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-5470** **Case No. 09-5470 (E.D. Louisiana)** **Chris Carbine,** **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 Ryan Casey's ("Casey" or "plaintiff")[1] First Amended and Supplemental Complaint ("FAC") (ECF No. 71).

[1] The FAC names former plaintiff Chris Carbine in the caption, but the allegations pertain exclusively to plaintiff Ryan Casey.

SUMMARY OF ARGUMENT

Casey's claims must be dismissed because the FAC establishes that *he cannot have seen or relied on any representation by Apple regarding MMS*. Casey purchased his iPhone 3G model prior to the date of any of the representations alleged in the FAC and, indeed, before Apple represented that any iPhone had or would have MMS. Accordingly, Casey does not have a misrepresentation case, and he does not have an omissions case. Apple cannot be held liable for failing to disclose that the iPhone 3G did not have a feature (MMS) that Apple had never represented it had. Nor can Casey pursue claims regarding alleged misrepresentations he never saw or represent a class of which he is not a member.

Casey devotes 38 paragraphs of the FAC to so-called "Common Facts" regarding advertising which he could not have seen or which did not refer to MMS. Moreover, Casey's claims would fail as a matter of law even if he had seen the representations regarding MMS. Casey 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.[2] Accurate copies of these Apple materials filed herewith demonstrate that Apple consistently provided the disclosure. The FAC must be dismissed with prejudice.

Tacitly conceding that his advertising-based claims against Apple fail, Casey attempts in the FAC to convert them into claims based upon ATTM's data service plan. Casey's ATTM data service plan cannot provide the basis for his claims against Apple. Moreover, Casey's claims based on the ATTM data plan are as misleadingly pled and are 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, but are generic plans for all models of phones from all manufacturers that

[2] 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.

are supported by ATTM.[3] These generic plans, to which Apple is not a party, cannot give rise to an actionable consumer expectation regarding iPhone 3G or 3GS.

Casey's claims are equally riddled with legal flaws. He has failed to adequately plead the elements of a purported fraud claim: he has not identified any representations regarding MMS to which he allegedly was exposed; he cannot demonstrate that he relied on the supposed representations; he has not pled a relationship with Apple that would give rise to a duty to disclose; and he cannot identify an injury purportedly caused by Apple's alleged misrepresentation or omission. Casey's warranty claims are merely thinly disguised repetitions of his misrepresentation claims and fail for the same reasons. They are also subsumed by his redhibition claim which, in turn, fails because Casey has not identified a redhibitory defect in his phone. Louisiana law precludes Casey's unjust enrichment claim, based upon the existence of other legal remedies and Apple's express warranty. Finally, Casey's claims for breach of contract, breach of the implied covenant of good faith and fair dealing, and article 1953 fraud fail based on the lack of any contract with Apple that includes MMS. For these reasons, Casey's claims against Apple should be dismissed with prejudice.[4]

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[3] 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.

[4] 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, the 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

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RELEVANT BACKGROUND

Casey's 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. Casey is wrong. Months after Casey bought his phone, Apple first advertised — and thereafter 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 Casey'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.

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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).

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 ¶¶ 25-26; 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 Casey does not contend otherwise. (Preovolos Decl., Ex. A) The iPhone 2G was first sold in June 2007. (FAC ¶ 28) 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 ¶ 30) The 3G technology "allows simultaneous use of speech and data services" and faster data transfer speeds. (FAC ¶ 30)

Apple did not make any representations about the availability of MMS at the time of the iPhone 3G launch, and Casey does not contend that it did. (FAC ¶ 31) In fact, ATTM published a statement informing owners of non-MMS-compatible phones, such as iPhone 3G, that they

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[5] Apple attaches documents Casey pled or referenced in the FAC but did 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).

would not be able to receive MMS photos or videos directly on their phones but could nonetheless download them from a website. (FAC ¶ 34)

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.

