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-7608** **Case No. 09-2613 (D. Minnesota)** **Kyle Irving,** **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 Kyle Irving's ("plaintiff" or "Irving") First Amended and Supplemental Complaint ("FAC") (ECF No. 74).

SUMMARY OF ARGUMENT

Plaintiff attempts to avoid dismissal by blatantly mischaracterizing Apple's advertising regarding MMS. Irving 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. That plaintiff persists in this mischaracterization demonstrates the baselessness of his claims. Tellingly, Irving does not identify a single advertisement that he allegedly saw and relied on. That is because he cannot do so; all the Apple advertisements plaintiff alleges contained the disclosure. The FAC must be dismissed with prejudice.

Every Apple advertisement or other marketing document for iPhone 3GS alleged in the FAC that mentioned MMS disclosed that MMS was coming in late summer. The FAC's allegations regarding Irving carefully avoid stating *which* supposed Apple advertisements he saw. The reason is simple: if Irving admitted seeing any specific advertisement regarding MMS, it would be evident that he also saw the disclosure. Either Irving saw no representation about MMS, in which case there is no basis for his claims, or he saw an Apple advertisement that contained the disclosure, in which case his claims are barred.

Tacitly conceding that his false advertising claims fail, Irving attempts in the FAC to convert his prior false advertising claims into claims based upon ATTM's data service contracts with plaintiff. Irving's contracts with ATTM cannot provide the basis for his claims against Apple. Moreover, plaintiff's claims based on the ATTM data plans are as misleadingly pled and as lacking in merit as his claims based on Apple's advertising. The FAC itself discloses that the ATTM data plans are not specific to the iPhone 3G or 3GS, but are generic plans for all phones

[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.

supported by ATTM.[2] Such generic plans cannot be the basis for a consumer expectation regarding iPhone 3G or 3GS.

Irving's claims are equally riddled with legal flaws. His MPCFA, MUTPA, and MUDTPA claims fail to satisfy the elements required to maintain these causes of action. Irving does not identify the particular representations regarding MMS to which he was allegedly exposed, and he does not allege facts establishing that he was caused injury thereby. Plaintiff's express and implied warranty claims are merely thinly disguised repetitions of his misrepresentation claims and fail for the same reasons. Finally, Irving does not adequately allege that he suffered damage. The fact that he was required to wait approximately three months for one of hundreds of functions offered on the iPhone 3GS — timing he was informed of in advance — does not constitute a legally cognizable injury. For all these reasons, the FAC should be dismissed with prejudice.[3]

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[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.

[3] In addition to the arguments set forth herein, Apple notes the following further obstacle to plaintiffs' claims. Plaintiff alleges that "AT&T needed to build up its network to support" MMS. (FAC ¶¶ 4-6) 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).

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. 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. 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.

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;

Declaration of Penelope A. Preovolos in Support of Apple Inc.'s Mot. to Dismiss ("Preovolos Decl."), Ex. A)[4]

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 ¶ 26) 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 the third-generation or "3G" network as well as the 2G network. (FAC ¶¶ 27-28) 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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[4] 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)[5] Apple also issued a press release the same day announcing that MMS,

[5] 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.

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)[6]

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: "In 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))[7]

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*:[8]

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[6] 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)

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

[8] 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 omits the disclosure from 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

[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 from AT&T coming 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).

Irving'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 form previous page.]

misleading attempt to render the relevant "late summer" language unreadable. (FAC ¶ 41) A copy of the web page as it actually would have appeared to a customer is attached as Exhibit F1 to the Preovolos Declaration.

Irving 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) Irving does not allege that he listened to this call and cannot so allege, as he purchased his iPhone 3GS in June 2009, prior to the July 21 earnings call. (FAC ¶ 13) Accordingly, any statements made during the call could not have caused him 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.[9] 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 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)[10] General commercials about ATTM data plans applicable to all phones, including a commercial before any iPhone was ever released, cannot be the basis for plaintiff's alleged expectations concerning the specific features of iPhone 3G and 3GS.

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[9] 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.

[10] The FAC avoids this factual problem by using misleading pleading tactics. The FAC alleges that "AT&T *continued* marketing its Messaging Unlimited plans" 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).

