UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

IN RE: APPLE iPHONE 3G AND 3GS "MMS" MARKETING AND SALES PRACTICES LITIGATION	**CIVIL ACTION**
THIS DOCUMENT RELATES TO:	**MDL NO: 2116**
CASE NO. 1:09-CV-1993 (N.D. OHIO)	**SECTION "J"**
SULLIVAN,	**JUDGE BARBIER**
Plaintiff,	**MAGISTRATE JUDGE WILKINSON**
v.	
APPLE INC., *et al*.,	
Defendants.	

MEMORANDUM IN SUPPORT OF MOTION OF AT&T MOBILITY LLC TO DISMISS FIRST AMENDED AND SUPPLEMENTAL COMPLAINT

Plaintiff spins his straightforward contract with AT&T Mobility LLC ("ATTM") into a long list of claims, ranging from fraud and violation of Ohio consumer laws, to breach of warranty and even unjust enrichment, in his First Amended and Supplemental Complaint ("Amended Complaint" or "FAC"). None of plaintiff's claims survive scrutiny under Federal

Rules of Civil Procedure 9(b) and 12(b)(6),[1] and therefore should be dismissed for the following deficiencies.

First, the Federal Communications Act ("FCA") expressly preempts plaintiff's claims, which are all brought under state law. Plaintiff's claims are a challenge to the sufficiency of ATTM's wireless network and the fairness of ATTM's rates for wireless service. The FCA reserves issues of network capacity and wireless rates for federal regulation and control, and bars state law claims in these areas.

Second, plaintiff fails to state claims for violation of Ohio's Consumer Sales Practices Act ("OCSPA"), Ohio Rev. Code Ann. §§ 1345.01, *et seq*., violation of Ohio's Deceptive Trade Practice Act ("ODTPA"), Ohio Rev. Code Ann. § 4165.02, and negligent misrepresentation because plaintiff does not plead the allegations that support these fraud-based claims with the specificity required under Rule 9(b). These claims are also defective because plaintiff fails to allege the essential elements for each of these claims, such as a cognizable misrepresentation or omission, causation and reliance. Plaintiff's claims also fail because the economic loss doctrine bars plaintiff's negligent misrepresentation claim and defendants' alleged conduct is not actionable under the "safe harbor" provisions of the OCSPA and ODTPA.

Third, plaintiff fails to state claims for breach of an express or implied contract because plaintiff does not allege that ATTM explicitly agreed that it would provide MMS capability on

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[1] ATTM concurrently files its motion to compel arbitration of plaintiff's claims. ATTM respectfully submits that the Court should decide its motion to compel arbitration before reaching this motion – and may wish to defer motion to dismiss briefing – because the arbitration motion raises the threshold issue of whether plaintiff may pursue his claims against ATTM in this forum. If the Court ultimately determines that plaintiff may pursue his claims against ATTM in this forum, then this motion should be heard.

the iPhone 3G or 3GS, and because both the existence and explicit terms of its wireless service contract preclude plaintiff's breach of implied contract claim.

Fourth, plaintiff fails to state a breach of warranty claim because ATTM clearly and expressly disclaimed all warranties, express or implied, in its wireless service contract with plaintiff. In addition, plaintiff does not plead the requisite facts to establish a claim for breach of an express warranty.

Finally, plaintiff's unjust enrichment claim fails because it is barred by the existence of an express contract between ATTM and plaintiff.

BACKGROUND

I. Procedural History

On December 3, 2009, the Judicial Panel for Multidistrict Litigation, pursuant to 28 U.S.C. § 1407, centralized 12 putative class actions in this District for coordinated pretrial proceedings. D.E. 1. Since that time, an additional 12 actions have been transferred to this multidistrict litigation.

On April 1, 2010, plaintiffs filed a proposed "exemplar complaint," entitled "First Amended Complaint" (D.E. 50), which essentially merged two actions – *Sterker v. Apple Inc.*, Case No. 09-4242, filed in the Northern District of California, and *Williams v. Apple Inc.*, Case No. 09-6914, filed in the Central District of California – into a single putative nationwide class action. Plaintiffs' proposed exemplar complaint did not address the other 21 individual actions then pending in the multidistrict litigation. On May 28, 2010, after briefing by the parties, this Court ordered that plaintiffs' proposed exemplar complaint be stricken from the record. D.E. 66. The Court also ordered plaintiffs in all of the pending actions to file amended complaints by June 4, 2010. *Id.*

This multidistrict litigation currently comprises 20 putative class actions brought by 24 plaintiffs against Apple Inc. ("Apple") and ATTM in 13 different states across the country.[2] On June 4, 2010, amended complaints were filed in 16 actions.[3] D.E. 67-82. The amended complaints allege putative statewide classes, except for the amended complaints filed in the *Sterker* action, which alleges a putative nationwide class against Apple and a putative statewide class against ATTM, and in *Goette v. Apple Inc.*, Case No. 4:09-CV-1480, filed in the Eastern District of Missouri, which alleges a putative nationwide class against Apple and ATTM.

II. Factual Allegations, Putative Classes And Causes of Actions

A. Factual Allegations

The core allegation in plaintiff's Amended Complaint is that Apple and ATTM misrepresented the availability of a single feature of the iPhone 3G and 3GS known as Multimedia Messaging Services ("MMS"). The iPhone is a mobile phone, an iPod music player, and an Internet communications device, with e-mail, web browsing, and text messaging capabilities. FAC ¶ 24. MMS enhances the basic text feature of Standard Messaging Services ("SMS") by enabling users to send pictures and videos in addition to standard text. *See id*. ¶ 25.

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[2] Four of the actions have been voluntarily dismissed: *Pietrangelo v. Apple Inc.*, Case No. 09-cv-1992 (N.D. Ohio); *Kamarian v. Apple Inc.*, Case No. 09-cv-6590 (C.D. Cal.); *Williams v. Apple Inc.*, Case No. 09-6914 (C.D. Cal.); and *Gros v. Apple Inc.*, Case No. 09-cv-08006 (E.D. La.). D.E. 86-89.

[3] Amended complaints have not been filed in four actions: *Carr v. Apple Inc.*, Case No. 09-cv-1996 (N.D. Ohio); *Tran v. Apple Inc.*, Case No. 09-4048 (N.D. Cal.); *Molina v. Apple Inc.*, Case No. 09-cv-2032 (S.D. Cal.); and *West v. Apple Inc.*, Case No. 1:10-cv-01370 (D.N.J.), which was transferred into this MDL proceeding on June 11, 2010. D.E. 85. The parties have agreed to and are working on a different schedule for briefing the responsive pleadings in those actions for submission to the Court.

In June 2007, Apple launched the original iPhone, known as the iPhone 2G. FAC ¶ 26. In July 2008, Apple launched the second generation iPhone 3G. *Id.* ¶ 27. In June 2009, Apple launched the third generation iPhone 3GS. *Id.* ¶ 34.

