UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

IN RE: APPLE iPHONE 3G AND 3GS "MMS" MARKETING AND SALES PRACTICES LITIGATION **THIS DOCUMENT RELATES TO:** **EDLA No. 09-cv-7611** **Case No. 1:09-CV-1993 (N.D. Ohio)** **Matthew Sullivan,** **Plaintiff,** **v.** **Apple Inc. and AT&T Mobility LLC,** **Defendants.**	**CIVIL ACTION** **MDL No. 2116** **SECTION "J"** **JUDGE BARBIER** **MAGISTRATE JUDGE WILKINSON**

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT APPLE INC.'S MOTION TO DISMISS FIRST AMENDED AND SUPPLEMENTAL COMPLAINT

Defendant Apple Inc. ("Apple") hereby files its Motion to Dismiss Plaintiff Matthew Sullivan's ("plaintiff" or "Sullivan") First Amended and Supplemental Complaint ("FAC") (ECF No. 76).

SUMMARY OF ARGUMENT

Plaintiff Sullivan attempts to avoid dismissal by blatantly mischaracterizing Apple's advertising regarding MMS. Sullivan references Apple advertisements and marketing materials regarding MMS in the FAC, but *omits Apple's disclosure that MMS would not be available until late summer 2009*.[1] Accurate copies of these Apple materials filed herewith demonstrate that Apple consistently provided the disclosure in every instance. That plaintiff persists in his mischaracterization demonstrates the baselessness of his claims. Tellingly, Sullivan does not identify a single advertisement that he allegedly saw and relied on. That is because he cannot do so; all the advertisements plaintiff alleges contained the disclosure. The FAC must be dismissed with prejudice.

Tacitly conceding that his false advertising claims fail, Sullivan attempts to convert his prior false advertising claims into claims based upon ATTM's data service plan. Plaintiff's ATTM data service plan cannot provide the basis for his claims against Apple. Moreover, Sullivan's claims based on the ATTM data plan are as misleadingly pled and as lacking in merit as his claims based on Apple's advertising. The FAC itself discloses that ATTM's data plans are not specific to the iPhone 3G, but are generic plans for all phones supported by ATTM.[2] Such generic plans cannot be the basis for a purported consumer expectation regarding iPhone 3G.

Sullivan's claims are equally riddled with legal flaws. His consumer fraud, negligent misrepresentation, and false advertising claims fail to satisfy the elements required to maintain these causes of action. Sullivan does not identify the particular representations regarding MMS

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[1] In one instance, plaintiff includes an entire document but shrinks it so far below actual size that the disclosure is rendered unreadable. Actual-size copies of the documents filed herewith demonstrate that the disclosure was included and completely readable.

[2] The FAC concedes that every other wireless carrier offers the same bundle of data services in its generic plans. Similarly, the ATTM data plan advertising campaign alleged in the FAC applied, as the FAC itself makes clear, to all phones and not to the iPhone in particular. Indeed, the alleged advertising campaign began before even the original iPhone went on sale.

to which he was allegedly exposed; he does not demonstrate that he relied on the supposed representations; and he does not adequately allege that he was caused injury thereby. Plaintiff's warranty and contract claims are merely thinly disguised repetitions of his misrepresentation claims. They fail for the same reasons. Finally, plaintiff does not adequately allege that he suffered damage. The fact that plaintiff was required to wait less than three months for one of hundreds of features offered on the iPhone — which plaintiff was informed of in advance — does not constitute a legally cognizable injury. For all these reasons, the FAC should be dismissed with prejudice.[3]

RELEVANT BACKGROUND

Plaintiffs' core allegation is that Apple's advertising and marketing misrepresented or failed to disclose the timing of the release of a single feature — Multimedia Messaging Service ("MMS") — among over 100 new features offered on Apple's iPhone 3G and iPhone 3GS. Plaintiff is wrong. Beginning with its very first announcement regarding MMS, Apple repeatedly and consistently disclosed that MMS would not be available until late summer 2009.

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[3] In addition to the arguments set forth herein, Apple notes the following further obstacle to plaintiff's claims. Plaintiff alleges that "AT&T needed to build up its network to support" MMS. (FAC ¶¶ 5-6) State law claims based upon such allegations challenging the sufficiency of ATTM's network infrastructure are preempted by the Federal Communications Act ("FCA"). The United States District Court for the Northern District of California recently granted a dismissal with prejudice of all state law claims in the iPhone 3G MDL on precisely these grounds. *In re Apple iPhone 3G Prods. Liab. Litig.*, ___ F. Supp. 3d ___, No. C 09-02045 JW, 2010 WL 3059417 (N.D. Cal. Apr. 2, 2010). The court held that plaintiffs' claims were "based on the core allegation that Defendants knew that ATTM's 3G network was not sufficiently developed to accommodate the number of iPhone 3G users, and that Defendants deceived Plaintiffs into paying higher rates for a service that Defendants knew they could not deliver." *Id.* at *6. Therefore, plaintiffs' state law claims were preempted in their entirety against ATTM.

If this Court grants ATTM's motion to dismiss on the basis of FCA preemption, it must also dismiss Apple. In the iPhone 3G MDL, the court dismissed the claims against Apple on the ground that ATTM is an indispensable party to claims about its network. *Id.* at *9. The court found that "the case could not proceed without ATTM in 'equity and good conscience' because any adjudication of claims as to Defendant Apple would necessarily require a determination of the sufficiency of ATTM's 3G network infrastructure." *Id.* The same holds equally true here and requires dismissal of plaintiff's claims. *Bry-Man's, Inc. v. Stute*, 312 F.2d 585, 586 (5th Cir. 1963).

There was no misrepresentation, no omission, no concealment, and no misconduct of any kind, as plaintiff's own FAC and the documents cited therein reveal.

A. The Two Text Functions for iPhone: SMS and MMS.

Apple's iPhone allows users to send messages by text. There are two separate text functions, both of which require support from AT&T Mobility LLC's ("ATTM") network. The standard text function is Short Messaging Service ("SMS"). Unlike email, SMS is limited to 160 characters. All Apple iPhones have and always have had the ability to send text messages via SMS. The enhanced text function, MMS (Multimedia Messaging Service), allows users to send pictures or videos by text. (FAC ¶ 25) As set forth below, the enhanced functionality of MMS was made available for iPhone in the United States in September 2009. Prior to that time, photos and videos could be sent using other commonly supported functions, such as email. Like email, both SMS and MMS require a network connection to send or receive messages. Although most phones come equipped with SMS, not all phones are equipped with the enhanced function, MMS.[4]

B. A Brief History of iPhone.

1. June 2007: Apple Launches the Original iPhone 2G.

In January 2007, Apple announced its intention to release its first cellular telephone, the iPhone 2G. Apple advertised the iPhone 2G as "revolutionary" because it "reinvented the phone" by combining, for the first time, multiple products into one handheld device — a mobile phone, an iPod music player, and an Internet communications device. (FAC ¶¶ 23-24;

[4] The FAC contains self-contradictory and conclusory allegations about the general availability of MMS in the United States. Plaintiff alleges that "[a]ll [] phones . . . [had the ability] to text photos" but later alleges that "[a]t least 12 other AT&T mobile phones provided MMS." (FAC ¶¶ 3, 55) These allegations contain no facts regarding any other specific phone that supported MMS at any relevant time during the class period. Such vague, inconsistent, and conclusory allegations must be disregarded on a motion to dismiss. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 564 (2007).

Declaration of Penelope A. Preovolos in Support of Apple Inc.'s Mot. to Dismiss ("Preovolos Decl."), Ex. A)[5]

iPhone 2G did not have MMS capabilities. Apple never represented that MMS was available for iPhone 2G, and plaintiff does not contend otherwise. (Preovolos Decl., Ex. A) The iPhone 2G was first sold in June 2007. (FAC ¶ 23) Apple discontinued sales of the iPhone 2G one year later, in July 2008.

