that Verizon agreed to deliver text messages that bypassed Verizon's network.

Missed Messages and Injury-in-Fact: Plaintiff's allegations that she did not receive certain text messages are not enough for standing, either. First, Plaintiff does not identify a ***single*** text message that was sent to her that she did not receive. She does not explain the number, content, or significance of the text messages she allegedly did not receive. She does not explain how she suffered harm because she did not receive these unidentified text messages. Her conclusory allegations of harm cannot confer standing. *See Gonzalez v. Drew Indus., Inc.*, No. CV 06-08233 DDP (JWJx), 2010 WL 3894791, at *3 (C.D. Cal. Sept. 30, 2010), *aff'd*, 750 F. App'x 768 (9th Cir. 2012).

B. Plaintiff Does Not State a Claim for Tortious Interference with Contract

Plaintiff now says that her "principal" claim is that Apple interfered with her contract with her wireless carrier — a third party. In fact, Apple has absolutely no interest in inducing a breach of Plaintiff's (or any customer's) contractual relationship with a wireless carrier. Apple's devices are wholly reliant on wireless services provided by third-party carriers. Apple has nothing to gain by causing a breach.

1. Plaintiff Does Not Allege A Specific Contractual Provision

Plaintiff makes the conclusory allegation that Apple interfered with her Verizon contract. Conclusory allegations are not enough. Under either the notice pleading requirements of Rule 8 (which Plaintiff argues apply) or the more stringent pleading requirements of Rule 9(b), Plaintiff is required to identify the ***specific contractual obligations*** she alleges are at issue. She has not done so. *See Wofford v. Apple Inc.*, No. 11-cv-0034 AJB NLS, 2011 WL 5445054, at *3 (S.D. Cal. Nov. 9, 2011) ("The Plaintiffs make only conclusory allegations that Apple's purported actions interfered with ATTM's ability to fulfill its obligations under ATTM and plaintiffs' wireless contracts (FAC¶ 69), but they do not identify the specific obligations that were breached, as required by *Twombly*, *Iqbal*, and Rule 9(b)."); *Hartford Life Ins. Co. v. Banks*, No. 08cv1279 WQH (LSP), 2009 WL 863267, at *6 (S.D. Cal. Mar. 25, 2009) (dismissing interference with contract claim because plaintiff failed to allege facts describing the contractual relationship);

Yanik v. Countrywide Home Loans, Inc., No. CV 10-6268 CAS (RZx), 2010 WL 4256312, at *5-6 (C.D. Cal. Oct. 18, 2010) (same).[1]

Plaintiff makes general allegations that her wireless service contract entitled her to receive wireless service, including, "*inter alia*," text messages. (*See* Compl. ¶ 36; Opp. at 4:26-5:11.) Courts have found similar allegations to be too conclusory to satisfy even the Rule 8 notice pleading standard. *See Image Online Design, Inc. v. Internet Corp. for Assigned Names & Numbers*, No. CV 12-08968 DDP (JCx), 2013 WL 489899, at *9 (C.D. Cal. Feb. 17, 2013) (finding "conclusory" plaintiff's allegations of tortious interference, including allegation that the defendant had contractual relationships with its customers for web services, including the "ability" to register domain names). Plaintiff is a party to her own wireless service contract. She has full access to her contract. She must identify the specific contractual provision(s) with which Apple supposedly interfered.

2. Plaintiff Must Show That Apple Knew About Those Contractual Obligations

Plaintiff cannot allege that Apple was aware of her third-party wireless carrier's contractual obligations to her or that it ***intended*** to interfere with those obligations. *See Wofford*, 2011 WL 5445054, at *3 ("Moreover, because plaintiffs have failed to identify any specific obligations, they have not provided any facts demonstrating that Apple was aware of the