Plaintiff alleges that Apple and ATTM falsely "advertised that MMS was a feature included with the iPhone 3G and 3GS and AT&T's messaging service plans" when in fact the MMS feature was disabled on the iPhone 3G and 3GS. FAC ¶ 9. As to ATTM, plaintiff alleges that in October 2007, following the iPhone 2G's June 29, 2007 launch, ATTM marketed and sold an unlimited texting plan called "Messaging Unlimited," which included text, picture, video, and instant messaging, to all of its customers, including iPhone customers. *Id.* ¶ 26. He further alleges that in June 2008, in anticipation of the launch of the iPhone 3G, ATTM announced the "iPhone 3G pricing plans," which were the same plans offered to all of its customers, including non-iPhone customers. *Id.* ¶ 29. Plaintiff's theory is that ATTM falsely represented that MMS was available on the iPhone 3G and 3GS by marketing and selling the same unlimited messaging plans to all of its customers, including non-iPhone customers with mobile phones that had MMS capability.[4]

According to plaintiff's allegations, the first time ATTM specifically advertised that the iPhone had MMS capability was on June 10, 2009, when ATTM purportedly advertised on its website that the iPhone 3GS had MMS functionality. FAC ¶ 39. Although plaintiff also alleges

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[4] Plaintiff also alleges that at an unspecified time after the July 2008 launch of the iPhone 3G, ATTM published a statement on the Answer Center of its website acknowledging that customers who were sent an MMS message and who owned a non-MMS capable device would receive a text message instead of an MMS message, and would be required to view the MMS message from an ATTM website. FAC ¶ 32.

that Apple and ATTM had in-store displays and/or videos that showed the iPhone sending photos via text messaging, he provides no specific details regarding when those displays and/or videos appeared in stores, instead vaguely alleging that they did so "[a]t certain times during the Class Period." *See id.* ¶ 42.

Plaintiff alleges that, contrary to Apple's and ATTM's purported representations about the availability of MMS on the iPhone 3G and 3GS, MMS was not available on either the iPhone 3G or iPhone 3GS until late September 2009. *See* FAC ¶¶ 49, 58, 77. According to plaintiff, the unavailability of MMS was the result of deficiencies in ATTM's network. Plaintiff alleges that as the defendants were about to launch the iPhone 3G, "AT&T realized that its entire network would be overloaded if millions of new iPhone users began texting pictures on the 3G iPhone" because sending pictures requires more network capacity than written text messages. *Id.* ¶ 4. Plaintiff also alleges that "AT&T's network was unable to provide the service of texting pictures until it upgraded its network." *Id.* ¶ 6; *see also id.* ¶ 5 ("AT&T needed to build up its network to support this new capacity and that would take time."). ATTM, plaintiff alleges, "intentionally barred iPhone users from having the same [MMS] ability [as non-iPhone users] given its network limitations." *Id.* ¶ 7; ¶ 120(i) ("AT&T had not upgraded its network to support MMS, and therefore, MMS would be unavailable on iPhones until the network was upgraded").

Plaintiff also complains about the amount charged by ATTM for its Messaging Unlimited plan, alleging that ATTM "charged the same price for each of its messaging plans and bundles to iPhone users as it charged to all other wireless service subscribers with cellular phones other than the iPhone." FAC ¶ 98; *see also id.* ¶ 10 (ATTM "charged Class members the same price as customers with different phones which support MMS service.").

B. The Putative Classes

Plaintiff Matthew A. Sullivan is an Ohio resident and alleges he purchased an iPhone 3G and a service plan from ATTM in Westlake, Ohio in July 2009. FAC ¶ 13. Plaintiff was required at purchase to enter "a two-year contract for service through AT&T." *Id.* ¶ 51. Plaintiff purports to bring his claims against ATTM and Apple on behalf of a statewide class of "[a]ll Ohio residents who purchased an iPhone 3G or 3GS from AT&T Mobility L.L.C. or Apple, Inc. from July 11, 2008 to September 25, 2009," and a sub-class of "[a]ll Ohio residents who purchased an iPhone and a text messaging plan from AT&T from July 11, 2008 to September, 2009." *Id.* ¶ 58.

C. Causes Of Action

The Amended Complaint asserts seven causes of action: (1) violation of Ohio's Consumer Sales Practice Act, Ohio Rev. Code Ann. §§ 1345, *et seq.*; (2) violation of Ohio's Deceptive Trade Practices Acts, Ohio Rev. Code Ann. § 4165.02; (3) breach of contract with respect to ATTM's messaging plans; (4) breach of contract; (5) breach of warranties; (6) unjust enrichment; and (7) negligent misrepresentation. FAC ¶¶ 67-125. Plaintiff asserts these causes of action against both Apple and ATTM, except he asserts against solely ATTM the claim for breach of contract with respect to ATTM's messaging plans. *Id.*

Plaintiff alleges he has been injured in two ways: (1) he paid more for his iPhone 3G than he should have, because MMS was not available on the iPhone 3G; and (2) he paid for a messaging service plan that included MMS even though MMS was not available on his iPhone 3G. *See, e.g.,* FAC ¶¶ 7, 10, 16. He seeks compensatory and punitive damages, as well as various forms of injunctive relief, including an order enjoining defendants' alleged wrongful acts and practices. *Id.* ¶¶ 80-81, 86, 125.

LEGAL STANDARDS

I. Rule 12(b)(6) Standards

To survive a motion to dismiss under Rule 12(b)(6), the complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *see also Ashcroft v. Iqbal*, 128 S. Ct. 1937, 1950 (2009); *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007). Although a plaintiff need not present detailed factual allegations, "a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (alteration omitted). In ruling on ATTM's motion to dismiss, the Court should "not accept as true conclusory allegations, unwarranted factual inferences, or legal conclusions." *Arias-Benn v. State Farm Fire & Cas. Ins. Co.*, 495 F.3d 228, 230 (5th Cir. 2007). Instead, the Court should assess only well-pleaded allegations and dismiss all claims that fail to state plausible claims for relief. *See id.*

II. Applicable Law

Where, as here, a plaintiff asserts state common law claims in federal multidistrict litigation founded on diversity jurisdiction, the transferee court must apply the substantive law, including choice of law rules, of the state in which the transferor court sits. *See Ferens v. John Deere Co.,* 494 U.S. 516, 523 (1990); *In re Korean Air Lines Disaster of Sept. 1, 1983,* 932 F.2d 1475, 1496 (D.C. Cir. 1991) ("When a case is transferred pursuant to 28 U.S.C. § 1407(a) by the Panel on Multi-District Litigation, the transferee court must apply the choice of law rules of the states where the transferor courts sit."); 15 Charles A. Wright, *et al., Federal Practice and Procedure,* §§ 3866, 4506 (3d ed. 2009).