2. June 2008: Apple Launches iPhone 3G.

In June 2008, Apple announced its second-generation iPhone, the iPhone 3G. The iPhone 3G was available for sale on July 11, 2008. The iPhone 3G is supported by ATTM's third-generation or "3G" network as well as the 2G network. (FAC ¶ 28) The 3G technology "allows simultaneous use of speech and data services" and faster data transfer speeds. (FAC ¶ 28)

Apple did not make any representations about the availability of MMS at the time of the iPhone 3G launch, and plaintiff does not contend that it did. (FAC ¶¶ 27-28) In fact, ATTM published a statement informing owners of non-MMS-compatible phones, such as iPhone 3G, that they would not be able to receive MMS photos or videos directly on their phones but could nonetheless download them from a website. (FAC ¶ 32)

As described in greater detail below, the first time Apple mentioned MMS in connection with any iPhone was in March 2009. Apple discontinued sales of the iPhone 3G in June 2010.

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[5] Apple attaches documents plaintiff pleads or references in the FAC but does not attach to the FAC. This Circuit has held that the inclusion of such documents is appropriate and does not convert the present motion to dismiss to a motion for summary judgment. *See Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498-99 (5th Cir. 2000) ("[D]ocuments that a defendant attaches to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to [the] claim."); *Borders v. Chase Home Fin., L.L.C.*, No. 09-3020, 2009 U.S. Dist. LEXIS 54871, at *12 (E.D. La. June 29, 2009).

3. June 2009: Apple Launches iPhone 3GS.

On June 8, 2009, Apple announced its third-generation iPhone, the iPhone 3GS. (FAC ¶ 34) The iPhone 3GS was available for sale on June 19, 2009. As set forth below, this was the first time Apple generally advertised MMS as a feature of any iPhone.

4. June 2010: Apple Launches iPhone 4.

In June 2010, Apple announced the launch of its newest iPhone, the iPhone 4. MMS is available for iPhone 4. Apple and ATTM both sell Apple's currently shipping iPhones — iPhone 4 and iPhone 3GS — through their respective retail stores and websites. (FAC ¶ 23)

C. What Apple Said About MMS and iPhone.

1. March 2009: Apple Announces Summer Release of New iPhone OS 3.0 Software with over 100 New Features, Including MMS, at Event for Registered Software Developers.

The first time Apple made any representation about MMS was on March 17, 2009. Apple previewed its anticipated new iPhone OS 3.0 software update for iPhone 3G through a beta release available exclusively to registered iPhone software developers. (Preovolos Decl., Ex. B) Among the over 100 new features discussed, Apple announced to the software developers that Apple's "future plans" for iPhone software included MMS. (FAC ¶ 35-36; Preovolos Decl., Ex. C at 00:00:30-33) During the presentation, Apple's Vice President of iPod and iPhone Product Marketing also told the audience that the new iPhone software would be made available "first . . . as a developer beta" that same day only to "everyone in [the] iPhone developer program" but would be "shipping for the rest of us this summer." (Preovolos Decl., Ex. C at 1:24-1:28:30)[6] Apple also issued a press release the same day announcing that

[6] Apple also made it clear that MMS would not be available for iPhone 2G, only for iPhone 3G, due to retroactive hardware-software compatibility issues between iPhone 2G and iPhone OS 3.0. (Preovolos Decl., Ex. B and Ex. C at 1:26-1:27:38) Plaintiff alleges that Apple's March 17, 2009 press release stating that MMS was "available only on the iPhone 3G" was "false and misleading." (FAC ¶ 35) Plaintiff is incorrect. The press release made it clear that MMS would not be available via the iPhone OS 3.0 software update for iPhone 3G until summer 2009. The point of Apple's statement was that the software release would make MMS available only for iPhone 3G and not for iPhone 2G. Moreover, as plaintiff concedes, iPhone 3GS was not announced until three months later (FAC ¶ 34), so Apple's statement did not relate to iPhone 3GS.

MMS, among other features, would be available "this summer." (FAC ¶ 35; Preovolos Decl., Ex. B) Apple made no other reference to MMS until the launch of iPhone 3GS in June 2009. (FAC ¶¶ 34-50)[7]

2. June 2009: Apple Announces iPhone 3GS at Worldwide Developers Conference and Tells Customers MMS Support Would Be Available in "Late Summer."

Apple announced the third-generation iPhone — iPhone 3GS — during the Worldwide Developers Conference ("WWDC") on June 8, 2009. (FAC ¶ 34) Apple's Senior Vice President of iPhone Software told the WWDC audience that: "[i]n the United States, AT&T will be ready to support **MMS later this summer**." (Preovolos Decl., Ex. D at 56:13-57:01 (emphasis added)) Apple issued a press release the same day which also stated that "MMS support from AT&T will be available in **late summer**." (Preovolos Decl., Ex. E (emphasis added))[8]

3. June 2009–September 2009: Apple Advertises iPhone 3G and 3GS MMS Capabilities as "Coming in Late Summer."

Apple's advertisements for iPhone 3G or iPhone 3GS from June 2009 until the release of MMS in September 2009 included an express disclosure notifying customers that MMS would not be available from ATTM until "late summer." Critically, the Apple advertisements plaintiff cites in the FAC *include* that disclosure, *but plaintiff omits it from the FAC* and does not include complete copies of the advertisements. When viewed in full, *these advertisements plaintiff partially pleads in the FAC included the MMS timing disclosure*:[9]

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[7] The FAC incorrectly states that Apple announced MMS in March 2009 to promote sales of iPhone 3GS. (FAC ¶ 35) That is not the case and is directly contradicted by plaintiff's own admission in the preceding paragraph that iPhone 3GS was not announced until June 2009. (FAC ¶ 34)

[8] Apple announced that MMS messaging would be available only for iPhone 3G or iPhone 3GS and not for iPhone 2G. (Preovolos Decl., Ex. E)

[9] The FAC acknowledges that references on Apple's website to sending "photos, video, audio, and more" using MMS included the statement "MMS support from AT&T coming in late summer," but the FAC omits the disclosure from its recitation of Apple's other advertising. (FAC ¶ 41; Preovolos Decl., Ex. F) Similarly, the FAC includes a size-reduced screen shot of Apple's web page in a misleading attempt to render the relevant "late summer" language

[Footnote continued on following page.]

- **iPhone Software Update web page**: Plaintiff selectively quotes the portion of the web page discussing MMS, but omits the footnote containing the language "MMS support from AT&T coming in late summer" (*compare* FAC ¶ 40 *with* Preovolos Decl., Exs. G, G1);
- **Apple/ATTM Kiosk video**: Plaintiff alleges the iPhone 3GS video that played on seven-foot-tall kiosks in Apple and ATTM retail stores contained a segment about MMS, but omits the following language: "MMS support from AT&T coming in late summer" (*compare* FAC 42 *with* Preovolos Decl., Ex. H at 1:50, Ex. H1);
- **iPhone 3GS Guided Tour**: Plaintiff alleges the Guided Tour video contains "a section devoted to MMS" but omits the following language: "MMS support coming from AT&T in late summer" (*compare* FAC ¶¶ 43-44 *with* Preovolos Decl., Ex. I at 9:26, Ex. I1);
- **"Send MMS" Apple web page**: Plaintiff selectively quotes only the portion of the web page about MMS and omits the asterisk and the language following the asterisk: "MMS support from AT&T coming in late summer" (*compare* FAC ¶ 45 *with* Preovolos Decl., Exs. F, F1); and
- **"Photos and Videos" Apple web page**: Plaintiff selectively quotes only the portion of the web page about MMS and omits the following language: "MMS support from AT&T coming in late summer" (*compare* FAC ¶ 46 *with* Preovolos Decl., Exs. J, J1).