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 purported ATTM billing statements for unidentified "customers" for the period August 15, 2009, through September 14, 2009. (FAC ¶ 54) These incomplete excerpts from anonymous customers' alleged billing statements cannot provide a basis for plaintiff Irving's misrepresentation claims against Apple.[11]

E. Irving's iPhone Purchase.

Irving alleges that he purchased an iPhone 3GS on June 22, 2009. (FAC ¶ 13) Irving alleges that he "reasonably expected that the 3GS iPhone would have the capacity and ability to send picture messages" using MMS. (FAC ¶ 15) He also alleges that he formed this belief in reliance upon "the representations by Apple and ATTM made in their advertisements, public announcements, and during the sales process" and his "general understanding of the 'revolutionary' nature of the 3GS." (FAC ¶ 16). Notably, Irving does not identify a single

[11] An examination of the other amended complaints filed in this MDL discloses that the billing statements belong 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 their claims in another.

specific "advertisement, public announcement" or representation "during the sales process" that caused him to form this expectation. Nor could he, since all of Apple's "advertisements [and] public announcements" identified in the FAC contained the timing disclosure.[12]

Irving also alleges that his expectation was based on his "general understanding of the 'revolutionary nature' of the iPhone 3GS." (FAC ¶ 16) Irving could not have relied upon the "revolutionary" nature of iPhone 3GS, however, because "revolutionary product" was the focus of the iPhone 2G, not the iPhone 3GS, advertising campaign. (FAC ¶ 23) Indeed, none of the advertisements plaintiff pleads in the FAC even includes the term "revolutionary." Finally, Irving admits that he learned his iPhone 3GS did not have MMS, yet he never alleges that he even attempted to return the iPhone. (FAC ¶ 14) Plaintiff was without MMS, one of over 100 new functions for the iPhone 3GS, for at most three months.

F. The First Amended Complaint.

The FAC asserts six causes of action under Minnesota law: (1) breach of contract (against ATTM only); (2) violation of Minnesota Prevention of Consumer Fraud Act ("MPCFA"), Minnesota Stat. § 325F.69; (3) violations of Minnesota Unlawful Trade Practices Act ("MUTPA"), Minn. Stat. § 325D.13; (4) violations of the Minnesota Uniform Deceptive Trade Practices Act ("MUDTPA"), Minn. Stat. § 325D.44; (5) breach of express and/or implied warranties; and (6) unjust enrichment. (FAC ¶¶ 67-108) As against Apple, the named plaintiff purports to represent a putative class of all "Minnesota residents who purchased an iPhone 3G or 3GS from [ATTM] or Apple Inc. from July 11, 2008 and September 25, 2009." (FAC ¶ 58) For the reasons set forth below, the FAC must be dismissed with prejudice.

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[12] Irving refers vaguely to "representations . . . during the sales process" (FAC ¶ 16) but never alleges what statements were made, whether they even referred to MMS, whether they were written or oral, whether they included the timing disclosure, or by whom, when, or where they were made, as required by Rule 9(b).

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)) (internal 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.* (quotations and 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 five 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 ¶¶ 20-57)

Irving lacks standing under Article III. Tellingly, he does not allege that he saw any of the advertising pled in the complaint regarding MMS before purchasing his iPhone 3GS. He cannot establish causation or injury. Nor could he 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 any of these advertisements, he was on notice of the timing of MMS availability and could not have thereby been injured. Because Irving cannot establish Article III standing, 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 ¶ 18) 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) (quotations 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). Fraud-based state law claims predicated on the same set of facts are similarly 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 "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

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[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 Eighth Circuit decisions respecting application of Rule 9(b) to claims sounding in fraud are in accord. Courts in the Eighth Circuit have held that Rule 9(b) applies to all claims where the gravamen of the complaint is fraud, and have explicitly applied the rule to the statutes at issue here. *See Russo v. NCS Pearson, Inc.*, 462 F. Supp. 2d 981, 1003 (D. Minn. 2006); *Tuttle v. Lorillard Tobacco Co.*, 118 F. Supp. 2d 954, 963 (D. Minn. 2000).