The Court should apply Ohio law in determining whether plaintiff in this action has stated plausible claims under Rule 12(b)(6). Plaintiff acknowledges that he is a party to "an

exclusive two year wireless service agreement with AT&T." FAC ¶ 95. Plaintiff's wireless service agreement with ATTM includes a choice of law provision stating that all "claims arising out of or relating to any aspect of the relationship between [ATTM and consumer], whether based in contract, tort, statute, fraud, misrepresentation or any other legal theory," are governed by the law of the state of the billing address. Mahone-Gonzalez Decl., filed in support of ATTM's Motions to Dismiss First Amended and Supplemental Complaint ("ATTM's Motions to Dismiss"), ¶ 17 & Ex. 16 ("*The law of the state of your billing address shall govern this Agreement* except to the extent that such law is preempted by or inconsistent with applicable federal law." (emphasis added)).[5] Plaintiff has an Ohio billing address. *Id.* ¶ 18 & Ex. 17.

Ohio courts apply the "law of the state chosen by the parties to govern their contractual rights and duties" unless either the chosen state has no substantial relationship to the parties or the transaction or Ohio has a materially greater interest than the chosen state in the determination of the particular issue. *Jarvis v. Ashland Oil, Inc.*, 478 N.E.2d 786, 788-89 (Ohio 1985); *see also Schulke Radio Prods., Ltd. v. Midwestern Broad. Co.*, 453 N.E.2d 683, 686 (Ohio 1983). Because plaintiff's claims here indisputably arise out of, and relate to, his relationship with ATTM, the choice of law provision applies to all of his claims. Thus, plaintiff's claims are governed by Ohio law.

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[5] Because the Amended Complaint expressly refers to the ATTM wireless service agreement between plaintiff and ATTM, the Court may consider the agreement in deciding this motion to dismiss without converting it into a motion for summary judgment. *In re Katrina Canal Breaches Litig*. 495 F.3d 191, 205 (5th Cir. 2007) ("Documents 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 her claim."); *see also Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498-99 (5th Cir. 2000) (same).

ARGUMENT

I. Plaintiff's Claims Against ATTM Are Preempted By The Federal Communications Act.

ATTM is a wireless service provider, and therefore its right to enter a market for wireless service, the capacity of its wireless network, and the rates it charges for wireless service are subject to *exclusive* federal regulation and control under the Federal Communications Act ("FCA"). *See* 47 U.S.C. §§ 201, 308-09, 332(c)(3)(A). The FCA completely preempts the application of state law to wireless carriers such as ATTM with respect to the regulation of rates and the terms and requirements for market entry. 47 U.S.C. § 332(c)(3)(A); *Bastien v. AT&T Wireless Servs., Inc.*, 205 F.3d 983, 989 (7th Cir. 2000); *see also Tex. Office of Pub. Util. v. FCC*, 183 F.3d 393, 432 (5th Cir. 1999) ("States . . . can never regulate rates and entry requirements for [wireless] providers.").

Section 332 of the FCA provides that "no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service." 47 U.S.C. § 332(c)(3)(A). In applying this preemption clause, courts have universally recognized that the FCA preempts all state law claims, regardless of how fashioned, that would require resolution of issues reserved for federal regulation, including such issues as "the type and adequacy of technology that a wireless service provider . . . must use in order to enter or serve a particular market," *Aubry v. Ameritech Mobile Commc'ns, Inc.*, No. 00-75080, 2002 WL 32521813, at *3 (E.D. Mich. June 17, 2002), "the manner in which a mobile service carrier charges customers for its services," *Brodie v. Telecorp Commc'ns Inc.*, 2002-942 (La. App. 5 Cir. 12/30/02), 836 So. 2d 646, 648, and whether the "services provided . . . were not worth the amount of the [rate charged]," *Gilmore v. Sw. Bell Mobile Sys.*, 156 F. Supp. 2d 916, 925 (N.D. Ill. 2001).

Preemption does not depend on the form or title of the causes of action at issue, but instead on "the nature of the claims" asserted and the extent to which those claims challenge federally regulated rates or practices. *Bastien,* 205 F.3d at 989 (consumer fraud and contract claims preempted where "complaint would directly alter the federal regulation of tower construction, location and coverage, quality of service and hence rates for service"); *accord Iberia Credit Bureau, Inc. v. Cingular Wireless*, 668 F. Supp. 2d 831, 842 (W.D. La. 2009) (recognizing that "in specific cases" the FCA preempts state law breach of contract and inadequate disclosure claims).

In *Bastien*, the plaintiff entered a service contract with AT&T Wireless Services ("AWS"), and sued after it became dissatisfied with the quality of AWS's service. *Bastien*, 205 F.3d at 985. The plaintiff asserted state law claims for breach of contract and statutory consumer fraud, alleging that AWS "signed up subscribers without first building the cellular towers and other infrastructure necessary to provide reliable cellular service and other infrastructure necessary to provide reliable cellular connections." Plaintiff also alleged that AWS "continued marketing and selling its telephones and telephone service, without regard to the fact that it knew that it could not deliver what it was promising," and that AWS "conceal[ed] the material fact that it did not have the capacity to handle the volume of its cellular calls." *Id*.

The court found that while the plaintiff's claims "appear more like traditional state law claims, they are all founded on the fact that [AWS] had not built more towers and more fully developed its network at the time Bastien tried to use the system." *Id.* at 989. The court held that the plaintiff's state law claims were expressly preempted by § 332 (c)(3)(A) of the FCA because they improperly "tread directly on the very areas reserved to the FCC: the modes and conditions under which [AWS] may begin offering services . . . as well as the rates and

conditions that can be offered for the new service." *Id.* The fact that the plaintiff included allegations that AWS misrepresented and fraudulently concealed the insufficiency of its network did not alter the court's analysis, because even those allegations, the court concluded, constituted a veiled challenge to the FCC's approval of AWS's schedule for building towers and establishing service. *Id.* at 989-90.

Likewise, in pending multidistrict litigation *In re Apple iPhone 3G Prods. Liab. Litig.*, No. 5:09-md-02045 JW, slip op. at 9 (N.D. Cal. Apr. 2, 2010), the United States District Court for the Northern District of California recently held that California state law claims for fraud, consumer fraud and breach of warranty against ATTM relating to sales and performance of the iPhone 3G are preempted by the FCA because plaintiffs' "core allegation [was] that Defendants knew . . . the network was not sufficiently developed . . . and that Defendants deceived Plaintiffs into paying higher rates for a service that Defendants knew they could not deliver." The court held that because "plaintiffs' claims are an attack on ATTM's rates and 3G market entry, [they] therefore tread on ground reserved by the FCA." *Id.*

Here, as in *Bastien* and *In re Apple iPhone 3G Prods. Liab. Litig.*, plaintiff's state law claims against ATTM improperly tread on ground reserved to federal law because they are based on allegations that ATTM's network was not sufficiently developed to support MMS for the iPhone 3G and iPhone 3GS, and that ATTM's rates for unlimited messaging on the iPhone 3G and iPhone 3GS were too high.