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[1] Plaintiff relies on *Catch Curve v. Venali, Inc.*, 519 F. Supp. 2d 1028, 1039 (C.D. Cal. 2007), and *AGA Shareholders, LLC v. CSK Auto, Inc.*, No. CV-07-0062-PHX-DGC, 2007 WL 2320532, at *4 (D. Ariz. Aug. 10, 2007), to argue that generalized allegations regarding the existence of a contract suffice at the pleading stage. (Opp. at 5:16-6:1.) Neither case supports that proposition. In *Catch Curve*, the defendant/counterclaimant, Venali, asserted unfair competition counterclaims premised on, among other things, "tortious interference with Venali's ***business relations*** based on a campaign of threats of patent infringement lawsuits targeting Venali's customers." 519 F. Supp. 2d at *1 (emphasis added). In other words, Venali's interference claim was focused on disruption of its business relationships ***generally***. Here, by contrast, Plaintiff asserts that Apple interfered with a specific, discrete contractual entitlement or obligation that she is unable to identify. Further, before the hearing on the motion to dismiss, Venali identified each contract that fell within the scope of its claim, tacitly conceding that the specific identification of the contractual provisions of issue is required at the pleading stage. *Id.* at 1039. Moreover, Plaintiff's tortious interference allegations bear no resemblance to the allegations in *AGA Shareholders*. There, the plaintiff alleged the precise language of the relevant agreement ***and*** attached a copy of the agreement to the Complaint. [*See AGA Shareholders, LLC v. CSK Auto, Inc.*, No. CV-07-0062-PHX-DGC, Dkt. No. 38-3, at ¶¶ 15-16, Ex. A.] Here, of course, Plaintiff has done neither.

obligations in question or that it intended to prevent those obligations from being fulfilled."); *Davis v. Nadrich*, 174 Cal. App. 4th 1, 10-11 (2009) (interference claim failed because plaintiff did not provide any facts demonstrating that defendant was sufficiently aware of the terms of the contract to form a specific intent to harm it).

Plaintiff claims that she has adequately pled that Apple knew about the relevant provisions of her wireless contract because: (1) she alleges that class members' wireless carriers "updated" wireless service accounts to reflect that class members were no longer receiving wireless service on their Apple devices (Compl. ¶ 38); (2) the declaration submitted in support of Apple's Motion "admit[s]" that Apple maintains certain records regarding iPhone purchases; and (3) Plaintiff alleges that she contacted Apple for technical assistance (*id.* ¶¶ 20-21). (Opp. at 6:4-7:23.) None of these is sufficient to impute knowledge to Apple. *See Trindade v. Reach Media Grp., LLC*, No. 12-CV-4759-PSG, 2013 WL 3977034, at *15-16 (N.D. Cal. July 31, 2013); *Jewelry 47, Inc. v. Biegler*, No. 2:08-CV-00174-MCE-KJM, 2008 WL 4642903, at *3-4 (E.D. Cal. Oct. 16, 2008).[2]

First, nothing in the Complaint suggests that ***Apple*** had knowledge of the information in accounts managed and "updated" by third-party wireless service providers. The knowledge of a separate party cannot be imputed to Apple.

Second, nothing in Mr. Kohlman's declaration suggests that Apple's records include the terms and conditions of Plaintiff's wireless service agreement. Mr. Kohlman states that Apple's

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[2] Plaintiff cites *Benson v. JP Morgan Chase Bank, N.A.*, Nos. C–09–5272 EMC, C–09–5560 EMC, 2010 WL 1526394 (N.D. Cal. Apr. 15, 2010), in support of her assertion that Apple's "dealings" with Verizon and other wireless carriers are sufficient to impute knowledge to Apple regarding the terms and conditions of Plaintiff's wireless contract. In addition to the great logical leap required to make this assertion, the *Benson* case does not support it and has no place here. *Benson* involved a cause of action for aiding and abetting fraud in the context of a Ponzi scheme. *Id.* at *1-2. To establish their claim, the plaintiffs were required to allege that the defendants — banks at which the alleged schemers held accounts — "had actual knowledge of the specific primary wrong." *Id.* at *2. The court found the plaintiffs' allegations of knowledge to be sufficient, but it highlighted the plaintiffs' "detailed factual allegations" in reaching that conclusion. *Id.* at *3. For example, the *Benson* plaintiffs alleged that the defendant banks knew specific details about the scheme because they audited the accounts used in the scheme and were aware of numerous other red flags. *Id.* at *3-4. Here, by contrast, Plaintiff has not and cannot allege facts showing or suggesting that Apple knew the terms and conditions of her wireless contract.

records include information about when Plaintiff purchased her iPhone. Mr. Kohlman's declaration does not suggest that Apple was aware of the terms and conditions of a customer's contractual relationship with her carrier.