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 caused him to make his purchase or otherwise caused him injury; or how he was allegedly injured. Plaintiff does not allege a single fact showing how (or even whether) he was caused injury; he offers only the bare legal conclusion that he generally has sustained damages. (FAC ¶¶ 84, 92) 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 MPCFA, MUTPA, and MUDTPA Claims Do Not Satisfy Rule 9(b).

Irving's MPCFA, MUTPA, and MUDTPA claims fail because he does not satisfy the core element required for a violation of each of these statutes: conduct that is fraudulent or deceptive. Irving fails to identify any specific advertisement to which he was allegedly exposed or which caused him to purchase his iPhone, nor does he allege when and where such exposure occurred. The reason is simple. Irving may in fact have seen no advertising regarding MMS, in which case he has no claim under these statutes. If, however, Irving identified advertising that he saw regarding MMS, and when and where he saw it, it would be evident that the advertising contained the timing disclosure. In either case, specific pleading would establish that there was no fraud or misrepresentation and would defeat Irving's claims. Further, each of the statutes requires that the allegedly misleading conduct caused injury to plaintiff. Irving does not allege facts establishing causation or injury.

Irving fails to plead facts demonstrating a violation of the MPCFA, MUTPA, or MUDTPA. Irving does not plead facts establishing that he was exposed to a single Apple

representation regarding MMS, much less that such a representation caused him to purchase his iPhone or otherwise caused him injury. The FAC does not satisfy Rule 8, much less the heightened standard of Rule 9(b).

1. Plaintiff Fails to State a Claim for Violation of the MPCFA or the MUTPA.

Neither the MPCFA nor the MUTPA provides a private right of action, but in limited circumstances, an individual can seek private remedies for violation of these statutes under Minnesota Statutes section 8.31, subdivision 3a. In order to do so, a plaintiff must allege facts establishing a MPCFA or MUTPA violation (fraudulent or deceptive conduct proscribed by the statutes) and also must establish (1) injury, (2) causation, and (3) that his claim will benefit the public. *Bykov v. Radisson Hotels Int'l Inc.*, No. 05-1280 ADM/JSM, 2006 U.S. Dist. LEXIS 12279, at *14 (D. Minn. Mar. 22, 2006), *aff'd,* 2007 U.S. App. LEXIS 3276 (8th Cir. 2007) (citing *Group Health Plan, Inc. v. Phillip Morris Inc.*, 621 N.W.2d 2d 2, 11, 13 (Minn. 2001)). The FAC does not satisfy any of these requirements.

a. Plaintiff Does Not Allege Facts Establishing a Misrepresentation or Fraudulent Omission.

Irving does not satisfy the core requirement of the MPCFA or the MUTPA: a misrepresentation or fraudulent omission. As is evident from the Apple advertisements referenced in the FAC and filed herewith, 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 false representation and no omission and hence, there could be no violation of these statutes.

Plaintiff alleges that he relied on his "general understanding" of the "revolutionary" nature of his iPhone based on representations made by Apple and ATTM. (FAC ¶ 16) He fails to identify where or when such statements were made. This is unsurprising, since "revolutionary product" was the focus of the iPhone 2G, not the iPhone 3G or 3GS, 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 Bernstein v. Extendicare Health Servs., Inc.*, 607 F. Supp. 2d 1027, 1031 (D. Minn. 2009); *Zapata v. Walgreen Co*., No. 08-5416 (RHK/FLN), 2009 U.S. Dist. LEXIS 102061, at *8 (D. Minn. Nov. 2, 2009).

Courts uniformly hold that "revolutionary" is a generalized statement that cannot give rise to legal liability. *See Allied Erecting and 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); *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. 2009). The general term "revolutionary" cannot conceivably be construed to represent that the iPhone would offer a specific feature such as MMS. Therefore, plaintiff's MPCFA and MUTPA claims fail.

b. Plaintiff Does Not Allege Facts Establishing Injury or Causation.