3. June 2009: Apple Launches iPhone 3GS.

On June 8, 2009, Apple announced its third-generation iPhone, the iPhone 3GS. (FAC ¶ 36) 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 ¶ 25)

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 ¶ 37-38; 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 MMS, among other features, would be available "this summer." (FAC ¶ 37; Preovolos Decl., Ex. B) Apple made no other reference to MMS until the launch of iPhone 3GS in June 2009. (FAC ¶¶ 36-52)[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 ¶ 38) 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 clearly stated that: "MMS support from AT&T will be available in **late summer**." (Preovolos Decl., Ex. E)[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

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[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 ¶ 37) Casey 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 Casey concedes, iPhone 3GS was not announced until three months later (FAC ¶ 36), so Apple's statement did not relate to iPhone 3GS.

[7] The FAC incorrectly states that Apple announced MMS in March 2009 to promote sales of iPhone 3GS. (FAC ¶ 37) That is not the case, as the iPhone 3GS was not announced until June 2009. (FAC ¶ 36) Contrary to Casey's assertions, the March 17, 2009 announcements concerned only the new iPhone OS 3.0 software, and did not mention iPhone 3GS.

[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)

not be available from ATTM until "late summer." Critically, the Apple advertisements Casey cites in the FAC *include* that disclosure, *but Casey omits it from the FAC* and does not include complete copies of the advertisements. When viewed in full, *these advertisements Casey partially pleads in the FAC included the MMS timing disclosure*:[9]

- **iPhone Software Update web page**: Casey selectively quotes only the portion of the web page about MMS and omits the footnote containing the language "MMS support from AT&T coming in late summer" (*compare* FAC ¶ 42 *with* Preovolos Decl., Exs. G, G1);
- **Apple/ATTM Kiosk video**: Casey alleges the iPhone 3GS video that played on seven-foot-tall kiosks in Apple and ATTM retail stores contained a segment about MMS, but Casey omits the following language included in that video: "MMS support from AT&T coming in late summer" (*compare* FAC ¶ 44 *with* Preovolos Decl., Ex. H at 1:50, Ex. H1);
- **iPhone 3GS Guided Tour**: Casey alleges the video contains "a section devoted to MMS" but omits the following language from that video: "MMS support from AT&T coming in late summer" (*compare* FAC ¶¶ 45-46 *with* Preovolos Decl., Ex. I at 9:26, Ex. I1);
- **"Send MMS" Apple web page**: Casey 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 ¶ 47 *with* Preovolos Decl., Exs. F, F1); and

[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 ¶ 43; Preovolos Decl., Ex. F) The FAC includes a size-reduced screen shot of Apple's web page in a misleading attempt to render the relevant "late summer" language unreadable. (FAC ¶ 43) A copy of the web page as it actually would have appeared to a customer is attached as Exhibit F1 to the Preovolos Declaration.

- **"Sharing Photos and Videos" Apple web page**: Casey 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 ¶ 48 *with* Preovolos Decl., Exs. J, J1).

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

Casey points to only one written representation that did not contain the disclosure — the iPhone 3G (not 3GS) box. (FAC ¶ 40) But the iPhone box did not list MMS as a feature or, indeed, refer to MMS at all. (FAC ¶ 40; Preovolos Decl., Ex. K) Thus, a disclosure on the box 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 ¶ 52) 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 ¶ 52; Preovolos Decl., Ex. L at 4 para. 3) Casey does not allege that he listened to this call and cannot so allege, as he purchased his iPhone 3G in December 2008, long before to the July 21, 2009 earnings call. (FAC ¶ 13) Accordingly, he could not have 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. Casey

acknowledges there have been no issues with MMS availability since that date by cutting off the putative class after September 25, 2009. (FAC ¶ 60)

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 Casey 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 timing disclosure: "MMS support from AT&T coming in late summer."

Casey 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.

In the FAC, Casey tacitly concedes that ATTM's advertising of its iPhone 3G and 3GS messaging plans never represented that any iPhone would be MMS-capable. (FAC ¶¶ 31, 54) Casey does not allege that ATTM made any pre-sale representations regarding MMS for the iPhone.

Rather, the vast majority of the ATTM representations Casey 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 ¶ 28) 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

[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.