Finally, the fact that Plaintiff requested technical assistance from Apple does not lead to the conclusion that Apple was aware of the terms and conditions of Plaintiff's wireless service contract. Plaintiff's alleged conversation with "Apple personnel" does not impute awareness to Apple of Verizon's contractual obligations under any contract with Plaintiff. Indeed, as this conversation allegedly occurred ***after*** Plaintiff stopped receiving text messages from Apple users, Apple could not have intended to disrupt a contractual obligation it did not know about at the time the alleged breach occurred.

3. Plaintiff Cannot Allege Any Breach of Any Contractual Obligations

Plaintiff contracted with Verizon to "receive cellular service." (Compl. ¶¶ 36-37.) That service includes the "***ability***" to send and receive text messages. (*See id.* ¶¶ 1, 36-37.) It does not include a guarantee that Plaintiff ***will*** receive each and every text message sent to her.[3] Plaintiff does not claim that Verizon did not provide wireless service. Rather, the core of her claim is that she could not receive certain text messages on her non-Apple device because those messages were "routed" through Apple's proprietary iMessage service and Messages application, ***instead of*** her wireless carrier's SMS/MMS system. (*Id.* ¶ 5.) iMessages are sent through Apple's proprietary systems; they never touched, let alone disrupted, the wireless service provided to Plaintiff by Verizon. Without a breach, Plaintiff cannot claim interference with her Verizon contract. *See Wofford*, 2011 WL 5445054, at *4 (finding that plaintiffs failed to allege breach of wireless services agreement because they "cannot allege that [the wireless service provider]

[3] Plaintiff's reliance on case law concerning interference with at-will employment and client agreements is misplaced. (*See* Opp. at 10:20-11:4 (citing *Reeves v. Hanlon*, 33 Cal. 4th 1140, 1148 (2004), and *Chaganti v. i2Phone Int'l, Inc.*, 635 F. Supp. 2d 1065 (N.D. Cal. 2007)).) Plaintiff relies on these cases to argue that, even when a contracting party has the right to refrain from performing, interference with the contract can still give rise to liability. (*See id.*) Plaintiff misses the point. At most, Plaintiff's allegations suggest that her Verizon contract entitled her to wireless service, including certain capabilities that enabled her to receive text messages. Plaintiff did not have a contractual right to each and every text message sent to her. Neither Verizon nor any other wireless carrier could agree to that.

guaranteed the operability of phones used on its network"); *Davis*, 174 Cal. App. 4th at 10 (dismissing interference with contract claim where plaintiff failed to demonstrate that the actions allegedly induced by defendants breached plaintiff's contract).

4. Plaintiff Cannot Allege Any Intentional Actions by Apple to Induce a Breach

Plaintiff cannot allege that Apple intentionally induced Verizon to breach the wireless services contract because she cannot identify a specific contractual provision, Apple's knowledge of that provision, or a breach of that provision. *Wofford*, 2011 WL 505054, at *3 (concluding that "because plaintiffs have failed to identify any specific obligations, they have not provided any facts demonstrating that Apple was aware of the obligations in question or that it intended to prevent those obligations from being fulfilled"); *name.space, Inc. v. Internet Corp. for Assigned Names & Numbers*, No. CV 12-8676 PA (PLAx), 2013 WL 2151478, at *8 (C.D. Cal. Mar. 4, 2013) (finding that plaintiff failed to allege intentional actions designed to induce a breach or disruption). Plaintiff tries to rely on an alleged statement by an unidentified "Apple customer support employee" cited in an online article by a third party. (Opp. at 9:26-10:5.) This employee allegedly stated that "[i]f you switch from an iPhone to an Android, iMessage won't deliver texts from iPhone users to your new Android phone." (*Id.* at 10:2-5.) Even if true, this statement does not show: (1) that Apple believed the wireless carriers were contractually obligated to deliver iMessages sent over Apple's systems; or (2) that Apple intended to disrupt that obligation. For the same reasons, Plaintiff cannot allege that she was harmed by any purported interference by Apple because she received the "full benefit" of her contractual bargain with Verizon.