Plaintiff's failure to attach any of these materials is a transparent attempt to avoid Apple's clear and systematic disclosures about MMS availability.

[Footnote continued from previous page.]

unreadable. (FAC ¶ 42) A copy of the web page as it actually would have appeared to a customer is attached as Exhibit F1 to the Preovolos Declaration.

Plaintiff points to only one written representation that did not contain the disclosure — the iPhone 3G (not 3GS) box. (FAC ¶ 38) But the iPhone box did not list MMS as a feature or, indeed, refer to MMS at all. (FAC ¶ 38; Preovolos Decl., Ex. K) Thus, a disclosure regarding the timing of MMS's release was not only unnecessary, it would have made no sense.

Similarly, the FAC contains allegations regarding a single oral communication — an investors call on July 21, 2009 — during which MMS was mentioned without the timing disclosure. (FAC ¶ 50) But the purpose of that call was not to market iPhones. Rather, it was a quarterly earnings conference call designed to update Apple's investors and the financial press on the company's financial status. In the course of the one-hour conference call, an Apple spokesperson made a passing reference to the over 100 new features of the iPhone OS 3.0 software, including MMS. (FAC ¶ 50; Preovolos Decl., Ex. L at 4 para. 3) Plaintiff does not allege that he purchased after the earnings call, or that he even listened to the call. Nor does he allege that he learned of or relied on any statement made during the call in deciding to purchase the iPhone, and it thus is irrelevant to the present motion to dismiss. The other Apple representations plaintiff pleads in the FAC included the disclosure about "late summer" availability for MMS.

4. September 25, 2009: MMS Available for iPhone 3G and 3GS.

Three months after the iPhone 3GS went on sale, ATTM made MMS available. In early September 2009, ATTM announced that MMS would be available for iPhone 3G and 3GS users on September 25, 2009. MMS has been available since September 25, 2009. Plaintiff acknowledges there have been no issues with MMS availability since that date by cutting off the putative class after September 25, 2009. (FAC ¶ 58)

D. What Apple Did Not Say About MMS and iPhone.

The FAC also unsuccessfully seeks to obscure what Apple did *not* say about MMS. As set forth above, Apple never made any representations about MMS for iPhone 2G, and plaintiff does not suggest otherwise. Similarly, Apple made no general representations about MMS for

iPhone 3G prior to June 2009.[10] From June 2009 on, when Apple did advertise MMS, Apple consistently included the disclosure: "MMS support from AT&T coming in late summer."

Plaintiff seeks to avoid these facts, which spell the demise of his claims, by endeavoring to refocus the FAC on what ATTM allegedly said about its messaging plans. But this stratagem is equally unavailing.

The FAC tacitly concedes that ATTM's advertising of its iPhone 3G and 3GS messaging plans never represented that iPhone 3G would be MMS-capable. (FAC ¶¶ 29, 52) Plaintiff does not allege that ATTM made any pre-sale representations regarding MMS for the iPhone.

Rather, the vast majority of the ATTM representations plaintiff cites are not specific to the iPhone but are generic representations about ATTM's pricing plans. In fact, the only pre–March 2009 representation pled in the FAC is an ATTM commercial about text-messaging plans for *all* ATTM phones. (FAC ¶ 26) But that commercial makes no mention of iPhone whatsoever. Nor could it. As plaintiff has previously admitted, ATTM's unlimited messaging plans were launched in April 2007, *two months before Apple sold any iPhone*, much less the second- and third-generation iPhones at issue here. (Pls.' Mem. on the Scope, Extent, and Timing of Discovery, at 4, ECF No. 33)[11] General commercials about ATTM data plans applicable to all phones, including a commercial before any iPhone was ever released, cannot

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[10] As noted in section C.1 above, MMS was mentioned during the March 17, 2009 software developer presentation as part of the many features to be provided by the iPhone OS 3.0 software bundle, but the presentation specifically disclosed that OS 3.0 would not be available to the public until summer 2009.

[11] The FAC avoids this factual problem by using misleading pleading tactics. The FAC alleges that "AT&T *continued* marketing its Messaging Unlimited plan" in "October 2007," but conspicuously omits when ATTM began marketing that plan. (FAC ¶ 26 (emphasis added)) Plaintiff cannot disguise the facts he previously represented to the Court through artful pleading, and is bound by his prior admission. *Brandon v. Interfirst Corp.*, 858 F.2d 266, 268 (5th Cir. 1988) ("[A] party who has assumed one position in his pleadings may be estopped from assuming an inconsistent position. . . . The purpose of the doctrine is 'to prevent parties from "playing fast and loose" with (the courts) to suit the exigencies of self interest.'") (citation omitted).

be the basis for plaintiff's alleged expectations concerning the specific features of iPhone 3G and 3GS.

Not surprisingly, plaintiff does not allege that Apple made any representations regarding ATTM's messaging plans. (FAC ¶ 26) Plaintiff points to only one ATTM representation that he contends is iPhone-specific. (FAC ¶ 29) However, plaintiff's other allegations state that the ATTM plans were all the same and were not specific to any particular manufacturer's phone. Plaintiff alleges that ATTM's "iPhone 3G pricing plans" were the "same plans offered to all of its customers," not just iPhone customers. (FAC ¶ 29) "Specifically, for every other AT&T mobile phone," ATTM's messaging plans "are the exact same prices" as the "charges . . . for iPhone customers." (FAC ¶ 56) Indeed, plaintiff acknowledges that the messaging plans were not even unique to ATTM, but comprised the same bundle of messaging services offered by "all other wireless service providers." (FAC ¶ 29) Plaintiff cannot seriously suggest that ATTM's generic data plans defined iPhone-specific features, in particular MMS, without any specific representation to that effect.

Instead, plaintiff seeks to rely on a purported ATTM billing statement for an unidentified "customer," for the period August 15, 2009, through September 14, 2009. (FAC ¶ 54) Plaintiff does not plead that the billing statement is his own; indeed, the unidentified customer appears to be a named plaintiff from a *different action.*[12] Even if the billing statement related to Sullivan or this action (and it does not), Sullivan could not have relied on a billing statement issued in August or September of 2009, at the time he purchased his iPhone in July 2009. (FAC ¶ 13)

[12] An examination of the other amended complaints filed in this MDL discloses that the billing statement belongs to plaintiff Williams in the *Sterker* action. Plaintiffs cannot have it both ways: they cannot decline to file a master complaint and then rely upon facts and allegations in one action to support the claims in another.

E. Plaintiff's iPhone Purchase.

The FAC alleges that Sullivan purchased an iPhone 3G in July 2009. (FAC ¶ 13) Sullivan alleges that he "expected that the iPhone would have the ability to text pictures" using MMS. (FAC ¶ 13) He also alleges that he formed this belief in reliance upon the "representations by Apple and AT&T in television commercials referenced in [the] Complaint" and his "general understanding of the 'revolutionary' nature of the 3G." (FAC ¶ 14) However, Sullivan does not reference any Apple television commercial in the FAC. (FAC ¶ 14) Every iPhone 3G advertisement referenced in the FAC included the disclosure that MMS support would be coming from ATTM "in late summer." Any "general understanding" Sullivan allegedly formed was contradicted by that express disclosure.

Moreover, Sullivan could not have relied upon the "revolutionary" nature of iPhone 3G, because, "revolutionary product" was the focus of the iPhone 2G, not the iPhone 3GS, advertising campaign. (FAC ¶ 23) Sullivan alleges that he "would not have purchased the 3G if he had known that picture messaging was not available at the time of purchase." (FAC ¶ 14) Tellingly, however, although Sullivan admits that he "learned that his iPhone 3G did not have" MMS (FAC ¶ 15), he does not allege that he ever attempted to exercise his right to return it. Sullivan was without MMS — one of over 100 new features for the iPhone — for less than three months.