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

Not surprisingly, Casey does not allege that Apple made any representations regarding ATTM's messaging plans. (FAC ¶ 28) Casey points to only one ATTM representation that he contends is iPhone-specific. (FAC ¶ 31) However, Casey's other allegations state that the ATTM plans were all the same and were not specific to any particular iPhone. (FAC ¶ 54 ("[R]egardless of the particular iPhone purchased, the same basic pricing plans exist for all iPhones.")) Similarly, Casey concedes that ATTM's pricing plans were not specific to any particular manufacturer's phone. Casey alleges that ATTM's "iPhone 3G pricing plans" were the "same plans offered to all of its customers," not just iPhone customers. (FAC ¶ 31) "Specifically, for every other AT&T mobile phone," ATTM's messaging plans "are the exact same prices" as the "charges for iPhone customers." (FAC ¶ 58) Indeed, Casey 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 ¶ 31) Casey cannot seriously suggest that ATTM's generic data plans defined iPhone-specific features, in particular MMS, without any specific representation to that effect.

Instead, Casey seeks to rely on purported ATTM billing statements that are not even his own. Rather, the billing statements are those of an unidentified "class plaintiff" from a *different action* for the period July 2009, through September 2009. (FAC ¶ 56)[12] Even if the billing

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[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 ¶ 28 (emphasis added)) Casey cannot disguise the facts he previously represented in briefing 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).

[12] 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

[Footnote continued on following page.]

statements related to Casey or this action (and they do not), Casey could not have relied on billing statements first issued in July 2009, when he purchased his iPhone 3G in December 2008. (FAC ¶ 13)

E. Casey's iPhone Purchase.

Casey alleges that in December 2008, he purchased an iPhone 3G and a messaging service plan from ATTM. (FAC ¶ 13) Casey alleges that from the time he bought his iPhone 3G,[13] he "expected that the iPhone would have the ability to text pictures" using MMS. (FAC ¶ 13) But Casey can have no basis for such an expectation. By his own admission, he bought his iPhone 3G *before* Apple's March 17, 2009 software developer event and press release, its first public announcement of MMS. He could not have relied upon the materials referenced in the FAC, because there had been no Apple representations regarding MMS at the time of his purchase. Notably, Casey never identifies a single representation by Apple (or ATTM) that he relied on in forming this expectation. Finally, Casey admits that he learned his iPhone 3G did not have MMS, yet he never alleges that he even attempted to return the phone. (FAC ¶ 16)

F. The First Amended Complaint.

The FAC asserts nine causes of action under Louisiana law: (1) violation of Louisiana Civil Code article 2315 (intentional tort); (2) violation of Louisiana Civil Code article 2315 (negligent misrepresentation); (3) breach of contract (against ATTM only); (4) breach of contract (against Apple and ATTM); (5) breach of the implied covenant of good faith and fair dealing; (6) breach of express and/or implied warranty; (7) unjust enrichment; (8) violation of Louisiana Civil Code article 1953 (fraud); and (9) redhibition. (FAC ¶¶ 69-127) As against Apple, Casey purports to represent a putative class of all "Louisiana residents who purchased an iPhone 3G or

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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.

[13] Casey does not allege ownership of an iPhone 3GS. There is a single, stray allegation in the FAC referencing an iPhone 3GS which appears to be a typo. (FAC ¶ 16) All of the Casey-specific allegations reference only his iPhone 3G.

3GS from [ATTM] or Apple Inc. from July 11, 2008 to September 25, 2009." (FAC ¶ 60) For the reasons set forth below, the FAC must be dismissed with prejudice.

LEGAL STANDARD

The Court must grant a 12(b)(6) motion to dismiss 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 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

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 Court should dismiss the FAC and all causes of action therein because Casey 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 eight 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 ¶¶ 22-59)

Nowhere in the FAC has Casey alleged that he saw or relied on any of the advertising pled in the complaint regarding MMS before purchasing his iPhone 3G. Indeed, by his own admission, he could not have done so. Thus, he cannot establish reliance, causation, or injury. Nor can he amend to cure this deficiency. Every advertisement pled in the FAC contains the disclosure regarding the timing of MMS's release. If Casey saw these advertisements, he was on notice of the timing of MMS availability and could not have thereby been injured. Accordingly, Casey cannot establish Article III standing, and his claims must be dismissed with prejudice.

II. CASEY HAS NOT STATED A VIABLE CAUSE OF ACTION FOR ANY OF HIS 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.[14] (FAC ¶ 20) As set forth in detail below, Casey's allegations fall far short of the heightened pleading requirements of Rule 9(b), and his fraud-based claims fail as a matter of law.