Irving also fails to plead facts establishing injury or causation. In order to state a claim under the MPCFA and the MUTPA, plaintiff must plead a causal nexus between the alleged misrepresentations and his alleged injury. *Group Health Plan*, 621 N.W.2d at 13. The Minnesota Supreme Court has made it clear that this causal nexus includes a reliance element: "[W]here, as here, the plaintiffs allege that their damages were caused by deceptive, misleading, or fraudulent statements or conduct in violation of the misrepresentation in sales laws, as a practical matter it is not possible that the damages could be caused by a violation without reliance on the statements or conduct alleged to violate the statutes." *Id.*

Irving does not plead facts establishing a causal nexus between his iPhone purchase and any of Apple's representations. He does not allege that he was exposed to *any* specific Apple advertisement regarding MMS, let alone that statements regarding MMS in such advertisements caused him to purchase his iPhone 3GS or otherwise caused him injury.[14] This is fatal to Irving's claims. *See Bykov*, 2006 U.S. Dist. LEXIS 12279, at *16 (plaintiff failed to establish a causal nexus between representations regarding hotel pricing and his alleged injury because he never saw the representations).

Recognizing that he cannot plead causation, Irving endeavors to end run the requirement by arguing that causation should be presumed because the alleged representations were false and allegedly omitted material information regarding the availability of MMS. (FAC ¶¶ 85-86) But plaintiff cannot end-run the content of the very Apple advertisements that he pleads in the FAC. Those advertisements expressly disclosed when MMS would be available, and accordingly were not false and did not omit material — or any — information regarding the timing of MMS's release.

Moreover, plaintiff's attempt to avoid the causation argument is precluded by Minnesota law. Relying on Minnesota Supreme Court authority, the District of Minnesota refused to create a presumption of causation or injury in a case where plaintiffs alleged that defendants' advertising misled the public regarding the dangers of tobacco. *Group Health Plan, Inc. v. Phillip Morris*, *U.S.A., Inc.*, 188 F. Supp. 2d 1122, 1126 (D. Minn. 2002) (stating that recognition of such a presumption would "amount to a radical sea change in Minnesota consumer protection law" and would contravene the Minnesota Supreme Court's express language in *Group Health Plan*, 621 N.W.2d at 14), *aff'd*, 344 F.3d 753 (8th Cir. 2003). Irving's failure to plead facts establishing injury or causation requires dismissal of his MPCFA and MUTPA claims.

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[14] Moreover, any representations made after June 22, 2009, cannot have caused plaintiff's purported injury, as they were made after he purchased his iPhone. (FAC ¶ 13 (plaintiff purchased his iPhone 3GS on June 22, 2009))

c. Plaintiff Does Not Satisfy the "Public Benefit" Requirement.

Finally, Irving's MPCFA and MUTPA claims fail for an additional reason: his action does not satisfy the "public benefit" requirement. The Minnesota Supreme Court has held that in order to bring a claim under section 8.31, the plaintiff must demonstrate that the claim benefits the public. *Ly v. Nystrom*, 615 N.W.2d 302, 314 (Minn. 2000). Irving cannot do so.

It is undisputed that MMS has been available for nearly a year; that it became available within approximately three months of the release of iPhone 3GS; and that there have been no issues with MMS's availability since its release. Where the alleged offending practice has stopped, the "public benefit" requirement is not met. *See Kalmes Farms, Inc. v. J-Star Indus.*, No. 02-1141 (DWF/SRN), 2004 U.S. Dist. LEXIS 683, at *18 (D. Minn. Jan. 16, 2004) (no public benefit where allegedly false advertising was presented to public, but the advertising had ceased); *Tuttle v. Lorillard Tobacco Co.*, No. 99-1550 (PAM/JGL), 2003 U.S. Dist. LEXIS 3721, at *19 (D. Minn. Mar. 3, 2003), *reversed on other grounds*, 377 F.3d 917 (8th Cir. 2004) (lawsuit would not benefit public by changing the manner in which tobacco is marketed because the practices at issue had already been corrected); *Berczyk v. Emerson Tool Co.*, 291 F. Supp. 2d 1004, 1020 (D. Minn. 2003) (no public benefit from suit based on lack of blade guard on saw, where products had been recalled and blade guards installed).[15] Moreover, the suggestion that a "public benefit" could be conferred by establishing that Irving or other Minnesota iPhone 3GS purchasers were required to wait for MMS for a period of three months or less is untenable on its face. Because plaintiff cannot demonstrate that his action will benefit the public, his MPCFA and MUTPA claims fail.