F. The First Amended Complaint.

The FAC asserts seven causes of action under Ohio law: (1) violation of Ohio's Consumer Sales Practices Act, Ohio Revised Code § 1345 *et seq.*; (2) violation of Ohio's Deceptive Trade Practices Act, Ohio Revised Code § 4165 *et seq.*; (3) breach of contract (against ATTM only); (4) breach of contract (against all Defendants); (5) breach of warranties; (6) unjust enrichment; and (7) negligent misrepresentation. (FAC ¶¶ 67-125) As against Apple, the named plaintiff purports to represent a putative class of all "Ohio residents who purchased an iPhone 3G or 3GS . . . from July 11, 2008 to September 25, 2009." (FAC ¶ 58) For the reasons set forth below, the FAC must be dismissed with prejudice.

LEGAL STANDARD

Dismissal under Federal Rule of Civil Procedure 12(b)(6) is required when the plaintiff fails to set forth "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Gonzalez v. Kay*, 577 F.3d 600, 603 (5th Cir. 2009) (quoting *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009)) (quotations omitted), *cert. denied*, 130 S. Ct. 1505 (2010). To satisfy Rule 8(a)(2), the plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (quoting *Iqbal*, 129 S. Ct. at 1949). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged — but it has not 'show[n]' — 'that the pleader is entitled to relief.'" *Id.* (quoting *Iqbal*, 129 S. Ct. at 1950 (quoting Rule 8(a)(2))). Pleadings that offer mere "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." *Iqbal*, 129 S. Ct. at 1949 (citing *Twombly*, 550 U.S. at 555).

Claims alleging fraudulent conduct must withstand the heightened pleading standard of Rule 9(b), which requires the plaintiff to "state with particularity the circumstances constituting the fraud." *Shandong Yinguang Chem. Indus. Joint Stock Co. v. Potter*, No. 09-20268, 2010 U.S. App. LEXIS 10881, at *5 (5th Cir. May 27, 2010) (quoting Rule 9(b)). The Fifth Circuit "interprets Rule 9(b) strictly, requiring a plaintiff . . . to specify the statements contended to be fraudulent, identify the speaker, state when and where the statements were made, and explain why the statements were fraudulent." *Dorsey v. Portfolio Equities, Inc*., 540 F.3d 333, 339 (5th Cir. 2008) (citation omitted). "Put simply, Rule 9(b) requires the complaint to set forth 'the who, what, when, where, and how' of the events at issue." *Id.* (citation and quotations citation omitted).

ARGUMENT

I. PLAINTIFF LACKS STANDING UNDER ARTICLE III AS TO ALL CAUSES OF ACTION.

The FAC and all causes of action therein must be dismissed because plaintiff has not pled facts sufficient to satisfy the standing requirements of the United States Constitution, Article III. Article III standing requirements include "a causal connection between the injury and the conduct complained of — the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (citation omitted). The "named plaintiffs who represent a class '[must] allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.'" *Lewis v. Casey*, 518 U.S. 343, 357 (1996) (citation omitted). The FAC alleges six causes of action against Apple, all of which are predicated upon "common facts" related to Apple's and ATTM's alleged misrepresentations about the timing of the availability of MMS. (FAC ¶¶ 22-57)

Plaintiff lacks Article III standing as a matter of law. Tellingly, plaintiff never alleges that he saw or relied on any of the advertising pled in the complaint regarding MMS before purchasing his iPhone 3G. Plaintiff cannot establish reliance, causation, or injury. Nor can plaintiff amend to cure this deficiency. Every advertisement pled in the FAC contains the disclosure regarding the timing of MMS's release. Thus, if plaintiff saw these advertisements, he was on notice of the timing of MMS availability and could not have thereby been injured. Accordingly, plaintiff cannot establish Article III standing, and his claims must be dismissed with prejudice.

II. RULE 9(b) REQUIRES DISMISSAL OF PLAINTIFF'S FRAUD-BASED CLAIMS.

The Federal Rules of Civil Procedure apply in diversity cases. *See Hyde v. Hoffman-La Roche, Inc.*, 511 F.3d 506 (5th Cir. 2007). Thus, Federal Rule of Civil Procedure 9(b) applies to the present diversity case, which was brought under the Class Action

Fairness Act. (FAC ¶ 20) As set forth in detail below, plaintiff's allegations fall far short of the heightened pleading requirements of Rule 9(b).

A. Rule 9(b) Applies to State Law Claims Grounded in Fraud.

"A claim of fraud can neither be presumed nor stated in general terms." *Peters v. Metro. Life Ins. Co.*, 164 F. Supp. 2d 830, 835 (S.D. Miss. 2001) (quotations and citation omitted). "At a minimum, Rule 9(b) requires allegations of the particulars of time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby." *Tel-Phonic Servs., Inc. v. TBS Int'l, Inc.*, 975 F.2d 1134, 1139 (5th Cir. 1992) (internal quotation marks and citation omitted). "Put simply, Rule 9(b) requires 'the who, what, when, where, and how' to be laid out." *Dorsey*, 540 F.3d at 339.

"State law fraud claims are subject to the heightened pleading requirements of Rule 9(b)." *Sullivan v. Leor Energy, LLC*, 600 F.3d 542, 550-51 (5th Cir. 2010). Similarly, other state law claims predicated on the same (fraud-based) set of facts are subject to Rule 9(b)'s heightened requirements. *See, e.g.*, *Potter*, 2010 U.S. App. LEXIS 10881, at *5; *Pinero v. Jackson Hewitt Tax Serv. Inc.*, 594 F. Supp. 2d 710, 721 (E.D. La. 2009) (applying Rule 9(b) to Louisiana Unfair Trade Practices Act where "plaintiff's [] claim is based on defendants' allegedly fraudulent misrepresentation"). Moreover, Rule 9(b) applies equally to fraud-based allegations of misrepresentation and omission. *See, e.g., id.*[13] Fifth Circuit courts

[13] In actions transferred pursuant to 28 U.S.C. § 1407, the procedural law of the transferee court applies. *See Bhatia v. Dischino*, No. 3:09-cv-1086-B, 2010 U.S. Dist. LEXIS 31750, at *9-10 (N.D. Tex. Mar. 30, 2010) ("Because the Court is hearing this action as a result of a forum transfer by the Multidistrict Litigation Panel, if called upon to address matters of state law, the Court is bound to apply the state law of the transferor forum. As to matters of federal law, however, it is the law of the transferee court that governs. Thus, because pleading requirements are purely matters of federal law, the Court looks to the law of the transferee court — this Circuit — for controlling Rule 12(b)(6) and Rule 9(b) standards.") (citations omitted). Here, however, Fifth Circuit and Sixth Circuit decisions respecting application of Rule 9(b) to claims are in accord. *See United States ex rel. Marlar v. BWXT Y-12, L.L.C.,* 525 F.3d 439, 444-45 (6th Cir. 2008); *Ferron v. SubscriberBase Holdings, Inc.*, No. 2:08-CV-760, 2009 U.S. Dist. LEXIS 23583, at *15-16 (S.D. Ohio Mar. 10, 2009) ("Rule 9(b) is not limited to claims of common law fraud or claims which include fraud as one of the elements. Rather,

[Footnote continued on following page.]

"apply the rule with force, without apology." *Williams v. WMX Techs., Inc.*, 112 F.3d 175, 178 (5th Cir.), *cert. denied*, 1997 U.S. LEXIS 6725 (1997) ("[R]eady access to the discovery engine . . . has been held back for certain types of claims. An allegation of fraud is one. Rule 9(b) demands a larger role for pleading in the pre-trial defining of such claims.").