In particular, the resolution of plaintiff's claims here turn on allegations regarding the sufficiency of ATTM's network. Plaintiff alleges, for example, that "AT&T needed to build up its network to support [MMS] and that would take time," "AT&T's network was unable to provide the service of texting pictures until it upgraded its network," and ATTM concealed the

fact that "AT&T had not upgraded its network to support MMS." FAC ¶¶ 5-6, 120(i). Plaintiff essentially asks this Court to evaluate whether ATTM adequately developed its network to provide MMS on the iPhone 3G and 3GS. *See In re Apple iPhone 3G Prod. Liab. Litig.*, No. 5:09-md-02045 JW, slip op. at 12 (claims preempted where "Plaintiffs directly allege . . . that Defendants do not have the infrastructure necessary to provide [sufficient] level of service.").

In addition, plaintiff's claims call for a determination as to the reasonableness of ATTM's rates. Plaintiff alleges that "[e]ven though the [MMS] function was disabled, AT&T charged Class members the same price as customers with different phones which support MMS," "iPhone users had to pay for MMS if they wanted unlimited AT&T messaging plans," and "AT&T charged the same price for each of its messaging plans and bundles to iPhone users as it charged to all other wireless service subscribers with cellular phones other than the iPhone." FAC ¶¶ 10, 57, 98. Thus, resolution of plaintiff's claims will require proof that he was injured because he paid too much for his messaging plan. *See Gilmore*, 1156 F. Supp. 2d at 925 (fraud claim based on allegations that wireless carrier charged a fee for which no services were provided was preempted because resolution of claim "would require proof that any services provided in return were not worth the amount of the Fee"); *see also In re Apple iPhone 3G Prod. Liab. Litig.*, No. 5:09-md-02045 JW, slip op. at 9 (fraud claim that wireless carrier charged for 3G service but delivered 2G service "implicated the reasonableness of [the carrier's] rates" and was preempted). Because their resolution "would enmesh the court[] in a determination of the reasonableness of a rate charged" and would require the Court "to determine the infrastructure appropriate for market

entry," *Fedor v. Cingular Wireless Corp.*, 355 F.3d 1069, 1073 (7th Cir. 2004) (referencing *Bastien*), plaintiff's claims clearly trespass into areas preempted by the FCA.[6]

II. Plaintiff's OCSPA, ODTPA And Negligent Misrepresentation Claims Fail Under Rule 9(b) And State Law.

A. Plaintiff's Fraud-Based Claims Do Not Meet Rule 9(b) Standards.

The Fifth Circuit requires that all federal and state law claims "resting on allegations of fraud" meet the heightened pleading standards of Federal Rule of Civil Procedure 9(b). *Williams v. WMX Techs., Inc.*, 112 F.3d 175, 177 (5th Cir. 1997). To comply with Rule 9(b), a complaint must specify the alleged fraudulent statements, identify the speaker, state when and where the statements were made, and explain why the statements are fraudulent. *Id.* The Fifth Circuit holds to a strict interpretation of Rule 9(b), *Nathenson v. Zonagen, Inc.*, 267 F.3d 400, 412 (5th Cir. 2001), and has long relied on Rule 9(b) as "a tool to weed out meritless fraud claims sooner than later," *Bonvillain v. La. Land & Exploration Co.*, No. 99-3540, 2010 WL 1293808, at *8 (E.D. La. Mar. 29, 2010).

Plaintiff's OCSPA, ODTPA and negligent misrepresentation claims "rest on allegations of fraud."[7] The allegations underlying these claims fall far short of meeting Rule 9(b)'s requirements.

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[6] The Ninth Circuit recently issued an opinion drawing a line between claims that are preempted by § 332 and claims that are not. *See Shroyer v. New Cingular Wireless Servs., Inc.*, 606 F.3d 658, 662-63 (9th Cir. 2010). In *Shroyer,* the Ninth Circuit distinguished *Bastien*, reasoning that the claims in *Bastien* ran afoul of § 332 because they sought a determination that the network infrastructure was insufficient and did not justify the rates, but that the *Shroyer* claims fell outside § 332 because they did not implicate the network infrastructure or rates. *Id.* The claims against ATTM in this case are akin to the claims the Seventh Circuit found preempted in *Bastien*, because plaintiff seeks a determination that ATTM failed to adequately build out its network to offer MMS on the iPhone 3G and 3GS, and given its inability to provide MMS, charged unreasonable rates.

First, plaintiff's allegations improperly lump ATTM and Apple together as "defendants" instead of attributing each alleged misrepresentation to an identified "speaker." For example, plaintiff alleges that "Defendants began promoting the iPhone 3G-S claiming it had an MMS feature." FAC ¶ 35; *see also id.* ¶¶ 9, 12, 14, 19, 22, 57, 74-78, 90-92, 120-22. By improperly grouping together ATM and Apple, plaintiff fails to make the required identification of the alleged source for each misrepresentation. *Williams*, 112 F.3d at 179 (fraud allegations insufficient where plaintiff did not "demonstrate which statements were fraudulent and attributable" to each defendant).

Second, plaintiff does not allege *when* or *where* each alleged misrepresentation occurred. For instance, plaintiff alleges that "[a]t certain times during the Class Period," ATTM had in-store displays showing a video demonstrating the iPhone 3GS with an MMS feature. FAC ¶ 42. Plaintiff's vague pleading conspicuously does not specify whether plaintiff purchased his iPhone *before* or *after* the displays allegedly were set up in ATTM's stores, whether they appeared in the store in which plaintiff purchased his iPhone, or whether plaintiff ever saw or heard them.

Third, plaintiff fails to specify the actual content of ATTM's alleged misrepresentations. Plaintiff alleges, for instance, that "[o]n June 10, 2009, AT&T continued to falsely promote the iPhone and its messaging service by advertising on its website . . . that the iPhone 3GS had MMS functionality." FAC ¶ 39. This is the sole allegation in the entire Amended Complaint that ties

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(continued)

[7] While plaintiff's OCSPA claim also includes an allegation that defendants engaged in "unconscionable acts or practices," plaintiff's boilerplate allegations do not identify any conduct distinct from defendants' alleged misleading advertisements and omissions. FAC ¶ 78. Thus, plaintiff's claim is "grounded in fraud" regardless of whether plaintiff characterizes defendants' alleged conduct as deceptive or unconscionable.

ATTM to an alleged representation about MMS functionality on the iPhone purportedly made on a specific date, but it fails under Rule 9(b) because it is pled in conclusory fashion. Plaintiff does not fill in any details about what the purported website text stated, where it appeared or why it was false. The Amended Complaint is replete with similar conclusory allegations about "misrepresentations" and "omissions" that do not provide any of the substance, details or context required by Rule 9(b). *See id.* ¶¶ 9, 12, 14, 19, 35, 37, 57, 74, 79, 91, 120.

Further, plaintiff does not provide allegations required by Rule 9(b) identifying the misrepresentations that plaintiff relied on or that otherwise caused plaintiff's alleged injury. Instead, plaintiff offers only general, conclusory allegations that plaintiff "reasonably relied upon representation by Apple and AT&T in television commercials" and that "Defendants' conduct caused substantial injury to Plaintiff." FAC ¶ 14, 92; *see also id.* ¶¶ 12, 27, 48, 72, 123, 125.