C. Plaintiff Cannot Assert Claims Under the UCL and CLRA

1. Plaintiff's Consumer Protection Claims Do Not Satisfy Rule 9(b)

Plaintiff does not dispute that her UCL and CLRA claims sound in fraud and must satisfy Rule 9(b)'s particularity requirement. (*See* Mot. at 9:8-25.) In fact, Plaintiff effectively admits that her UCL and CLRA claims must be pled with specificity. (*See* Opp. at 24:2-8.) Yet, she has not done so.

a. No Misrepresentation or Omission

Plaintiff does not allege a single actionable misrepresentation regarding iOS 5, iMessage, or the Messages software. (Mot. at 10:6-24.) Plaintiff does not dispute that the Complaint does not identify a single actionable misrepresentation or omission.[4] (*See id.* at 10:25-11:25.) Instead, Plaintiff disregards her own Complaint and shifts to an entirely new theory of liability: an "omission" claim that she premises on Apple's iOS software license agreement.

Plaintiff's newly minted theory of liability is found nowhere in the Complaint. Indeed, Plaintiff does not mention the software license agreement in her Complaint, let alone make allegations that she was somehow misled by language in agreements that she does not claim she read. The Court should reject Plaintiff's attempt to re-plead her case in an opposition brief. *See Provencio v. Vazquez*, 258 F.R.D. 626, 638-39 (E.D. Cal. 2009) ("Raising a completely new theory of liability, with only attenuated connection to the complaint, in a brief in opposition to a motion to dismiss does not grant Defendant fair notice of Plaintiffs' claim or the grounds upon which it rests."); *Orea Energy Grp., LLC v. E. Tenn. Consultants, Inc.*, No. 3:09-CV-041, 2009 WL 3246853, at *3 (E.D. Tenn. Oct. 6, 2009) ("[T]hese allegations are nowhere to be found in the complaint. They are present only in plaintiff's briefing, and it is a basic principle that the complaint may not be amended by the briefs in opposition to a motion to dismiss." (internal quotation marks and citations omitted)).

In any case, Plaintiff's new theory does not support a claim for actionable omission. 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." *Baltazar v. Apple, Inc.*, No. CV-10-3231-JF, 2011 WL 588209, at *4 (N.D. Cal. Feb. 10, 2011) (internal quotation marks omitted) (quoting *Daugherty v. Am. Honda Motor Co. Inc.*, 144 Cal. App. 4th 824, 835 (2006)); *Wilson v. Hewlett-Packard Co.*, 668 F.3d 1136, 1141 (9th Cir. 2012) ("California courts have generally

[4] Plaintiff asks the Court to relax her pleading burden because she argues that her claims are based on an omission theory. (*See* Opp. at 24:13-20 (citing *MacDonald v. Ford Motor Co.*, Case No. 3:13–CV–02988–JST, 2014 WL 1340339 (N.D. Cal. Mar. 31, 2014).) Plaintiff's request is contrary to the law of this Circuit. As the Ninth Circuit held in *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1126 (9th Cir. 2009), alleged omissions are species of misrepresentations and are, therefore, subject to the pleading standards of Rule 9(b).

rejected a broad obligation to disclose . . . ."). Plaintiff argues that Apple omitted facts necessary to correct or supplement the following purported statement from Apple's iOS 5 software license agreement: "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." (Opp. at 21:15-16 (internal quotation marks omitted) (emphasis added).) However, Plaintiff does not allege when this purported representation was made or that Apple knew, or should have known, facts at that time that made the representation incomplete or misleading. The quoted statement discloses that potential carrier charges may apply if an Apple user has chosen to default to text messages when iMessage is unavailable. It does not suggest that Apple will automatically detect when a user switches to a non-Apple device and will ensure that all current Apple users will send messages to the former user as SMS/MMS text messages. Further, Plaintiff does not allege that ***she*** saw, heard, or reviewed this purported "partial disclosure." Thus, it cannot serve as the basis for her new omission theory. *See In re Facebook PPC Adver. Litig.*, No. 5:09-3043-JF, 2010 WL 3341062, at *10 (N.D. Cal. Aug. 25, 2010) ("Plaintiffs still should be able to identify with particularity at least the specific policies and representations that they reviewed.").