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). 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*. 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

[14] 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).

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 ¶ 59) All of Casey's causes of action are based on a set of "common facts" regarding Apple's and ATTM's alleged misrepresentations about MMS. Accordingly, Casey must satisfy the heightened pleading requirements of Rule 9(b) as to all claims. He fails to do so.

The FAC never identifies which advertisement regarding MMS that Casey allegedly saw prior to his iPhone 3G purchase, because there was no such advertising. Accordingly, Casey cannot satisfy Rule 9(b)'s requirement that he plead what advertising he saw, that he relied on such advertising, or that he was injured as a result. Casey offers only the bare legal conclusion that he has suffered an ascertainable loss. (FAC ¶¶ 72, 77, 115, 120) That allegation does not come close to satisfying Rule 8, let alone Rule 9(b). The Fifth Circuit "strictly interprets" Rule 9(b)'s requirements, and accordingly, Casey'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. Casey's Fraud Claims Fails to Satisfy Rule 9(b).

Casey asserts fraud claims under Louisiana Civil Code articles 2315 and 1953. (FAC, Counts One, Two, and Eight) Under Louisiana law, the essential elements of an action for delictual fraud pursuant to Civil Code article 2315 are: (1) a misrepresentation of a material fact, (2) made with the intent to deceive, (3) causing justifiable reliance with resultant injury. *Newport Ltd. v. Sears, Roebuck & Co.*, 6 F.3d 1058, 1068 (5th Cir. 1993), *cert. denied*, 512 U.S. 1221 (1994). To recover under article 1953, Casey first must demonstrate the existence of a contract. *Newport*, 6 F.3d at 1067 (Article 1953 pertains only to parties to a contract). Assuming Casey meets this burden, he must then show (1) that the defendant misrepresented or suppressed the truth with the intention of either gaining an unjust advantage or causing him to

suffer a loss and (2) that this misrepresentation or suppression of the truth caused actual or probable damages to him. *Id.*

The allegations in the FAC do not and cannot satisfy any of these requirements.

1. Casey Failed to Plead a Specific Representation on Which to Base His Claim of Fraud.

Casey cannot state a fraud claim because he has not pled that he saw — and, indeed, he cannot have seen — any Apple representation regarding MMS. Casey does not allege that he saw any of the representations alleged in the FAC, and given the alleged timing of his purchase, he could not have done so. (FAC ¶ 13-17) To properly plead fraud, Casey must *specifically* allege that a representation was made to him. *Pinero*, 594 F. Supp. 2d at 721 ("Fraud cannot be based on mere speculation and conclusory allegations.") (citations omitted). He has not done so, and accordingly, Casey's fraud claims should be dismissed.

Casey also alleges that from the time he bought his iPhone 3G in December 2008, he "expected that the iPhone would have the ability to text pictures" using MMS. (FAC ¶ 13) Casey alleges that he formed his expectation in reliance upon unspecified "representations by Apple and [ATTM] and general understanding of the 'revolutionary' nature of the 3G." (FAC ¶ 15) As set forth above, Casey cannot have seen any of Apple's alleged representations regarding MMS. Nor could Casey 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 ¶ 25) 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, e.g., Davis v. Allstate Ins. Co.*, No. 07-4572, 2009 WL 122761, at *6 (E.D. La. Jan. 15, 2009) (dismissing false advertising claim where slogan was subjective and amounted to puffery) (citing *Pizza Hut, Inc. v. Papa John's Int'l*, 227 F.3d 489, 496-97 (5th Cir. 2000) (non-actionable "puffery" includes "a general claim of superiority over comparable products that is so vague that it can be understood as nothing more than a mere expression of opinion")); *E.B. Kaiser Co. v. James F. O'Neil Co.*, 211 F. Supp. 161, 162 (E.D. La. 1962)

(granting judgment for defendant; noting "puffing" did not support claim for fraud in the inducement); *see also Oestreicher v. Alienware Corp*., 544 F. Supp. 2d 964, 973 (N.D. Cal. 2008), *aff'd*, 2009 U.S. Dist. LEXIS 7259 (9th Cir. 2009).