The overarching premise of the FAC is that "Apple and [ATTM] each misrepresented and/or concealed, suppressed, or omitted material facts to and from customers about the fact that MMS was not an available feature on the iPhone 3G and 3GS." (FAC ¶ 57) All of plaintiff's causes of action are based on a set of "common facts" regarding Apple's and ATTM's alleged misrepresentations about MMS. Accordingly, plaintiff must satisfy the heightened pleading requirements of Rule 9(b) as to all claims. He fails to do so.

The FAC never identifies which advertisements plaintiff saw, if any — including whether he saw any MMS representations; what specific advertising he relied on; or how he was allegedly injured. Plaintiff does not allege a single fact showing how (or even whether) he was caused to be injured; he offers only the bare legal conclusion that he generally has suffered an ascertainable loss. (FAC ¶¶ 92, 123, 125) The Fifth Circuit "strictly interprets" Rule 9(b)'s requirements, and for the reasons set forth below, plaintiff's claims must be dismissed. *Flaherty & Crumrine Preferred Income Fund, Inc. v. TXU Corp*., 565 F.3d 200, 207 (5th Cir.), *cert. denied*, 130 S. Ct. 199 (2009).

B. Plaintiff's Negligent Misrepresentation Claim Does Not Satisfy Rule 9(b).

1. Plaintiff Cannot Base a Claim for Negligent Misrepresentation on Accurate Representations.

The most basic element of negligent misrepresentation is a false or misleading statement. *GEM Indus. v. Sun Trust Bank*, No. 3:08 CV 2991, 2010 U.S. Dist. LEXIS 31042, at *20-21 (N.D. Ohio Mar. 31, 2010) (negligent misrepresentation requires that the defendant

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[Footnote continued from previous page.]

the heightened pleadings requirements apply to 'averments of fraud' or 'claim[s] that sound[s] in fraud — in other words, one[s] that [are] premised upon a course of fraudulent conduct.'") (citation omitted).

supply "false information"). Plaintiff cannot plead this element because Apple fully disclosed the availability of MMS, and accordingly, there was no misrepresentation.

As set forth above, Apple's advertising regarding MMS disclosed when MMS would be released. Accordingly, examination of full copies of the advertising alleged in the FAC demonstrates that there was no misrepresentation whatsoever. Ohio courts dismiss negligent misrepresentation claims in such circumstances. *See Delman v. City of Cleveland Heights*, 41 Ohio St. 3d 1, 4 (1989) (affirming summary judgment against plaintiffs because the point-of-sale inspection upon which plaintiffs purportedly relied contained a disclaimer); *R.J. Wildner Contracting Co. v. Ohio Turnpike Comm'n*, 913 F. Supp. 1031, 1040 (N.D. Ohio 1996) (dismissing negligent misrepresentation claim because the plaintiff, as a matter of law, could not have justifiably relied on alleged misrepresentations based on disclosures); *In re Jackson Nat'l Life Ins. Co. Premium Litig.*, 107 F. Supp. 2d 841, 860, 861 (W.D. Mich. 2000) (granting summary judgment on a negligent misrepresentation claim because the sales illustration upon which plaintiff purportedly relied contained conspicuous disclaimers). The most fundamental requirement of a negligent misrepresentation claim thus is lacking; plaintiff's negligent misrepresentation claim must be dismissed.

2. Plaintiff Cannot Allege Reliance as Required for a Negligent Misrepresentation Claim.

Reliance is an essential element of a misrepresentation claim. *See In re Nat'l Century Fin. Enters.,* 580 F. Supp. 2d 630, 638 (S.D. Ohio 2008) (citing *Delman,* 41 Ohio St. 3d 1)). Sullivan must allege that he saw and relied upon a particular representation in purchasing his iPhone 3G. The FAC's allegations fall far short of that standard, asserting only naked legal conclusions of reliance. (FAC ¶¶ 14, 123) Rule 9(b) imposes a higher standard; it requires plaintiff to allege the "who, what, when, where, and how" of the misrepresentations he saw or heard and of his reliance. Plaintiff's failure properly to allege reliance is not a simple pleading omission: it reflects a fundamental and incurable defect in his claims. Plaintiff either saw *no* representations regarding MMS, or saw advertising that contained the disclosure. Sullivan

accordingly cannot allege reliance on specific representations, as he must, to maintain his negligent misrepresentation claim.

Plaintiff also alleges that from the time he bought his iPhone 3G, he "expected that the iPhone would have the ability to text pictures" using MMS. (FAC ¶¶ 13, 14) Plaintiff further alleges that he relied upon unspecified representations by Apple and ATTM, and formed his expectation in reliance upon his "general understanding of the 'revolutionary' nature of the 3G." (FAC ¶ 14) Plaintiff could not have relied upon the "revolutionary" nature of iPhone 3G, because "revolutionary product" was the focus of the iPhone 2G, not the iPhone 3G, advertising campaign. (FAC ¶ 23) Indeed, none of the advertisements plaintiff pleads in the FAC even includes the term "revolutionary." Moreover, claims that the iPhone was "revolutionary" are non-actionable puffery. *See Allied Erecting & Dismantling Co. v. Genesis Equip. & Mfg.*, 649 F. Supp. 2d 702, 727 (N.D. Ohio 2009) (holding that defendant's "use of terms such as 'revolutionary' and 'unique' constitutes a 'general claim of superiority over comparable products that is so vague that it can be understood as nothing more than mere expression of opinion.' In other words, these statements are mere puffery") (citation and quotations omitted).[14] The general term "revolutionary" cannot conceivably be construed to represent that the iPhone would offer a specific feature such as MMS.[15]

Plaintiff's negligent misrepresentation claim does not meet the requirements of Rule 8, much less the heightened standard of Rule 9(b), and must be dismissed.

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[14] Courts uniformly hold that "revolutionary" is a generalized statement that cannot give rise to legal liability. *See, e.g., Soilworks, LLC v. Midwest Indus. Supply, Inc.*, 575 F. Supp. 2d 1118, 1133 (D. Ariz. 2008) (holding "revolutionary state-of-the-art innovation" is "mere puffery") (citation and quotations omitted); *In re NVE Corp. Sec. Litig.*, 551 F. Supp. 2d 871, 902 (D. Minn. 2007) (holding "use of the word 'revolutionary' to characterize MRAM was inactionable puffery"), *aff'd*, 527 F.3d 749 (8th Cir. 2008).

[15] Insofar as plaintiff's statutory claims, under the Ohio Consumer Sales Practices Act and Ohio Deceptive Trade Practices Act, are premised on his expectation that the iPhone was a "revolutionary" phone, those claims fail as well because such language is non-actionable puffery. *See Allied Erecting,* 649 F. Supp. 2d at 725 (DTPA claim); *Howard v. Norman's Auto Sales*, 2003 Ohio 2834, at ¶ 34 (Ct. App. June 3, 2003) (CSPA claim).

3. Plaintiff Cannot Base a Claim for Negligent Misrepresentation on Apple's Alleged Omissions.

Plaintiff attempts to circumvent the fact that Apple did not make *any* misrepresentations about MMS functionality, by basing his negligent misrepresentation claims on what Apple purportedly "concealed, suppressed, or omitted" (FAC ¶ 120). Under Ohio law, plaintiff may not do so. Ohio law is clear that "the alleged negligent misrepresentation must have been an affirmative false statement. An omission or silence will not satisfy this requirement." *Picker Int'l v. Mayo Found.,* 6 F. Supp. 2d 685, 689 (N.D. Ohio 1998) (holding that alleged misrepresentation premised on an omission could not support negligent misrepresentation claim); *see also Nat'l Mulch & Seed, Inc. v. Rexius Forest By-Products, Inc.*, No. 2:02-cv-1288, 2007 U.S. Dist. LEXIS 24904, at *40 (S.D. Ohio Mar. 22, 2007); *Manno v. St. Felicitas Elementary Sch.,* 161 Ohio App. 3d 715 (Ct. App., Cuyahoga County 2005). Accordingly, plaintiff's negligent misrepresentation claim fails as a matter of law.