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[15] Plaintiff may seek to argue that his suit will deter future misrepresentations, but that argument is also insufficient to establish a public benefit. *Scally v. Myhre*, No. C4-02-2181, 2003 Minn. App. LEXIS 1084, at *19 (Minn. App. Sept. 2, 2003) (rejecting argument that suit would deter lenders from defrauding their customers and encourage defendant to better supervise its loan officers, where loan officer in question had been fired); *Behrens v. United Vaccines, Inc.*, 228 F. Supp. 2d 965, 971 (D. Minn. 2002) (rejecting argument that the loss of a false advertising claim would encourage the advertiser to be more forthright in its advertisement of its other products).

2. Plaintiff Fails to State a Claim for Violation of the MUDTPA.

Irving's MUDTPA claim fails for three reasons. First, Apple did not make any misrepresentations or engage in any practice that created a likelihood of confusion regarding MMS's availability. Second, Irving has failed to demonstrate that he was damaged by any Apple representations, because he has not alleged that he saw any of those representations. Finally, injunctive relief is the exclusive remedy for a violation of the MUDTPA, and Irving cannot establish his entitlement to an injunction.

Irving's MUDTPA claim suffers from the same fundamental flaw as his other claims — Apple made no misrepresentations or statements that created a likelihood of confusion regarding when MMS would be available. Apple's advertising consistently stated when MMS would be available, and MMS was available when promised. Courts dismiss MUDTPA claims in such circumstances. *See, e.g., Bartol v. ACC Capital Holding Corp.*, No. 09-2718 (DWF/JSM), 2010 U.S. Dist. LEXIS 2024, at *17-18 (D. Minn. Jan. 11, 2010) (practice of assigning mortgage to a different lender was not likely to cause confusion or misunderstanding where mortgage expressly provided that it could be sold or assigned); *Walker v. Fingerhut Corp.*, No. C5-99-881, 2000 Minn. App. LEXIS 142, at *18-19 (Minn. App. Jan. 28, 2000) (assessing interest during advertised "free trial period" did not make plaintiff's advertising misleading, where contract informed customers that they would be assessed interest during the trial period). Accordingly, Apple's alleged representations are not actionable under the MUDTPA.

Irving's failure to plead that he saw any of Apple's representations is also fatal to his MUDTPA claim. Where a plaintiff was not exposed to the alleged misrepresentations, he cannot establish that he was damaged by them. *Lofquist v. Whitaker Buick-Jeep-Eagle, Inc.*, No. C5-01-767, 2001 Minn. App. LEXIS 1291, at *6 (Minn. App. Dec. 4, 2001), *review denied*, 2002 Minn. LEXIS 120 (2002) (because plaintiff did not read contract, she was not damaged by any alleged misrepresentations therein); *Bykov*, 2006 U.S. Dist. LEXIS 12279, at *18 (whether representations caused a likelihood of confusion irrelevant because plaintiff never received them).

Further, Irving's MUDTPA claim fails because he cannot establish that he is entitled to a remedy. His damages claim fails because damages are not available under the MUDTPA; the only remedy for a violation of the MUDTPA is injunctive relief. Minn. Stat. §§ 325D.44, 325D.45; *Bartol*, 2010 U.S. Dist. LEXIS 2024, at *17 (D. Minn. Jan. 11, 2010); *Ensminger v. Timberland Mortg. Servs., Inc.*, No. A09-1213, 2010 Minn. App. Unpub. LEXIS 341, at *11 (Minn. App. April 20, 2010); *Alsides v. Brown Inst., Ltd.*, 592 N.W.2d 468, 476 (Minn. App. 1999); *Simmons v. Modern Aero, Inc.*, 603 N.W.2d 336, 339-40 (Minn. App. 1999).[16] Plaintiff's injunctive relief claim fails because he has no standing to seek such relief.