Courts uniformly hold that "revolutionary" is a generalized statement that cannot give rise to legal liability. *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); *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). The general term "revolutionary" cannot conceivably be construed to represent that the iPhone would offer a specific feature such as MMS. Casey's fraud claims fail as a matter of law.

2. Casey Cannot Plead Reliance.

Reliance is an essential element of a fraud claim. *See, e.g.*, *Abbott v. Equity Grp., Inc.*, 2 F.3d 613, 624 (5th Cir. 1993), *reh'g denied*, 9.F3d 105 (5th Cir. 1993) (To prevail on a fraud claim, "Louisiana requires proof of actual reliance."); *see also Sun Drilling Prods. v. Rayborn*, 798 So. 2d 1141, 1153 (La. App. 4th Cir. 2001), *writ denied*, 807 So. 2d 840 (La. 2002). By his own admission, Casey *cannot* allege reliance on a specific representation as required to maintain his fraud claim. Based on the allegations in the FAC, Casey made his iPhone 3G purchase before Apple made any representations regarding MMS. (FAC ¶ 13) Accordingly, there is no representation regarding MMS on which he could have relied.

Casey's failure to properly allege reliance is not a simple pleading omission: it reflects a fundamental and incurable defect in his claims. Casey either saw *no* representations regarding MMS, or he saw truthful advertising that contained the disclosure.

3. Casey's Fraud Claim Under Article 1953 Is Barred By the Lack of a Contract.

"[T]o recover under Article 1953, [the plaintiff] must demonstrate the existence of a contract." *Free v. Abbott Labs., Inc.*, 164 F.3d 270, 274 (5th Cir. 1999) (citing *Newport*, 6 F.3d at 1067). Here, Casey purchased his iPhone 3G from ATTM, rather than from Apple. (FAC ¶ 13) Thus he has no purchase contract with Apple and cannot state a valid cause of action. *Free*, 164 F.3d at 274 ("Because [the plaintiffs] were indirect purchasers of infant formula and had no contract with [the baby-formula manufacturers], they have not stated a valid cause of action."). Casey's claim under article 1953 must be dismissed.

4. Casey's Suppression Claim Is Barred by the Lack of a Confidential Relationship with Apple.

Under Louisiana law, "to state a cause of action in fraud from silence or suppression of the truth, there must be a duty to speak or disclose information." *Becnel v. Grodner*, 982 So. 2d 891, 894 (La. App. 4th Cir. 2008) (citing *Greene v. Gulf Coast Bank*, 593 So. 2d 630, 632 (La. 1992)). "Although there is no general duty to speak, a duty to speak or disclose may arise when there exists a fiduciary relationship between the parties." *Id.*; *see also Wilson v. Mobil Oil Corp.*, 940 F. Supp. 944, 955 (E.D. La. 1996) ("A duty to disclose does not arise absent special circumstances, such as a fiduciary or confidential relationship between the parties.").

Here, Casey's iPhone purchase is precisely the type of simple, arm's-length transaction that does not give rise to a duty to disclose. Casey does not allege, nor can he, any special or fiduciary relationship that would give rise to a duty to disclose. Thus, the claim must be dismissed. *See, e.g., Free*, 164 F.3d at 274 (plaintiffs failed to allege a valid fraud claim where manufacturer owed no legal duty to disclose pricing information to end purchaser of product).

III. CASEY'S CONTRACT-BASED CLAIMS MUST BE DISMISSED.

A. Casey Is Not in Privity with Apple.

Casey's contract claims must be dismissed because he has not alleged the existence of a valid and binding sales contract with Apple, nor can he do so. The FAC establishes that Casey purchased his iPhone from ATTM. (FAC ¶13)

Louisiana law is clear that "no action for breach of contract may lie in the absence of privity of contract between the parties." *Estate of Mayeaux v. Glover*, 31 So. 3d 1090, 1095 (La. App. 1st Cir.), *writ denied*, 31 So. 3d 1069 (La. 2010); *see also Pearl River Basin Land & Dev. Co. v. State, ex rel. Governor's Office of Homeland Sec. & Emerg'y Preparedness*, 29 So. 3d 589, 592 (La. App. 1st Cir. 2009) (same; noting the fact that plaintiff may have contract with third parties, who in turn have separate contracts with defendant, does not create a contract or privity of contract between plaintiff and defendant). The FAC acknowledges Casey's lack of privity with Apple. (*See* FAC ¶ 13 ("In December 2008, Casey purchased an iPhone 3G from an AT&T store . . . in Louisiana.")) Without privity, Casey's breach of contract claim fails as a matter of law and must be dismissed.