C. Plaintiff's Claims Under Ohio's Consumer Sales Practice Act Do Not Satisfy Rule 9(b).

Plaintiff's claims under Ohio's Consumer Sales Practice Act ("CSPA") fail for similar reasons. The CSPA requires Sullivan to allege facts demonstrating that the conduct at issue is at "variance with the truth." *Cranford v. Joseph Airport Toyota*, No. 15408, 1996 Ohio App. LEXIS 2252, at *5-6 (Ohio Ct. App., Montgomery County May 17, 1996); Ohio Rev. Code Ann. § 1345.02. He cannot do so. Moreover, Sullivan fails to allege facts establishing causation as required to state a CSPA violation. Ohio Rev. Code Ann. §§ 1345.02, 1345.03.

1. Accurate Representations Cannot Violate the CSPA.

The threshold requirement for a CSPA claim is that "a seller's act must . . . be at variance with the truth." *Cranford,* 1996 Ohio App. LEXIS 2252, at *5-6. Under the CSPA, Sullivan must "show a material misrepresentation, deceptive act, or omission." *Mathias v. Am. Online, Inc.*, 2002 Ohio 814 (Ct. App., Cuyahoga County 2001). As set forth above, Apple's representations regarding MMS functionality were accurate.

Sullivan seeks to evade Apple's accurate representations by alleging that unspecified "representations and advertisements" regarding the iPhone 3G and 3GS were "unsubstantiated, false and misleading." (FAC ¶ 73) Plaintiff cannot save his claim from dismissal by vague and conclusory pleading. Where plaintiff fails to allege that any specific representation misled him, there can be no deceptive act as contemplated by the CSPA. *Rice v. State Lottery Comm'n*, 96 Ohio Misc. 2d 25, 31 (Ct. Cl. 1999); *Mercy Health Partners of Sw. Ohio v. Miller*, No. A0301165, 2005 WL 2592674, at *3 (Ohio Ct. Common Pleas Sept. 30, 2005). Because Apple fully disclosed that MMS functionality would not be available until late summer, Sullivan cannot state a claim of deceptive practices under section 1345.02 of the CSPA.

2. Plaintiff Fails to Plead Causation as Required by the CSPA.

Sullivan's CSPA claim must also be dismissed because he does not plead facts establishing causation. *Lilly v. Hewlett-Packard Co.*, No. 1:05-CV-465, 2006 U.S. Dist. LEXIS 22114, at *13-15 (S.D. Ohio Apr. 21, 2006). "[W]hether it be termed an issue of reliance or an issue of proximate cause, an appropriate rule is that where the defendant is alleged to have made material misrepresentations or misstatements, there must be a cause and effect relationship between the defendant's acts and the plaintiff's injuries." *Id.* at *13; *see also Butler v. Sterling*, No. 98-3223, 2000 U.S. App. LEXIS 6419, at *13 (6th Cir. Mar. 31, 2000) ("[w]hat we cannot accept . . . is that an OCSPA claim . . . does not require a plaintiff to demonstrate that damages were proximately caused by the 'deceptive' act"); *Temple v. Fleetwood Enters.*, 133 F.App'x 254, 267-68 (6th Cir. 2005); *Street v. Bristol-Myers Squibb Co.*, No. 3:07-cv-1182 (FLW), 2009 U.S. Dist. LEXIS 121120, at *35 (D.N.J. Dec. 30, 2009) (dismissing CSPA claims where "Plaintiffs fail[ed] to identify any specific advertisements that were viewed by themselves or their prescribing physicians" and thus failed to plead, in anything more than conclusory terms, a violation of the CSPA). Principles of causation require that a plaintiff specifically plead the representations that he saw and that caused him harm. Sullivan's failure to do so requires dismissal of his CSPA claim. *See, e.g., Lilly*, 2006 U.S. Dist. LEXIS 22114, at *15.

D. Plaintiff's Claims Under Ohio's Deceptive Trade Practices Act Do Not Satisfy Rule 9(b).

Like the CSPA, the Deceptive Trade Practices Act ("DTPA") requires that Sullivan plead facts establishing a specific false statement that caused him injury. *Arlington Video Prods. v. Fifth Third Bancorp*, No. 2:08-cv-122, 2008 U.S. Dist. LEXIS 51196, at *7 (S.D. Ohio May 1, 2008). Sullivan has not done so and his DTPA claim must be dismissed.

1. Accurate Representations Cannot Violate the DTPA.

Sullivan does not plead the threshold requirement for a DTPA claim — that the alleged representation was in fact false. Where, as here, there is nothing untruthful about a defendant's representations or advertisements, a DTPA claim must be dismissed. *See, e.g., Popovich v. Southern Park Pontiac & Subaru*, 704 N.E.2d 286, 292 (Ohio Ct. App., Mahoning County 1997) ("In order to prove a violation of R.C. 4165.02, it must be shown that the subject representation was in fact false or misleading."); *Crail v. Best Buy Co.,* No. 2006-227 (WOB), 2007 U.S. Dist. LEXIS 68983, at *11 (E.D. Ky. Sept. 17, 2007) (dismissing DTPA claim on grounds that plaintiff did not allege false or misleading representations where defendants brochures clearly explained return policy). As discussed above, the Apple representations that plaintiff pleads fully disclosed that MMS functionality would not be available until late summer.

2. Plaintiff Fails to Plead Causation as Required by the DTPA.

Sullivan does not plead that he actually saw or heard any of the allegedly false advertising, and thus he has not pled the proximate cause required under the DTPA. Courts have dismissed DTPA claims on analogous facts. *See, e.g., Arlington Video Prods.*, 2008 U.S. Dist. LEXIS 51196, at *13 (dismissing DTPA claim where plaintiff failed to "allege that [plaintiff], specifically, even received or saw a booklet or handout, or any of the advertisements

which contained a specific false or misleading statement that induced [plaintiff] to bank with Defendant, thereby causing [plaintiff] harm"). Plaintiff's DTPA claim must be dismissed.[16]

III. PLAINTIFF'S NEGLIGENT MISREPRESENTATION CLAIM ALSO FAILS BECAUSE HE DOES NOT PLEAD A SPECIAL RELATIONSHIP.

Ohio law requires a special relationship to state a claim for negligent misrepresentation. "This relationship occurs only in 'special' circumstances." *Picker Int'l*, 6 F. Supp. 2d at 689. It does not exist in an "ordinary business transaction." *Id.* Rather, the "relationship is similar . . . to a fiduciary relationship. . . . The classic example is a client placing his or her trust in an attorney or accountant." *Premier Bus. Group, LLC v. Red Bull of N. Am., Inc.,* No. 08-CV-01453, 2009 U.S. Dist. LEXIS 91647, at *32 (N.D. Ohio Sept. 30, 2009); *see also Picker Int'l,* 6 F. Supp. 2d at 689 ("Usually the defendant is a professional . . . who is in the business of rendering opinions to others for their use in guiding their business, and the plaintiff is a member of a limited class."); *Thornton v. State Farm Mut. Auto Ins. Co*., No. 1:06-cv-00018, 2006 U.S. Dist. LEXIS 83968, at *49 (N.D. Ohio Nov. 17, 2006) ("The Ohio Supreme Court is unequivocal that negligent misrepresentation is a business tort related to professional malpractice.").[17]

Ohio courts routinely hold that a special relationship requires a closer degree of trust than an ordinary business relationship; consumer transactions do not meet this standard.