Plaintiff's Amended Complaint puts forward the type of meritless fraud claims built on "mere speculation and conclusory allegations" that Rule 9(b) is intended to weed out. *Pinero v. Jackson Hewitt Tax Servs. Inc.*, 594 F. Supp. 2d 710, 719-20 (E.D. La. 2009) (internal quotation marks omitted).

B. Plaintiff Does Not Attribute Any Actionable Misrepresentations Or Fraudulent Omissions To ATTM.

Plaintiff's OCSPA, ODTPA and negligent misrepresentation claims are all based on the same conclusory allegations: (1) defendants represented that MMS was a feature on the iPhone 3G and iPhone 3GS; (2) defendants failed to disclose that MMS would not be available on the iPhone 3G and 3GS unless and until ATTM upgraded its network; and (3) defendants failed to disclose that iPhone 3G and iPhone 3GS customers would be charged ATTM's standard messaging plan rates regardless of the fact that MMS was temporarily unavailable. FAC ¶¶ 74-

75, 91, 120. These claims are also fatally flawed because they do not identify any actionable affirmative misrepresentations or fraudulent omissions attributable to ATTM.

1. Alleged Statements Are Non-Actionable Statements Of Opinion.

Throughout the Amended Complaint, plaintiff alleges that defendants' marketing campaigns represented that the iPhone was "revolutionary" and "the latest in mobile technology." FAC ¶¶ 5, 9, 14. Plaintiff relies on defendants' alleged superlatives as a basis for his claim that plaintiff "expected" that the iPhone 3G included MMS. FAC ¶ 14. Such statements are not actionable as misrepresentations. To state a claim under OCSPA or ODTPA based on misrepresentations, plaintiff must allege that ATTM made statements that are likely to mislead a reasonable consumer regarding material facts. *Richards v. Beechmont Volvo*, 711 N.E.2d 1088, 1090-91 (Ohio Ct. App. 1998). To plead negligent misrepresentation, plaintiff must allege ATTM made a false statement of material fact. *Gem Indus. v. Sun Trust Bank*, No. 3:08 CV 2991, 2010 WL 1244286, at *7 (N.D. Ohio Mar. 31, 2010). Under either standard, statements that offer only subjective opinions about a product's superiority, such as advertising slogans or sales talk, are not actionable under Ohio law. *Abele v. Bayliner Marine Corp.*, 11 F. Supp. 2d 955, 963-64 (N.D. Ohio 1997) ("[G]eneral statements regarding [a product's] quality . . . clearly cannot form the basis of a claim under the OCSPA."); *Diamond Co. v. Gentry Acquisition Corp.,* 48 Ohio Misc. 2d 1, 7 (Ohio C. P. 1988) ("[B]oastful assertions . . . are not false representations which constitute violation of the [ODTPA]."). Ohio courts have recognized that statements typically used in a sales context, such as "revolutionary," "unique," and "redesigned and improved," cannot support claims for negligent misrepresentation or false or misleading advertising because no reasonable consumer would rely on them. *Interactive Prods. Corp. v. A2Z Mobile Office Solutions, Inc.*, 326 F.3d 687, 699-700 (6th Cir. 2003); *Allied*

Erecting & Dismantling Co. v. Genesis Equip. & Mfg., Inc., 649 F. Supp. 2d 702, 725 (N.D. Ohio 2009). Alleged statements that the iPhone is "revolutionary" or "the latest in mobile technology" fall squarely within the definition of non-actionable opinion because they are not factual and, at best, are subjective opinions that are not likely to deceive reasonable consumers.

2. Plaintiff's Allegations That ATTM Marketed An Unlimited Messaging Plan Are Not Actionable Misrepresentations.

ATTM's representations regarding its unlimited messaging plans cannot form the basis of plaintiff's OCSPA, ODTPA or negligent misrepresentation claims. Plaintiff's fraud-based claims are based on allegations that during the class period, ATTM advertised an unlimited messaging plan that included MMS. FAC ¶¶ 7, 10, 26, 29, 37, 49, 56. Plaintiff's theory seems to be that consumers were deceived into believing that the iPhone 3G and iPhone 3GS supported MMS because the ATTM advertisements he points to, which did not mention or refer to the iPhone, promoted an unlimited messaging plan that was available on other phones with MMS capability sold by ATTM. The allegations that string this strained theory together do not include any statements that are either actually false or likely to mislead a substantial number of reasonable consumers. *Interactive Prods. Corp.,* 326 F.3d at 698-99 ("When a plaintiff seeks an award of monetary damages for false or misleading advertisement . . . he may show either that the defendant's advertisement is literally false or that it is true yet misleading and confusing.").

As plaintiff acknowledges, the ATTM advertisements he refers to in his Amended Complaint were general, non-device-specific promotions for an unlimited messaging plan. FAC ¶ 7 ("AT&T promoted and sold unlimited texting plans to all its customers."). Plaintiff does not allege that these advertisements made any reference to the iPhone or the availability of the MMS on the iPhone. *Id.* ¶¶ 7, 26. Plaintiff also acknowledges that when ATTM announced the

messaging plan rates of the iPhone 3G in June 2008, ATTM made no reference to or promises regarding the availability of MMS. *Id.* ¶ 29.

Based on these facts, a reasonable consumer exposed to ATTM's messaging plan advertisements would not be deceived into believing that *every* feature advertised by ATTM is available on *every* phone ATTM offers. *See Scales v. Six Flags, Inc.,* No. 2003-P-0043, 2004 WL 1870499, at *4 (Ohio Ct. App. Aug. 20, 2004) (statement that amusement park season pass was "good for all rides" not likely to deceive pass holder into belief that she would have access to all rides at all times); *accord Andre Strishak & Assocs., P.C. v. Hewlett Packard Co.*, 752 N.Y.S.2d 400, 409-10 (App. Div. 2002) (printer manufacturer did not engage in deceptive practice by failing to disclose on printer box that free ink cartridge was not the "large size" provided with prior models). Consumers purchasing wireless service and consumer electronics recognize that service options vary among devises, and that each device has its own strengths and weaknesses in terms of options. *See Olde Towne Windows v. Baker*, 644 N.E.2d 1054, 1055 (Ohio Ct. App. 1994) (statement that window vendor sold "factory direct" was not likely to lead consumers to believe that price was discounted); *see also Consumer Advocates v. Echostar Satellite Corp.,* 8 Cal. Rptr. 3d 22, 29-30 (Ct. App. 2003) ("The common experience of television watchers since the beginning of television is that no television delivery system is perfect.").