Casey does not allege facts establishing the existence of any contract with Apple. Casey does not allege that Apple is a party to his wireless service agreement with ATTM (FAC ¶¶ 90-94), nor does he identify any other contract with Apple in more than conclusory terms. (FAC ¶ 100) Nor does Casey allege that he was denied the benefit of a specific contractual provision as required for a claim of breach. He alleges only bare legal conclusions — that the "contract" included unspecified "express warranties" and that Apple breached those "warranties" by "not providing an iPhone 3G . . . and messaging service plans that included MMS." (FAC ¶ 103) But Casey does not plead facts establishing either a contract with Apple or any specific provision of such a contract that entitled him to MMS functionality on his iPhone 3G. That is because there was no such contract, and accordingly, there could be no such term. Casey purchased his iPhone 3G prior to any representations regarding MMS that could have created "express warranties" or other terms of the alleged contract. Therefore, Casey's claim for breach of contract must be dismissed. *See, e.g, Wright v. Citimortgage, Inc*., No. 09-482, 2010 U.S. Dist. LEXIS 17979, at *8 (W.D. La. Mar. 1, 2010) ("to properly plead a cause of action based on breach of contract, a [p]laintiff must allege an identifiable contractual promise that [the defendant] failed to honor") (citing *Morris v. Countrywide Home Loans*, No. 06-5472, 2008 U.S. Dist. LEXIS 16793 (E.D. La. Mar. 5, 2008)); *Whiddon v. Chase Home Fin., LLC*, 666 F. Supp.

2d 681, 692 (E.D. Tex. 2009) (citing *Flynn v. CIT Group*, 294 F.App'x 152, 154 (5th Cir. 2008)).

B. Without an Underlying Contract, the Claim for Breach of the Implied Covenant of Good Faith and Fair Dealing Must Be Dismissed.

To state a cognizable claim for breach of the duty of good faith and fair dealing under Louisiana law, a plaintiff must first allege the existence of a binding contract. *Jones v. Honeywell Int'l*, 295 F. Supp. 2d 652, 671 (M.D. La. 2003) (under Louisiana law, implied duty of good faith arises only in context of performance of contract); *Adams v. Autozoners, Inc.*, No. Civ.A. 98-2336, 1999 WL 744039, at *7 (E.D. La. Sept. 23, 1999) (where no enforceable contract exists, no covenant of good faith and fair dealing can be implied). Casey has not alleged the existence of such a contract upon which to base his claim of breach of the duty of good faith and fair dealing. Accordingly, this claim fails as a matter of law.

IV. CASEY CANNOT STATE A CLAIM FOR BREACH OF EXPRESS OR IMPLIED WARRANTIES.

A. Casey's "Warranty" Claims Are Merely Repackaged Versions of His Fraud-Based Claims and Must Be Dismissed for the Same Reasons.

Casey's so-called express and implied warranty claims are in fact identical to his fraud-based claims, thinly disguised with sparse legal conclusions using the rhetoric of warranty. It is important to be clear about what Casey does and does not allege. Casey does *not* allege that Apple's express, one-year limited warranty was breached.

Rather, Casey's "warranty" claims are that Apple's advertising of MMS allegedly created a "warranty" that MMS would be available, and that this agreement was breached. (FAC ¶¶ 99-104) Casey's "warranty" claims thus are identical to his fraud-based claims and fail for the same reasons. Any purported "warranty" created by Apple's advertising of MMS was not extended to Casey, who made his purchase of the iPhone 3G before any such advertising occurred. Moreover, if Casey 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 2009.

Further, if Apple's advertising created any "warranty" regarding MMS — and it did not —the "warranty" was the truthful statement that MMS would be available in late summer 2009. There was no breach of warranty, as is clear from the full text of the Apple advertising identified in the FAC and filed herewith. Casey's warranty claims are without merit and must be dismissed.