Plaintiff argues in the alternative that Apple had a duty to disclose because it had "exclusive knowledge" of the "consequences" users would experience after using iMessage and switching to a non-Apple device. (Opp. at 22:23-23:13.) Independent disclosure obligations arise only when the alleged "defect" relates to a "safety issue." *Wilson*, 668 F.3d at 1141. Plaintiff has identified no such issues. In any event, nothing in the Complaint indicates that Apple knew of any alleged defect regarding iMessage at the time Plaintiff purchased her iPhone or downloaded iOS 5. Indeed, the only complaints regarding iMessage cited in the Complaint are from 2014 (*see* Compl. ¶¶ 24-27), three years after Apple released iOS 5 and iMessage in 2011 (*id.* ¶ 6). Even if there was a duty to disclose, Plaintiff admits that Apple affirmatively disclosed

to users that if they switch to a non-Apple device, they should turn off iMessage on their iPhone before the switch.[5] (*Id.* ¶ 27, Ex. 2 at 2.)

b. No Reliance

Plaintiff now contends that her consumer protection claims are based on omissions made in connection with iOS 5. iOS 5 was released along with iMessage and Messages for free download on October 12, 2011 — seven months ***after*** Plaintiff purchased her iPhone. (Compl. ¶¶ 5-6; Decl. of Jeffrey Kohlman ¶ 2.) By definition, Plaintiff cannot rely on post-sale representations and omissions because they necessarily played no part in inducing her purchase. *See Hensley-Maclean v. Safeway, Inc.*, No. CV 11-01230 RS, 2014 WL 1364906, at *6 (N.D. Cal. Apr. 7, 2014) (dismissing CLRA claim because plaintiff only alleged misrepresentations after the time of sale, and stating that "the CLRA only applies to representation and omissions that occur during pre-sale transactions"); *Baba v. Hewlett-Packard Co.*, No. C 09-05946 RS, 2010 WL 2486353, at *5 (N.D. Cal. June 16, 2010) (noting that "plaintiffs have not sufficiently alleged that they relied on any of HP's statements or omissions in purchasing the computers" where plaintiffs alleged that the defendant made misleading statements only after the sale transaction. "This behavior is irrelevant to the question of whether HP made false statements to plaintiffs before or during their respective transactions which induced them to purchase the computers.").

To overcome this insurmountable hurdle, Plaintiff proffers a novel definition of "purchase." According to Plaintiff, the purchase of her iPhone did not begin and end when she bought the device in March 2011. Rather, because Plaintiff has the ability to download updates to her iOS, she argues that her purchase ***is still*** ongoing and will ***continue*** as long as Apple offers updates to its iOS. (*See* Opp. at 18:23-19:5.) When Plaintiff's purchase will be finally "consummated" is unclear. Plaintiff appears to contend that she can base her UCL and CLRA claims on the allegation that she purchased an iPhone 4 because of future omissions that occurred

[5] Although Plaintiff notes that some portion of the webpage on which the disclosure appears was "last modified" in March 2014, he does not and cannot allege that the disclosure appeared on Apple's website for the first time in March 2014. (Compl. ¶ 27, Ex. 2 at 2.)

months after purchase concerning a messaging application she had never heard of, knew nothing about, and did not know would ever be available. Unsurprisingly, Plaintiff offers no case law or statutory support for this argument. Any alleged omissions in the iOS 5 License Agreement (Plaintiff's new theory) occurred well after she bought her iPhone 4; she could not have relied on such omissions in connection with her purchase.

2. Plaintiff Does Not Otherwise State a Claim Under the CLRA

a. Plaintiff Does Not Allege a Sale or Lease

A free download is not a "sale or lease" within the meaning of the CLRA. *See Schauer v. Mandarin Gems of Cal., Inc.*, 125 Cal. App. 4th 949, 960 (2005). Plaintiff does not allege that she purchased iOS 5, Messages, or iMessage. However, she now argues for the first time in her Opposition that iOS 5 should be considered part of her original iPhone purchase several months earlier. As discussed above, Plaintiff's attempt to describe her purchase as open-ended and perpetual is unsupported.[6] Further, this Court has expressly rejected the notion that a plaintiff's original equipment purchase and later download of a free update to the operating software are one and the same. *See Wofford*, 2011 WL 5445054, at *2. Specifically, the Court held that "[p]laintiffs' original purchase of the iPhone is a ***separate transaction*** from their free upgrade of the iPhone's operating system, which occurred about a year later. The iPhone's software upgrade was not intended to result in a 'sale or lease' because it was provided free of charge." *Id.* (emphasis added). *Wofford* is directly on point. Plaintiff cannot allege a "sale or lease" within the meaning of the CLRA based on her download of free software.