Injunctive relief is only available to persons who are "likely to be damaged" by a deceptive trade practice. Minn. Stat. § 325D.45, subd. 1. Because MMS has been available for nearly a year, plaintiff is not "likely to be damaged" by Apple's representations regarding MMS's availability. Minnesota courts routinely dismiss MUDTPA claims on such facts. *See, e.g., Four D., Inc. v. Dutchland Plastics Corp.*, No. 01-2073 (RHK/JMM), 2002 U.S. Dist. LEXIS 6669, at *11-12 (D. Minn. Apr. 15, 2002) (where all of the activities that provided the factual basis for the MUDTPA claim occurred in the past, plaintiff could not plead that it was likely to be damaged by any of defendant's misrepresentations); *Lofquist*, 2001 Minn. App. LEXIS 1291, at *6 (plaintiff not likely to be damaged by misrepresentations in connection with installment sales contract because she had already signed the contract); *Blackwater Techs., Inc. v. Synesi Grp., Inc.*, 2008 U.S. Dist. LEXIS 2744, at *17 (D. Minn. Jan. 14, 2008) (no risk of future harm from representations regarding patent infringement where defendant no longer had the rights to the patent and no longer operated as a business); *cf. Independent Glass Ass'n v. Safelite Grp., Inc.*, No. 05-238 ADM/FLN, 2005 U.S. Dist. LEXIS 28597, at *6 (D. Minn.

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[16] Irving alleges that he is entitled to damages and attorney's fees under section 8.31. (FAC ¶ 95) But *Simmons* clearly held that section 8.31 does not apply to MUDTPA: "[S]ubdivision 3a specifically limits its relief to those statutes referred to in subdivision 1, and the [MU]DTPA is not included in that list." *Simmons*, 603 N.W.2d at 340. Even if section 8.31 does apply to the MUDTPA, the claim fails because plaintiff cannot meet the requirements of that section, as established above.

Nov. 16, 2005) (plaintiff could not demonstrate future risk of harm because he was aware of defendant's allegedly deceptive practices and could avoid being deceived by them).

Finally, there is nothing to enjoin. It is undisputed that MMS is now available; Irving was required to wait for MMS's release for approximately three months, and he has now had MMS capability for nearly a year. Plaintiff does not contend that there are any issues with Apple's current advertising regarding MMS or MMS's availability. For all these reasons, plaintiff's MUDTPA claim fails.

III. PLAINTIFF CANNOT STATE A CLAIM FOR BREACH OF EXPRESS OR IMPLIED WARRANTY.

A. Plaintiff's "Warranty" Claims Are Merely Repackaged Versions of His MPCFA, MUPTA and MUDTPA Claims and Must Be Dismissed for the Same Reasons.

Plaintiff's so-called express and implied warranty claims are in fact identical to his MPCFA, MUTPA, and MUDTPA claims, thinly disguised with sparse legal conclusions using the rhetoric of warranty. 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. Nor does plaintiff allege that the implied warranties of merchantability or fitness for use were breached; indeed, plaintiff does not even *refer* to these implied warranties in the FAC.

Rather, plaintiff's "warranty" claims are that Apple's advertising of MMS allegedly created a "warranty" that MMS would be available, and that this "warranty" was breached. (FAC ¶¶ 97-104) Plaintiff's "warranty" claims thus are identical to his MPCFA, MUTPA, and MUDTPA 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" that MMS would be available before late summer.

Further, if Apple's advertising created any "warranty" regarding MMS — and it did not — the "warranty" was that MMS would be available in late summer 2009. And so it was. There was no breach of warranty, as is clear from the full text of the Apple advertising identified

in the FAC and filed herewith. *Cipollone v. Liggett Group, Inc*., 505 U.S. 504, 525 (1992) ("A manufacturer's liability for breach of an express warranty derives from, and is measured by, the terms of that warranty."). Plaintiff's warranty claims are meritless and accordingly must be dismissed.

B. Plaintiff Cannot State a Claim for Breach of Express or Implied Warranty.

As set forth above, plaintiff's warranty claims are merely repled renditions of his MPCFA, MUTPA, and MUDTPA claims, and fail for the same reasons. In addition, plaintiff's express and implied warranty claims must be dismissed because he fails to allege required elements of these claims.