B. Casey's "Warranty" Claims Are Subsumed by the Redhibition Articles of the Code.

The Louisiana Products Liability Act ("LPLA") "establishes the exclusive duties of liability for manufacturers for damage caused by their products." La. R.S. 9:2800.52. The LPLA defines "damage" to include "damage to the product itself and economic loss arising from a deficiency in or loss of use of the product." La. R.S. 9:2800.53(5). The LPLA preserves the remedies provided by the Redhibition Articles of Chapter 9 of Title VII of Book III of the Civil Code. La. R.S. 9:2800.53. All other remedies for an allegedly defective product are superseded by the LPLA. Thus, while plaintiff styles his claim as one for "implied warranty," such claim is governed by the redhibition articles of the Code. *Johnson v. CHL Enters.*, 115 F. Supp. 2d 723, 732 (W.D. La. 2000); *In re Air Bag Prods. Liab. Litig.*, 7 F. Supp. 2d 792, 800 (E.D. La. 1998). As discussed in Section VI below, plaintiff has not sufficiently pled and cannot establish a redhibition claim.

V. CASEY CANNOT STATE A CLAIM FOR UNJUST ENRICHMENT.

Louisiana law is clear that "[u]njust enrichment principles are only applicable to fill a gap in the law where no express remedy is provided." *Mouton v. State*, 525 So. 2d 1136, 1142 (La. App. 1st Cir. 1988). Thus, Casey cannot bring an unjust enrichment claim, since the law provides other remedies for his alleged harm. *Harrison v. Christus St. Patrick Hosp.*, 430 F. Supp. 2d 591, 597 (W.D. La. 2006) (unjust enrichment claim "unavailable where another legal remedy could have prevented [plaintiff's] impoverishment"); *Boudreaux v. Jefferson Island Storage & Hub*, 255 F.3d 271, 275 (5th Cir. 2001) ("The nature of this case makes clear that the plaintiffs have no claim for unjust enrichment under Louisiana law."); *Finova Capital Corp. v.*

IT Corp., 774 So. 2d 1129, 1132 (La. App. 2d Cir. 2000) (unjust enrichment claim failed where plaintiff "clearly had other remedies available to it"). While Casey has not pled facts sufficient to support a viable claim, Louisiana law provides other legal remedies for alleged fraud, breach of contract, and redhibition. Because there are other available remedies, unjust enrichment does not apply. The unjust enrichment count should be dismissed.

VI. CASEY CANNOT STATE A CLAIM FOR REDHIBITION.

Casey's redhibition claim is based on the allegation that he purchased an iPhone because he thought it had MMS. (FAC ¶ 121) However, Casey has not identified any representation or omission by Apple regarding MMS that induced him to purchase an iPhone. Accordingly, he cannot show that the iPhone contained a redhibitory defect, as the phone was given to him with exactly the features that Apple represented it would have. Without a defect, Casey's redhibition claim fails as a matter of law. *See Mire v. Eatelcorp., Inc.*, 927 So. 2d 1113, 1118 (La. App. 1st Cir. 2005) (without a redhibitory defect, "factual allegations . . . simply do not state a cause of action in redhibition").

Furthermore, Casey cannot show that he reasonably did not know of the alleged "defect." La. Civ. Code art. 2540. Apple's product literature and advertising accurately disclosed the timing and availability of MMS. Accordingly, Casey's redhibition claim is barred. *Johnson v. CHL Enters.*, 115 F. Supp. 2d at 729-30, 732 (dismissing redhibition claims on basis that alleged defect, a characteristic of the throttle mechanism of a watercraft, was "apparent" as a matter of law when it was disclosed in instructional literature, deals on product, and instructional video); *see also Nelson Radiology Assocs. v. Integrity Med. Sys., Inc.*, 16 So. 3d 1197, 1207 (La. App. 4th Cir. 2009); *In re Air Bags Prods. Liab. Litig.,* 7 F. Supp. 2d 792, 798 (E.D. La. 1998).

Finally, Casey did not tender the product to Apple prior to suit, as required by Civil Code article 2522. For all of these reasons, Casey's redhibition claim should be dismissed.

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