3. Plaintiff's OCSPA And ODTPA Claims Based On Alleged Material Omissions Fail Because ATTM Had No Duty To Disclose.

To assert a claim for fraudulent concealment as a predicate for an OCSPA or ODTPA claim, plaintiff must allege facts sufficient to establish that ATTM had a duty to disclose the alleged omissions.[8] *Radford v. Daimler Chrysler Corp.*, 168 F. Supp. 2d 751, 754 (N.D. Ohio 2001) ("[M]ere non-disclosure of a defect, without more, does not fall within the purview of deceptive or unconscionable practices prohibited by the Act." (internal quotation marks omitted)). Under Ohio law, a duty to disclose only arises where there is a fiduciary relationship between the parties or where the omitted facts render other statements made by defendant misleading. *Advanced Prod. Ctr., Inc. v. Emco Maier Corp.,* No. 2003CAE03020, 2003 WL 22746020, at *3 (Ohio Ct. App. Nov. 20, 2003) ("[T]he duty to disclose arises when one party has information that the other party is entitled to know because of a *fiduciary or another similar relation of trust and confidence*." (emphasis added)); *see also Bergmoser v. Smart Document Solutions, LLC*, 268 F. App'x 392, 395 (6th Cir. 2008) (no duty to disclose actual cost of postage "in the absence of facts indicating that [the defendant] affirmatively misrepresented the nature of the charge").

Plaintiff alleges that ATTM failed to disclose two facts: (1) that its network would not support MMS on the iPhone 3G and iPhone 3GS unless and until it was upgraded; and (2) that, during the time that MMS was not available on the iPhone 3G and 3GS, iPhone 3G and 3GS users paid the same amount for unlimited texting plans as non-iPhone mobile phone users whose mobile phones had MMS capability. Plaintiff does not allege any facts establishing that ATTM

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[8] Ohio law does not recognize negligent misrepresentation claims based on a failure to disclose or omission of material fact. *In re Nat'l Century Fin. Enters., Inc., Inv. Litig.,* 580 F. Supp. 2d 630, 646 (S.D. Ohio 2008) ("A claim for negligent misrepresentation lies only for an affirmative false statement, not for an omission.").

had a duty to disclose the allegedly omitted facts. Absent allegations of facts establishing a special relationship between ATTM and plaintiff, no such duty exists. *Ziegler v. Findlay Indus., Inc.*, 464 F. Supp. 2d 733, 738 (N.D. Ohio 2006) ("'[S]pecial' relationship does not exist in ordinary business transactions."). Nor does plaintiff allege that ATTM ever made any affirmative representations that the iPhone 3G had MMS capability.[9] *Temple v. Fleetwood Enter., Inc.*, 133 F. App'x 254, 267 (6th Cir. 2005) (no deception under the OCSPA absent false representation). Nor does plaintiff allege that ATTM made any misrepresentations regarding the rates it charged for its iPhone unlimited messaging plans. The rates ATTM charged plaintiff were fully disclosed and accurate and were not rendered "misleading" merely because ATTM did not also disclose the rates other customers were paying or the services other customers received. *See Firelands Reg'l Med. Ctr. v. Jeavons*, No. E-07-068, 2008 WL 4408600, at *6 (Ohio Ct. App. Sept. 30, 2008) (medical providers failure to disclose discounts given to other patients not misleading).

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[9] Plaintiff's allegations regarding statements about MMS on ATTM's invoices and account statements of "certain Class members" other than plaintiff (FAC ¶¶ 53-54) fail, because they are irrelevant to the question of whether *plaintiff* has adequately pled his fraud-based claims, and would not likely mislead consumers regarding the capabilities of the iPhone because consumers would only have received such statements *after* they purchased an iPhone and subscribed to ATTM's service. Similarly, plaintiff's vague allegations about in-store displays in ATTM stores (*id.* ¶ 42) omits information regarding when such displays were set up in ATTM's stores, and for how long. Moreover, plaintiff does not allege that he saw, let alone relied upon, the in-store displays. Thus, even under Rule 8(a)'s less stringent pleadings standards, plaintiff's allegations lack facts sufficient to support a plausible inference that the in-store displays could have misled plaintiff regarding the availability of MMS on the iPhone 3G or 3GS. *See Twombly*, 550 U.S. at 569.

C. Plaintiff Fails To Allege Either The Causal Nexus Necessary For His OCSPA And ODTPA Claims Or The Reliance Necessary For A Negligent Misrepresentation Claim.

To state a claim under the OCSPA or ODTPA, plaintiff must allege a causal nexus between ATTM's alleged deceptive acts and his injuries. *Cesare v. Work*, 520 N.E.2d 586, 590 (Ohio Ct. App. 1987) (ODTPA claim failed where plaintiff not harmed by alleged violation); *Jones v. McAlarney Pools, Spas & Billiards, Inc.*, No. 07CA34, 2008 WL 757522, at *5 (Ohio Ct. App. Mar. 19, 2008) (deceptive statements made after sale consummated could not support OCPA claim). To state a claim for negligent misrepresentation, plaintiff must allege actual and reasonable reliance on ATTM's alleged misrepresentations. *Doe v. Sexsearch.com,* 551 F.3d 412, 418 (6th Cir. 2008). Plaintiff's allegations are woefully inadequate under both standards.

Plaintiff does not allege facts sufficient to establish either a causal nexus between ATTM's conduct and plaintiff's alleged injury or plaintiff's reasonable reliance on ATTM's alleged misrepresentations. Instead, plaintiff alleges, in boilerplate fashion, that he "suffered injury in fact . . . as a result of Defendants' deceptive conduct" (FAC ¶ 92) and that he "relied upon the representations by Apple and AT&T in television commercials referenced in this Complaint." *Id.* ¶ 14. The Amended Complaint is devoid of any plausible facts regarding *which* ATTM representations plaintiff relied upon, when they were made, and by whom.

Plaintiff alleges that he purchased his iPhone 3G in July 2009. *Id.* ¶ 13. The Amended Complaint identifies an ATTM television commercial regarding its unlimited messaging plan that allegedly aired in October 2007 (*id.* ¶ 26), over one and a half years before plaintiff purchased his iPhone. It strains credulity to suggest that plaintiff relied on a commercial ATTM aired in October 2007 regarding its unlimited messaging plan that did not even mention the iPhone when he purchased an iPhone in June 2009. Furthermore, many of the purported representations regarding he availability of MMS on the iPhone in the Amended Complaint were

allegedly made one year or more before he purchased his iPhone (*see, e.g.,* FAC ¶¶ 3, 7, 23, 26, 29), making it either extremely implausible or impossible that those statements caused him to purchase an iPhone. Because plaintiff has not alleged either a causal connection between ATTM's conduct and his injury or justifiable reliance on ATTM's alleged statements, his OCSPA, ODTPA and negligent misrepresentation claims cannot proceed.

D. Plaintiff's Negligent Misrepresentation Claim Fails Because Plaintiff Cannot Allege The Required "Special Relationship" And It Is Barred By The Economic Loss Doctrine.

1. Plaintiff Has Not Alleged A "Special Relationship" With ATTM.

Under Ohio law, "[a] core requirement in a claim for negligent misrepresentation is a special relationship." *Ziegler,* 464 F. Supp. 2d at 738 (internal quotation marks omitted). Ohio courts have limited the type of "special relationship" that gives rise to a negligent misrepresentation claim to those involving a party who is "in the business of supplying information for the guidance of others," such as "attorneys, surveyors [or] abstractors of title." *Id.* A "special relationship" does not exist in ordinary business transactions. *Id.; see also Sexsearch.com*, 551 F.3d at 418 (no "special relationship" between on-line dating service and subscriber). Plaintiff's negligent misrepresentation claim cannot proceed here because plaintiff has not alleged and cannot allege the existence of a "special relationship" with ATTM, nor is ATTM in the "business of supplying information for the guidance of others."