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

An express warranty claim requires plaintiff to allege an "affirmation of fact or promise made by the seller to the buyer which relate[d] to the goods and [became] part of the basis of the bargain," or a "description of the goods which [was] made part of the basis of the bargain." Minn. Stat. Ann. § 336.2-313(1)(a), (b). Plaintiff has not alleged that he saw or heard any "affirmation of fact or promise" or "description" of MMS prior to purchasing his iPhone 3GS. Accordingly, no Apple communications concerning MMS could have become "part of the basis of the bargain" with plaintiff. *Riley v. Cordis Corp.*, 625 F. Supp. 2d 769, 788 (D. Minn. 2009) (representations not made to plaintiff patient or his doctors could not form the basis for an express warranty claim); *Bea v. Hoehne Bros*., No. A03-484, 2004 Minn. App. LEXIS 1, at *11-12 (Mich. App. Jan. 6, 2004). Further, if plaintiff had seen the advertisements at issue, he would also have seen the timing disclosures. Accordingly, he would have been expressly informed by Apple that the immediate availability of MMS was *not* "part of the basis of the bargain."

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

The Minnesota Commercial Code requires plaintiff to plead that he provided notice within a reasonable time of discovering the alleged breach. Minn. Stat. § 336.2-607(3)(a); Minn.

Stat. § 336.2-714. Failure to provide notice bars both express and implied warranty claims. *Christian v. Sony Corp. of Am.*, 152 F. Supp. 2d 1184, 1188-89 (D. Minn. 2001) (lack of notice by plaintiffs precluded breach of warranty claims); *Valspar Refinish, Inc. v. Gaylord's, Inc.*, No. A06-2227, 2007 Minn. App. Unpub. LEXIS 1146, at *8 (Minn. App. Dec. 4, 2007) (same) (citing *Church of the Nativity of Our Lord v. WatPro, Inc.*, 491 N.W.2d 1, 5 (Minn. 1992)).

Irving's warranty claims fail for lack of notice. Apple offers a return right for its iPhones. Yet nowhere in the FAC does plaintiff allege that he contacted Apple to try 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. The fact that MMS was not yet enabled on his iPhone would have been immediately apparent when he attempted to text a picture. Irving, however, has had his iPhone for over a year but has never contacted Apple about MMS or returned the iPhone. (FAC ¶ 13 (plaintiff purchased an iPhone 3GS in June 2009)) Therefore, he cannot establish the statutorily mandated notice of the alleged breach within a reasonable time.

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.[17] *Smith v. Apple Inc.*, No. 08-AR-1498-S, 2008 U.S. Dist. LEXIS 111777, at *4 (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

[17] The portion of Alabama's Commercial Code at issue in *Smith* is identical to Minnesota Statute § 336.2-607(3)(a). *See* Ala. Code § 7-2-607(3)(a) ("Where a tender has been accepted . . . (a) [t]he buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy.").

extinguish the purposes of the notice requirement, nor does it substitute for that requirement"). Irving's express and implied warranty claims must be dismissed for the same reasons.

C. Plaintiff Cannot State a Claim for Breach of Any Implied Warranties.

The weakness of plaintiff's implied warranty claims is evident from his failure even to specify which, if any, implied warranty he purports to assert. (FAC ¶¶ 97-104) However, the Minnesota Commercial Code recognizes only two implied warranties: the implied warranty of merchantability and the implied warranty of fitness for a particular purpose. Minn. Stat. §§ 336.2-314, 336.2-315. Irving cannot establish the elements of either.

The Minnesota Commercial Code implies a warranty of merchantability that goods "are fit for the ordinary purposes for which such goods are used." Minn. Stat. § 336.2-314(2)(c). In order to be merchantable, the goods must be reasonably fit for the general purposes for which they were manufactured and sold. *Crenlo, Inc. v. Austin-Romtech*, No. A03-851, 2004 Minn. App. LEXIS 483, at *16-17 (Minn. Ct. App. May 4, 2004).