[6] *In re Sony PS3 Other OS Litigation*, 551 Fed. App'x 916 (9th Cir. Jan. 6, 2014), on which Plaintiff relies to make this argument, is completely inapposite. The *In re Sony PS3* Court did not consider whether the plaintiffs could tether their free download of a firmware update to their earlier purchase of the video gaming system on which it was installed. Rather, the Court considered whether the defendant's alleged representations regarding a feature of the video gaming system ***that existed at the time of the plaintiffs' purchases*** were likely to mislead consumers when the defendant later disabled that feature. *Id.* at 920-21. Here, it is undisputed that Apple made no representations regarding iMessage when Plaintiff acquired her iPhone. Indeed, iMessage did not exist in the marketplace at that time.

b. The CLRA Does Not Apply to Software

Plaintiff argues that iMessage is a "service" and a "good" covered by the CLRA. But to make this argument, she ignores the allegations in which she admits that iMessage worked through its client software "***application***," Messages, and was a feature of Apple's iOS 5 ***software***. (*See, e.g.*, Compl. ¶¶ 1 (iMessage and Messages "were part of Apple's software operating system"), 11 ("Apple's software on Apple iPhone and iPad wireless devices would employ iMessage and Messages").) Indeed, the first line of the iOS software license agreement excerpted at page 13 of Plaintiff's opposition describes iMessage as a "***feature*** of the iOS ***Software***." (Opp. at 13:5-6 (emphasis added).) This Court has already found that the same iOS operating system at the core of Plaintiff's claims is software and, therefore, not covered by the CLRA. *Wofford*, 2011 WL 5445054, at *2. The same conclusion is warranted here.

None of the cases Plaintiff cites in her Opposition support treating iMessage, its companion application, Messages, and iOS 5 as a good or service:

- First, contrary to Plaintiff's assertion, the Court in *In re Apple & AT&T iPad Unlimited Data Plan Litigation*, 802 F. Supp. 2d 1070 (N.D. Cal. 2011), did not hold that a data plan is a good or service covered by the CLRA. *In re Apple & AT&T* involved Apple iPads with 3G data functionality. *See id.* at 1073-74. The Court did not even discuss the CLRA's "good or service" requirement.
- Second, in *Perrine v. Sega of America, Inc.*, No. C 13–01962 JSW, 2013 WL 6328489, at *4 (N.D. Cal. Oct. 3, 2013), the Court concluded that a video game was a good within the meaning of the CLRA but noted that the question was a "close[] call." The Court emphasized that the plaintiffs described the product at issue as a "game," not software. *Id.* Here, by contrast, Plaintiff expressly refers to iMessage and Messages "part of Apple's ***software*** operating system." (Compl. ¶ 11 (emphasis added).)
- Third, as with *In re Apple & AT&T*, the Court in *In re Apple In-App Purchase Litigation*, 855 F. Supp. 2d 1030, 1038-39 (N.D. Cal. 2012), did not consider or discuss whether the apps at issue constituted goods or services under the CLRA.

- Finally, Plaintiff misstates the product at issue in *Khoday v. Symantec Corp.*, 858 F. Supp. 2d 1004, 1012-14 (D. Minn. 2012). There, the plaintiffs' claims related to a form of ***insurance*** that they purchased at the same time they bought the defendant's antivirus software. *Id.* at 1008. *Khoday* court did not decide that the antivirus software itself constituted a service under the CLRA.

3. Plaintiff Does Not Otherwise State a Claim Under the UCL

a. Unlawful Prong — No Predicate Unlawful Act

Plaintiff has not stated a viable predicate claim under the CLRA or for tortious interference with contract. Therefore, she cannot plead an "unlawful" act under the UCL. *Daugherty v. Am. Honda Motor Co.*, 144 Cal. App. 4th 824 (2006).

b. Unfair Prong — No Unfair Acts

Apple demonstrated in its motion that Plaintiff's allegations do not satisfy any of the tests for "unfairness" within the meaning of the UCL. (*See* Mot. at 14:16-15:16.) Plaintiff does not attempt to address or rebut Apple's arguments. As such, she concedes that her claim under the unfair prong of the UCL should be dismissed.

III. CONCLUSION

For the foregoing reasons, and for the reasons set forth in Apple's motion, Apple respectfully requests that the Complaint be dismissed.

Dated: September 18, 2014

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