2. The Economic Loss Doctrine Bars Plaintiff's Negligent Misrepresentation Claim.

Under the economic loss doctrine, where the relationship between the parties to a lawsuit is governed by a contract, the plaintiff is barred from asserting tort claims, such as claims for negligence or negligent misrepresentation, to recover for purely economic damages. *Corporex Dev. & Constr. Mgmt., Inc. v. Shook, Inc.,* 835 N.E.2d 701, 704-05 (Ohio 2005). Put another

way, the economic loss doctrine prohibits parties from using tort remedies to recover for the breach of a contractual duty. *Id.* at 705.

In this case, plaintiff alleges that ATTM breached a duty to provide him with a promised feature on his iPhone (FAC ¶121) and seeks damages that represent the alleged "benefit of the bargain" of ATTM's promise, which he describes as "the difference in value between the iPhone and messaging plans as represented and the iPhone and messaging plans that Defendants actually provided." *Id.* ¶ 123. Plaintiff's negligent misrepresentation claim is predicated on a duty arising from an alleged "agreement" and is thus barred by the economic loss doctrine. *Corporex Dev. & Constr. Mgmt. Inc.*, 835 N.E.2d at 704 ("Tort law is not designed to compensate parties for losses suffered as a result of a breach of duties assumed only by agreement.") (internal quotations omitted).

E. The FCA Provides A "Safe Harbor" That Defeats Plaintiff's OCSPA And ODTPA Claims.

Both the OCSPA and the ODTPA provide a defendant with a "safe harbor" when the defendant's challenged conduct is subject to regulation by a federal agency. Ohio Rev. Code §§ 1345.12(A), 4165.04; *see also Bergmoser,* LLC, 268 F. App'x at 394-95. In this case, plaintiff's OCSPA and ODTPA claims seek to hold ATTM liable for failing to build up its network to support MMS and challenge the rates ATTM charged iPhone users for messaging plans. *See, e.g.,* FAC ¶¶ 5, 57, 74-75, 78. The FCA provides ATTM a "safe harbor" from such these claims because the express provisions of the FCA bar all state law claims related to ATTM's rates and service. 47 U.S.C. § 332(c)(3)(A); *Tex. Office of Pub. Util.*, 183 F.3d at 432 ("States . . . can never regulate rates and entry requirements for [wireless] providers.").

III. Plaintiff's Breach Of Contract Claim Should Be Dismissed.

Plaintiff alleges that when purchasing his iPhone 3G, he was "required to enter into an exclusive two year wireless service agreement with AT&T," and that "[p]art of that two year service agreement for Class members included the purchase of messaging plans." FAC ¶ 95.[10] His breach of contract claim rests on the allegation that ATTM "expressly and/or impliedly promised Plaintiffs and Class members that the iPhone 3G and 3GS messaging plans included the ability to send pictures by text message." *Id.* ¶ 97; *see also id.* ¶¶ 98, 104.

To plead a claim for breach of an express contract, plaintiff must point to a contract term that was explicitly agreed to by the parties, and that ATTM breached. *See Samadder v. DMF of Ohio*, *Inc.*, 798 N.E.2d 1141, 1147 (Ohio Ct. App. 2003) (holding that allegations did not constitute breach of contract where plaintiff did not specify what contractual terms were breached); *Sexsearch.com*, 551 F.3d at 417 ("[T]he complaint does not state a breach-of-contract claim because [plaintiff] has not alleged that [defendant] has breached any promise that is actually part of the contract." (applying Ohio law)); *Cheers Sports Bar & Grill v. DirecTV, Inc.*, 563 F. Supp. 2d 812, 818 (D. Ohio 2008) (dismissing breach of contract claim where plaintiff could not point to any language in contract guaranteeing exclusive broadcasting). Plaintiff has not pointed to, and cannot point to, any explicit promise made by ATTM – in his service agreement or messaging plan, or anywhere else – that MMS would be available on the iPhone 3G before late summer 2009. Thus, his breach of express contract claim fails as a matter of law.

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[10] Plaintiff does not allege that he was *required* by ATTM to purchase a messaging plan. *See* FAC ¶ 95. Indeed, he acknowledges elsewhere in the Amended Complaint that a messaging plan is an option offered by ATTM in addition to "a basic phone service or phone and data service plan." *Id.* ¶ 22.

Plaintiff also fails to state a claim for breach of an implied contract. Under Ohio law, "express contracts and implied in fact contracts covering the same subject matter cannot co-exist." *Arnold v. Morrin*, No. L-99-1279, 2000 WL 1004650, at *4 (Ohio Ct. App. July 21, 2000)). Not only does the very existence of plaintiff's wireless service agreement and messaging plan preclude an implied contract between him and ATTM, the service agreement itself expressly bars an implied contract. Plaintiff's service agreement plainly states:

> This Agreement, the signature or rate summary sheet, the terms included in the rate brochure(s) describing your plan and services, terms of service for products and services not otherwise described herein that are posted on applicable AT&T websites, and any documents expressly referred to herein or therein, *make up the complete agreement* between [plaintiff] and AT&T and supersede any and all prior agreements and understandings relating to the subject matter of this Agreement.

Mahone-Gonzalez Decl., filed in support of ATTM's Motions to Dismiss, ¶ 17 & Ex. 16 (emphasis added). None of the documents referenced in this provision state that MMS would be available on the iPhone 3G or iPhone 3GS before late summer 2009. *See id.*; *id.* ¶ 23 & Ex. 21.

Plaintiff also fails to allege any facts from which a promise by ATTM to provide MMS service on the iPhone 3G or 3GS can be implied. Plaintiff's implied contract claim rests on allegations that "AT&T charged the same price for each of its messaging plans and bundles to iPhone users as it charged to all other wireless service subscribers with cellular phones other than the iPhone" but it "provided the picture messaging functionality" only to non-iPhone users. FAC ¶¶ 98-99. As a matter of logic, ATTM's conduct towards non-iPhone customers cannot constitute an implied promise to plaintiff, who as an iPhone user is differently situated. Nor has plaintiff alleged any course of conduct under which ATTM provided or otherwise impliedly promised MMS functionality to iPhone 3G or iPhone 3GS customers.

IV. Plaintiff's Breach Of Warranty Claim Should Be Dismissed.

In pleading his breach of warranty claim, plaintiff alleges that he formed a contract with ATTM when he purchased his iPhone 3G, the terms of which "include the promises and affirmations of fact made by Defendants on the iPhone and AT&T labels, packaging materials, websites, advertisements and/or press releases," which plaintiff alleges "created or constituted express warranties that became . . . part of a standardized contract" between plaintiff and ATTM. FAC ¶ 110. Plaintiff's claim for breach of express warranty fails for multiple reasons.