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[16] Finally, plaintiff's DTPA claim should be dismissed because Ohio courts have held the DTPA applies in commercial — not consumer — disputes. "The Ohio Deceptive Trade Practices Act is substantially similar to the federal Lanham Act, and it generally regulates trademarks, unfair competition, and false advertising." *Dawson v. Blockbuster, Inc.,* 2006 Ohio 1240, at ¶ 23-25 (Ct. App., Cuyahoga County 2006). *See also Thornton v. State Farm Mut. Auto Ins. Co.*, No. 1:06-cv-00018, 2006 U.S. Dist. LEXIS 83968, at *50 (N.D. Ohio Nov. 17, 2006) (dismissing DTPA claim on the grounds that the Act only applies to disputes between commercial entities); *Glassner v. R.J. Reynolds Tobacco Co.*, No. 5:99 CV 0796, 1999 U.S. Dist. LEXIS 22637, at *21 (N.D. Ohio June 29, 1999) (dismissing DTPA claim brought by consumer, where "[a]s a threshold matter," the court held "that Ohio Rev. Code § 4165.01 *et seq.* governs conduct between commercial entities, not between a commercial entity and a consumer"); *but see Bower v. IBM,* 495 F. Supp. 2d 837, 842-43 (S.D. Ohio 2007); *Popovich,* 704 N.E.2d 286.

[17] Although a "special relationship" is "not a formal element of a claim for negligent misrepresentation under the law of Ohio," it is a "characterization of the requirements for liability to exist." *Nat'l Mulch & Seed,* 2007 U.S. Dist. LEXIS 24904, at *29-30, *37.

Thornton, 2006 U.S. Dist. LEXIS 83968, at *50 n.10 ("Courts are wary of applying the tort to typical business transactions, let alone a consumer transaction."); *Premier Bus. Group*, 2009 U.S. Dist. LEXIS 91647, at *32 ("While [defendant] allegedly supplied [plaintiff] with information . . . the mere act of supplying information in itself is not sufficient to give rise to a negligent misrepresentation claim. Indeed, countless companies supply information in the ordinary course of business."). In *Thornton*, the plaintiff alleged that she purchased the vehicle at issue "primarily for personal, family or household purposes." 2006 U.S. Dist. LEXIS 83968, at *49. The court expressly declined to "expand the tort [of negligent misrepresentation] into the realm of simple consumer transactions," noting that to do so "would wholly remove a tort originally founded in concepts of professional liability from its foundations." *Id*. at *50*; see also Picker Int'l*, 6 F. Supp. 2d at 689 (holding that the parties did not have a "special relationship" where contractual duties were simply tied to a commercial transaction). Further, "a person may not maintain an action for negligent misrepresentation when the alleged misrepresentation is intended to reach an extensive, unresolved class of persons. Representations made to the public-at-large cannot result in liability." *Nat'l Mulch & Seed*, 2007 U.S. Dist. LEXIS 24904, at *31-32 (citing a newspaper reader and radio listener as examples of members of unlimited classes). Therefore, plaintiff's negligent misrepresentation claim must be dismissed.

IV. PLAINTIFF CANNOT STATE CLAIMS FOR BREACH OF WARRANTY AND CONTRACT.

A. These Claims Are Merely Repackaged Versions of Plaintiff's CSPA, DTPA, and Negligent Misrepresentation Claims and Must Be Dismissed for the Same Reasons.

Plaintiff's so-called warranty and contract claims are in fact identical to his claims for violation of CSPA, violation of DTPA, and negligent misrepresentation, very thinly disguised with sparse legal conclusions using the rhetoric of warranty and contract law. It is important to be clear about what plaintiff does and does not allege. Plaintiff does not allege that Apple's express, one-year limited warranty was breached, or that he made any other written contract

with Apple. Nor does plaintiff allege that the implied warranties of merchantability or fitness for use were breached; indeed, plaintiff does not even *refer* in the FAC to these implied warranties. Rather, plaintiff asserts that Apple's advertising of MMS created a "warranty" and/or a "contract" that MMS would be available, and that these agreements were breached. (FAC ¶¶ 104-106, 112) Plaintiff's "warranty" and "contract" claims thus are identical to one another, and to his CSPA, DTPA, and negligent misrepresentation claims, and fail for the same reasons. If plaintiff saw any of the Apple advertising alleged in the FAC, he also saw the timing disclosure contained in the advertising. Accordingly, such advertising could not have created any "warranty" or "contract" that MMS would be available before late summer.

Further, if Apple's advertising created any "warranty" or "contract" regarding MMS — and it did not — that "warranty" or "contract" was the truthful statement that MMS would be available in late summer 2009. There was no breach, as is clear from the full text of the Apple advertising identified in the FAC and filed herewith. Plaintiff's warranty and contract claims are meritless and accordingly must be dismissed.

B. Plaintiff Cannot State a Claim for Breach of Warranty.

Sullivan's breach of warranty claim must be dismissed for three reasons. First, he has not pled the creation of an express warranty with regard to MMS on his iPhone. Second, Sullivan has not pled that he provided Apple with the required notice of an alleged breach of warranty. Finally, Sullivan is not in privity with Apple and cannot state a claim for breach of implied warranty.

1. Plaintiff Has Not Pled the Existence of an Express Warranty Regarding MMS Availability.

Plaintiff's express warranty claims suffer from the same core defect as the rest of his claims: failure to identify any communication by Apple regarding the availability of MMS on his iPhone. To allege an express warranty, plaintiff must allege an "affirmation of fact by the seller as to a product or commodity to induce the purchase thereof, on which affirmation the buyer relies in making the purchase." *Wagner v. Roche Labs*., 85 Ohio St. 3d 457, 459 (1999)

(quoting *Rogers v. Toni Home Permanent Co.*, 167 Ohio St. 244 (1958)); Ohio Rev. Code Ann. § 1302.26(A)(1),(2). "Express warranties under the Ohio Uniform Commercial Code [] are contractual in nature. They arise only where a promise by the seller or a description of the goods to be sold is made a part of the basis of the parties' bargain." *Price Bros. Co. v. Philadelphia Gear Corp.*, 649 F.2d 416, 422 (6th Cir. 1981); *see also Nessle v. Whirlpool Corp.*, No. 1:07CV3009, 2008 U.S. Dist. LEXIS 56940, at *10 (N.D. Ohio July 25, 2008) (dismissing express warranty claims where plaintiff did not plead any written or oral representation that could constitute an express warranty). Although reliance is not a formal element of a claim for breach of express warranty, "[t]o determine whether a representation is an affirmation of fact that became a part of the basis of the bargain, the Court must consider the surrounding circumstances of the sale, including: (1) the reasonableness of the buyer in believing the seller, (2) the reliance placed on the seller's statement by the buyer, and (3) whether the seller assumes to assert a fact of which the buyer is ignorant, or whether he merely states an opinion or expresses a judgment about a thing." *Nat'l Mulch & Seed*, 2007 U.S. Dist. LEXIS 24904, at *54.

As set forth above, Sullivan has pled no particular "affirmation or promise" or "description" concerning MMS that he actually saw, let alone relied upon in deciding to purchase an iPhone. *Iqbal*, as well as Rule 9(b), demand that plaintiff allege some "affirmation or promise" or "description" to which he was exposed and which could have created an express warranty. He does not. The FAC's lack of specificity also undermines any suggestion that representations regarding MMS became "part of the basis of the bargain." Sullivan alleges no affirmation or promise by Apple on which he relied before his purchase and which became part of his bargain with Apple. The conclusory allegation that "the promises and affirmations of fact made by Defendants on the iPhone and [ATTM] labels, packaging materials, websites, advertisements and/or press releases, all of which created or constituted express warranties that became part of the basis of the bargain" (FAC ¶ 110), is not sufficient. Plaintiff has not pled

facts demonstrating that he was exposed to a statement by Apple regarding MMS or that he relied on such a statement in purchasing his iPhone.