Irving's iPhone 3GS meets this standard. There is no dispute that the iPhone 3GS has an ordinary purpose for use as a phone, a music player, and an Internet device. (FAC ¶ 24) And the FAC concedes that the iPhone at all times performed these functions. (FAC ¶ 24) Irving alleges only that he had to wait to use MMS — one of over 100 new features for the iPhone 3GS — for a period of approximately three months. This trivial delay in the availability of a single feature does not state a claim for breach of the implied warranty of merchantability, which requires only that the device perform its basic purpose. *See, e.g., Crenlo, Inc.*, 2004 Minn. App. LEXIS 483 (because lock was capable of ordinary use, the fact that it was missing specific feature did not make it unmerchantable); *Birdsong v. Apple Inc.*, 590 F.3d 955, 958 (9th Cir. 2009) (affirming dismissal of claim for breach of the implied warranty of merchantability where plaintiffs alleged iPods could cause hearing loss at high volumes but conceded that "iPods play music, have an adjustable volume, and transmit sound through earbuds").

Plaintiff similarly cannot state a claim for breach of the implied warranty of fitness for a particular purpose. Such an implied warranty arises only "where the seller at the time of

contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods." Minn. Stat. § 336.2-315. "A particular purpose differs from the ordinary purpose for which the goods are used in that it envisages a specific use by the buyer which is peculiar to the nature of his business." *Solo v. Trus Joint MacMillan*, No. 02-2955 (RHK/RLE), 2004 U.S. Dist. LEXIS 4107, at *51-52 (D. Minn. Mar. 15, 2004) (quoting UCC Comment to Minn. Stat. § 336.2-315 P2).

Irving does not even attempt to allege that he intended to use the iPhone 3G for anything other than its ordinary purpose, much less that he informed Apple of any such intended purpose. *See Auto-Owners Ins. Co. v. Heggie's Full House Pizza, Inc.*, No. A03-316, 2003 Minn. App. LEXIS 1241, at *6 n.1 (Minn. App. Oct. 7, 2003) (no implied warranty of fitness for a particular purpose for pizza ovens where no evidence of party's intent to use ovens for any particular purpose other than baking pizzas). Similarly, plaintiff does not allege that Apple was aware of any particular purpose. *See Travelers Prop. Cas. Co. of Am. v. St.-Gobain Tech. Fabrics Canada, Ltd.*, 474 F. Supp. 2d 1075, 1084-85 (D. Minn. 2007) (because seller was not made aware of the purpose for which plaintiff was to use the product, no implied warranty of fitness for a particular purpose arose). Finally, plaintiff does not allege, as required for breach of this implied warranty, that he relied on Apple's skill or judgment. *Morris v. Goodwill Indus*., No. C2-95-196, 1995 Minn. App. LEXIS 1006, at *8 (Minn. App. Aug. 8, 1995). Plaintiff's claim for breach of the implied warranty of fitness for a particular purpose must be dismissed.

IV. PLAINTIFF FAILS TO STATE A CLAIM FOR UNJUST ENRICHMENT.

Because all of Irving's other claims fail, his unjust enrichment claim fails as well. *Noble Sys. Corp. v. Alorica Cent., LLC*, 543 F.3d 978, 986-87 (8th Cir. 2008) (unjust enrichment claim failed because there was no underlying tort to support it). Further, Irving has failed to plead facts demonstrating that it would be unjust to allow Apple to retain any benefit conferred by him. As demonstrated above, Irving has not pled a single instance of deceptive, misleading, or unlawful conduct by Apple. None of Apple's alleged conduct could have led plaintiff to believe that

MMS service would be available on his iPhone 3GS earlier than it actually was. Under these circumstances, there can be no claim for unjust enrichment.

CONCLUSION

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

Respectfully submitted,

IRWIN FRITCHIE URQUHART & MOORE LLC

By: */s/ Quentin F. Urquhart*
QUENTIN F. URQUHART, JR. (#14475)
DOUGLAS J. MOORE (#27706)
400 Poydras Street, Suite 2700
New Orleans, Louisiana 70130
Telephone: (504) 310-2100
Facsimile: (504) 310-2101

and

PENELOPE A. PREOVOLOS (*admitted pro hac vice)*
ANDREW MUHLBACH (*admitted pro hac vice)*
HEATHER A. MOSER (*admitted pro hac vice)*
MORRISON & FOERSTER, LLP
425 Market Street
San Francisco, CA 94105-2482
Telephone: (415) 268-7000
Facsimile: (415) 268-7522

Counsel for Defendant Apple Inc.

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