A. The ATTM Terms Of Service Agreement Expressly Disclaims All Warranties.

Express disclaimers of warranty are valid and enforceable in Ohio. *See, e.g., Doe*, 551 F.3d at 419 ("Limitation-of-liability clauses are viewed critically, but may be freely bargained for in Ohio and will be enforced."); *Robinson Mem'l Hosp. v. Hi Temp, Inc.*, No. 94-P-0096, 1995 WL 453430, at *4 (Ohio Ct. App. July 14, 1995) (dismissing express warranty claim in part where agreement contained specific disclaimer). Words or conduct may be construed to exclude an express warranty where reasonable. Ohio Rev. Code Ann. § 1302.29(1).[11]

Plaintiff's claim for breach of express warranty is foreclosed by his ATTM Terms of Service agreement, which expressly disclaims the existence of any warranties, express or implied:

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[11] Under Ohio law, there are two types of warranties implied in every contract for a sale of goods: the implied warranty of merchantability and the implied warranty of fitness for a particular purpose. Ohio Rev. Code Ann. §§ 1302.27, .28. Plaintiff does not specifically assert a claim for breach of implied warranty nor state any facts to support such a claim.

> AT&T MAKES NO WARRANTY, EXPRESS OR IMPLIED, OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, SUITABILITY, OR PERFORMANCE REGARDING ANY SERVICE OR GOODS.

Mahone-Gonzalez Decl., filed in support of ATTM's Motions to Dismiss, ¶ 17 & Ex. 16. This warranty disclaimer is conspicuously set forth in writing, in capital letters, in an agreement with plaintiff under the bold-faced heading, "**SERVICE LIMITATIONS; LIMITATIONS OF LIABILITY**." *Id.*

B. Plaintiff Fails To Plead Sufficient Facts For His Breach Of Warranty Claim.

Plaintiff's warranty claim is also precluded because, under Ohio law, a cause of action for breach of express warranty cannot be brought against a seller of services. *See Sexsearch.com*, 551 F.3d at 418 (dismissing express warranty claim where defendant sold and offered a service); *Brown v. Christopher Inn Co.*, 344 N.E.2d 140, 143 (Ohio Ct. App. 1975) (declining to apply Ohio Rev. Code Ann. § 1302.26 "because there was no sale of goods as defined under the Uniform Commercial Code"); *see also* Ohio Rev. Code Ann. § 1302.26 (describing express warranty in context of "goods"). Thus, plaintiff's express warranty claim, to the extent that it is based on ATTM furnishing services under the messaging plans for iPhone 3G (*see, e.g.,* FAC ¶¶ 97-98, 104), is barred.

To assert a claim for breach of express warranty, plaintiff must allege facts establishing "the circumstances surrounding the sale, the reasonableness of the buyer in believing the seller, and the reliance placed on the seller's statement by the buyer." *McCormack v. Knight*, No. CA88-11-080, 1989 WL 65570, at *2 (Ohio Ct. App. June 19, 1989) (citing *Slyman v. Pickwick Farms*, 472 N.E.2d 380, 384 (Ohio Ct. App. 1984)); *see also Price Bros. Co. v. Phil. Gear Corp.*, 649 F.2d 416, 422 (6th Cir. 1981) ("In order to determine whether the pre-contract statements of [defendant] were in fact a basis of the bargain and thus an express warranty . . ., the

court should consider the circumstances surrounding the transaction, the reasonableness of the buyer in believing the seller, and the reliance placed on the seller's statements by the buyer.").

Although plaintiff alleges, in conclusory fashion, that "the promises and affirmations of fact made by Defendants on the iPhone and AT&T labels, packaging materials, websites, advertisements and/or press releases, all of which created or constituted express warranties that became part of the basis of the bargain," he does not identify any specific representations that he reasonably relied upon to form the basis of his bargain with ATTM. FAC ¶ 110. As discussed above, any representations by ATTM regarding MMS capability on the iPhone were made long *before* plaintiff's purchase, including ATTM's television commercial in October 2007, and could not have formed the basis of plaintiff's bargain with ATTM. *Robinson Mem'l Hosp.*, 1995 WL 453430, at *4 (holding that defendant's averments did not constitute an express warranty where "averments were not made contemporaneously with the sale or as part of the contract").

C. The Wireless Service Agreement Governs Plaintiff's Relationship With ATTM.

Finally, plaintiff's allegation that he formed a contract with ATTM which included "promises and affirmations of fact" purportedly made by ATTM "on the iPhone and AT&T labels, packaging materials, websites, advertisements and/or press releases" (FAC ¶ 110) fails, because plaintiff's wireless service contract with ATTM expressly identifies the scope of the agreement between the parties, thus prohibiting plaintiff from importing or implying terms not agreed to by the parties. *See Nationwide Mut. Ins. Co. v. Jackson*, 226 N.E.2d 760, 762-63 (Ohio Ct. App. 1967) ("It is well settled that a court will not rewrite or distort a contract under the guise of judicial construction when a contract is unambiguous."); *Robinson Mem'l Hosp.*, 1995 WL 453430, at *5 ("[I]f the contested document contains an integration clause, [plaintiff] is precluded from providing additional terms."); *Price Bros.*, 649 F.2d at 422 ("[E]xpress

warranties may be added by proof of oral warranties so long as the writing is not itself a complete integration of the agreement.").

V. Plaintiff's Unjust Enrichment Claim Should Be Dismissed.

Plaintiff asserts a claim for unjust enrichment, but "the remedy of unjust enrichment is not available where there is an express contract covering the same subject." *Champion Contr. & Constr. Co. v. Valley City Post No. 5563*, No. 03CA0092-M, 2004 WL 1459298, at *6 (Ohio Ct. App. June 30, 2004). A claim based on a quasi-contract is incompatible with a claim based on an express contract because "if the parties have fixed their contractual relationship in an express contract, there is no reason or necessity for the law to supply an implied contractual relationship between them." *Id.* (internal citations omitted). Thus, "a party cannot claim that both an express contract and a quasi-contract exist over the same subject matter." *Id.*; *see also Hughes v. Oberholtzer*, 123 N.E.2d 393, 396 (Ohio 1954) ("It is generally agreed that there can not be an express agreement and an implied contract for the same thing existing at the same time.").

Here, plaintiff alleges that he entered into "an exclusive two year wireless service agreement" with ATTM, and that ATTM breached the agreement by "failing to provide messaging service plans that include the ability to send picture messages." FAC ¶¶ 95, 101. In his unjust enrichment count, after restating the preceding allegations of the Amended Complaint, plaintiff merely adds conclusory, boilerplate allegations that ATTM has been unjustly enriched based on its "deceptive, misleading and unlawful conduct." *See id.* ¶¶ 114-15. The express contract between the parties cannot support both a breach of contract *and* an unjust enrichment claim.

CONCLUSION

ATTM respectfully requests that the Court dismiss plaintiff's Amended Complaint with prejudice as to ATTM.

Dated: August 10, 2010

/s/ Kathleen Taylor Sooy

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CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of August, 2010, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing.

/s/ Kathleen Taylor Sooy
Kathleen Taylor Sooy