2. Plaintiff's Failure to Notify Apple and Return His iPhone Bars His Warranty Claims.

To state a viable express or implied warranty claim under the Ohio Commercial Code provisions governing warranties, Sullivan must plead that he provided notice to Apple within a reasonable time of discovering the alleged breach. Ohio Rev. Code Ann. § 1302.65(A)(1); *St. Clair v. Kroger Co*., 581 F. Supp. 2d 896, 901 (N.D. Ohio 2008); *Radford v. Daimler Chrysler Corp.*, 168 F. Supp. 2d 751, 754 (N.D. Ohio 2001). "As a general rule, once a buyer accepts a defective good, the buyer must notify the seller of the breach and afford the seller the opportunity to cure the claimed defects." *Abele v. Bayliner Marine Corp.*, 11 F. Supp. 2d 955, 960 (N.D. Ohio 1997). Plaintiff's failure to do so bars this claim.

Apple offers a return right for its iPhones. Yet nowhere in the FAC does plaintiff allege that he tried to return his iPhone because MMS was not yet functional. Nor does plaintiff allege that he notified Apple of the alleged breach within a "reasonable" time.

Sullivan concedes that it was apparent to him that MMS was not yet enabled on his iPhone after he signed up for his service plan. (FAC ¶ 15) Sullivan, however, has had his iPhone 3G for over a year. (FAC ¶ 13 (alleging July 2009 purchase)) Yet Sullivan does not allege that he contacted Apple about MMS or returned his iPhone. Therefore, he cannot establish the statutorily mandated notice of breach within a reasonable time. Ohio Rev. Code Ann. § 1302.65(A)(1).

Under similar circumstances, the Northern District of Alabama dismissed express and implied warranty claims with prejudice for this precise reason under an identical Alabama UCC provision.[18] *Smith v. Apple Inc.*, No. 08-AR-1498-S, 2008 U.S. Dist. LEXIS 111777, at *4

[18] Ohio has adopted an identical provision. *Big Lots Stores, Inc. v. Luv N' Care*, No. 2:04-810, 2007 U.S. Dist. LEXIS 23150, at *18 (S.D. Ohio Mar. 29, 2007) (holding Ohio law is not in conflict with other state laws adopting the same Commercial Code section).

(N.D. Ala. Nov. 4, 2008) ("Nowhere in their amended complaint do plaintiffs allege that they provided Apple notice of the alleged breach.") The *Smith* court rejected the plaintiffs' argument that Apple's alleged "general awareness" of alleged issues with the iPhone 3G satisfied the UCC's notice requirement. *Id*. at *5 (dismissing express and implied warranty claims with prejudice because "a general awareness on Apple's part of alleged defects in its iPhone does not extinguish the purposes of the notice requirement, nor does it substitute for that requirement"). For the same reasons, plaintiff's warranty claim here must be dismissed.

3. Plaintiff Cannot State a Claim for Breach of Implied Warranty.

It is unclear from the FAC whether plaintiff attempts to assert implied warranty claims. (FAC ¶¶ 108-113) If Sullivan intends to state an implied warranty claim, he does not allege facts establishing its elements, and his claim must be dismissed for failure to meet threshold pleading standards. *Twombly*, 550 U.S. at 564. Moreover, Sullivan allegedly purchased his iPhone 3G from ATTM and is not in privity with Apple. (FAC ¶ 13) Privity is required for implied warranty claims under Ohio law. *St. Paul Fire and Marine Ins. Co. v. R.V. World, Inc.*, 62 Ohio App. 3d 535, 540 (Ct. App., Summit County 1989) ("In Ohio, a long line of cases has developed the principle that absent privity, a plaintiff cannot bring a contract action for breach of implied warranty.").

Further, Sullivan cannot plead that his iPhone 3G is not fit for its ordinary purpose as a cellular telephone, music player, and Internet device. Accordingly, he cannot state a claim for breach of the warranty of merchantability. *See, e.g., Urso v. Compact Cars, Inc.,* 2007 Ohio 4375, at ¶ 19 (Ct. App., Trumbull County 2007) ("R.C. 1302.27(A) implies a warranty that goods sold must be merchantable. That is, all goods must be 'fit for the ordinary purpose for which such goods are used[.]'").

Nor has plaintiff stated a claim for breach of the implied warranty of fitness for a particular purpose. Plaintiff never informed ATTM or Apple that he intended to use his iPhone for any particular purpose other than the ordinary use for which it is intended. *Price Bros.*, 649 F.2d at 423 (existence of an implied warranty of fitness for a particular purpose is

contingent on the seller's awareness at the time of contracting of the particular purpose for which the buyer intends to use the goods). Insofar as plaintiff asserts a breach of implied warranty claim against Apple, it fails as a matter of law.

C. Plaintiff's Contract Claims Fail to Meet the Most Lenient Pleading Standard.

Sullivan does not plead the existence of *any* contract with Apple. Rather, his "contract" claim simply repeats the vague allegation that Apple "expressly and/or impliedly promised Plaintiff that the iPhone 3G and iPhone 3GS . . . included MMS." (FAC ¶ 104) Not only is this bare allegation insufficient to plead a contract, but, contrary to this conclusory assertion, Sullivan does not identify any Apple communications concerning MMS that he actually saw or heard. He thus has failed to allege any facts showing that Apple made any express or implied promises to *him*, and accordingly fails to allege the existence of a contract.

"The existence of an enforceable contract is a prerequisite to a claim for breach of contract." *Knoop v. Orthopaedic Consultants of Cincinnati, Inc.*, 2008 Ohio 3892, at ¶ 12 (Ct. App., Clermont County 2008) (affirming dismissal of contract claim where plaintiff failed to plead legally cognizable contract); *Bungard v. Dep't of Job & Family Servs.*, 2007 Ohio 6280 (Ct. App., Franklin County 2007) (same). The bare allegations set forth in the FAC do not establish the terms of a contract.

Finally, Apple's advertisements regarding MMS consistently disclosed that MMS would be available in late summer. And so it was. Accordingly, even had a "contract" been created, it would not have been breached.

V. PLAINTIFF'S UNJUST ENRICHMENT CLAIM FAILS AS A MATTER OF LAW.

Sullivan's unjust enrichment claim fails because he has not pled facts demonstrating that it would be unjust to allow Apple to retain any benefit conferred by him. Sullivan offers only the conclusory allegation that "[i]t is unjust to allow Defendants to retain the profits from their deceptive, misleading and unlawful conduct." (FAC ¶ 116) But as demonstrated above,

he has not pled a single instance of deceptive, misleading, or unlawful conduct by Apple. On the contrary, Apple consistently disclosed when MMS would become available.

Moreover, under Ohio law, an indirect purchaser cannot state a claim for unjust enrichment. Here, Sullivan purchased from ATTM, not Apple. (FAC ¶ 13) This bars his unjust enrichment claim. *See, e.g., In re Whirlpool*, 684 F. Supp. 2d 942, 952-53 (N.D. Ohio 2009) (dismissing unjust enrichment claim based on plaintiff's failure to plead economic transaction with defendant); *Johnson v. Microsoft Corp.*, 106 Ohio St. 3d 278, 286 (2005) (affirming dismissal of unjust enrichment claim because "[t]he rule of law is that an indirect purchaser cannot assert a common-law claim for . . . unjust enrichment against a defendant without establishing a benefit had been conferred upon that defendant by the purchaser").

CONCLUSION

For the reasons stated herein, the motion to dismiss should be granted with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading has been electronically filed and served upon all known counsel of record by electronic service and/or U. S. mail, properly addressed, this the 10th day of August, 2010.

/s/ Quentin F. Urquhart