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. 09-618 (E.D. TEX.)	**SECTION "J"**
FRILOUX,	**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 violation of Texas consumer laws, to breach of the covenant of good faith and fair dealing 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 a claim for violations of the Texas Deceptive Trade Practices Act ("DTPA"), Tex. Bus. & Com. Code Ann. §§ 17.41, *et seq*., because plaintiff does not plead the allegations that support this fraud-based claim with the specificity required under Rule 9(b).[2] Plaintiff's DTPA claim is also defective because plaintiff fails to allege essential elements for this claim, including a cognizable misrepresentation or omission and plaintiff's reliance. Plaintiff's DTPA claim also fails because plaintiff does not allege compliance with the DTPA's pre-litigation notice requirement.

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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.

[2] Both Counts I and III of the Amended Complaint assert claims under the DTPA. While the wording of each count varies slightly, the underlying DTPA claims asserted in each count appear to be substantively identical. Each claim is based on alleged violations of Texas Business & Commerce Code § 17.46(b), which defines the "laundry list" of acts or practices that are false, misleading or deceptive, and asserted pursuant to § 17.50(a)(1), which provides a private right of action for consumers injured by the acts or practices listed in § 17.46(b).

Third, plaintiff fails to state a claim for breach of an express or implied contract because plaintiff does not allege that ATTM explicitly agreed that it would provide MMS capability on 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. This claim also fails to the extent that it is based on the messaging plans provided by ATTM, because under Texas law, such warranties are available only against a seller of goods. In addition, plaintiff does not plead the requisite facts to establish a claim for breach of an implied warranty.

Fifth, plaintiff's claim for breach of the implied covenant of good faith and fair dealing fails because there is no such cause of action that applies to the ordinary, arms-length commercial transaction between plaintiff and ATTM under Texas law.

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.[3] On June 4, 2010, amended complaints were filed in 16 actions.[4] 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.

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[3] 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.

[4] 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.

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 ¶ 27. MMS enhances the basic text feature of Standard Messaging Services ("SMS") by enabling users to send pictures and videos in addition to standard text. *Id*. ¶¶ 8, 28.

In June 2007, Apple launched the original iPhone, known as the iPhone 2G. FAC ¶ 29. In July 2008, Apple launched the second generation iPhone 3G. *Id*. ¶ 31. In June 2009, Apple launched the third generation iPhone 3GS. *Id.* ¶ 36.

Plaintiff alleges that Apple and ATTM issued false "statements and advertisements 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 ¶ 11. 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.* ¶ 29. 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.* ¶ 32. 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.[5]

According to plaintiff's allegations, the first time ATTM specifically advertised that the iPhone had MMS capability was in June 2009, when ATTM purportedly advertised on its website that the iPhone 3GS had MMS functionality. FAC ¶ 42. Although plaintiff also alleges 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 "[d]uring the class period." *See id.* ¶ 45.

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 ¶¶ 52, 60. 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 text messaging pictures and videos until it upgraded its network." *Id.* ¶ 6; *see also id.* ¶ 5 ("AT&T needed time

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[5] 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 ¶ 35.

to build up its network to support this new capacity."). ATTM, plaintiff alleges, "secretly prohibited iPhone users from having the same [MMS] ability" as non-iPhone users given its network limitations. *Id.* ¶ 9; *see also id.* ¶ 76 ("Defendants failed to disclose that they would not allow Plaintiff to text pictures because AT&T's network would be over-burdened."); ¶ 74(a) ("AT&T had not upgraded its towers to support MMS, and therefore MMS would be unavailable on iPhones until the towers were 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 ¶ 88; *see also id.* ¶ 12 (ATTM "charged Plaintiff and members of the Class the same price as customers with different phones which support MMS service.").

B. The Putative Classes

Plaintiff Henri Friloux is a Texas resident and alleges he purchased an iPhone 3G and a service plan from ATTM in Texas at some unspecified time in 2009. FAC ¶ 14.[6] Plaintiff was required at purchase to enter "a two-year contract for service through AT&T." *Id.* ¶ 54. Plaintiff purports to bring his claims against ATTM and Apple on behalf of a statewide class of "[a]ll Texas 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 Texas residents who

[6] The original complaint filed in this action also named as a plaintiff Allison Friloux, who is not named as a plaintiff and does not appear to assert claims in the Amended Complaint. To the extent that Allison Friloux intends to assert claims against ATTM, ATTM also moves to dismiss those claims and incorporates its arguments here.

purchased an iPhone and a text messaging plan from AT&T from July 11, 2008 to September, 2009." *Id.* ¶ 60.

C. Causes Of Action

The Amended Complaint asserts six causes of action: (1) violation of Texas's Deceptive Trade Practices Act, Tex. Bus. & Com. Code Ann. §§ 17.41, *et seq.*; (2) breach of contract; (3) violation of Texas's Deceptive Trade Practices Act, Tex. Bus. & Com. Code Ann. §§ 17.41, *et seq.* (Vernon 2010); (4) breach of the implied covenant of good faith and fair dealing; (5) breach of express and/or implied warranty; and (6) unjust enrichment. FAC ¶¶ 69-126. Plaintiff asserts these causes of action against both Apple and ATTM, except he asserts against solely ATTM the causes of action for breach of contract and breach of the implied covenant of good faith and fair dealing. *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 ¶¶ 6, 12, 18. He seeks compensatory and punitive damages. *See, e.g., id.* ¶ 106.

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*, 129 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 Texas 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 ¶ 85. 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. Rives Decl., filed in support of ATTM's Motions to Compel Arbitration Pursuant to the Federal Arbitration Act ("ATTM's Motions to Compel Arbitration"), ¶ 5 & Ex. 3 ("*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)).[7] Plaintiff has a Texas billing address. Mahone-Gonzalez Decl., filed in support of ATTM's Motions to Dismiss First Amended and Supplemental Complaint ("ATTM's Motions to Dismiss"), ¶ 5 & Ex. 2.

Texas courts apply the law of the jurisdiction chosen by the parties if the particular issue is one that they could have resolved by explicit agreement. *Monsanto Co. v. Boustany*, 73 S.W.3d 225, 229 (Tex. 2002) (applying Restatement (Second) of Conflict of Laws § 187); *Lockheed Martin Corp. v. Gordon*, 16 S.W.3d 127, 133 (Tex. App. 2000) (applying law of state specified in parties' contract where chosen state bore some reasonable relationship to the parties and the transaction). 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 Texas law.

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

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[7] 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).

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 time to build up its network to support [MMS]," "AT&T's network was unable to provide the service of text messaging pictures and videos until it upgraded its network," and ATTM concealed the fact that "AT&T has not upgraded its towers to support MMS." FAC ¶¶ 5-6, 74(a). Plaintiffs essentially ask 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 Plaintiff and members of the Class 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 ¶¶ 12, 59, 88. 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.[8]

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[8] 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

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II. Plaintiff's DTPA Claim Fails Under Rule 9(b) And State Law.

A. Plaintiff's DTPA Claim Does 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 claim under the DTPA "rests on allegations of fraud." *See Munawar v. Cadle Co.,* 2 S.W.3d 12, 17 (Tex. App. 1999) ("A DTPA action, by its very nature, is similar to a fraud action."). The allegations underlying this claim fall far short of meeting Rule 9(b)'s requirements.

First, plaintiff's allegations often improperly lump Apple and ATTM together as "defendants" instead of attributing each alleged misrepresentation to an identified "speaker." For example, plaintiff alleges that "Defendants began falsely advertising the iPhone 3GS claiming that it had a MMS feature." FAC ¶ 37; *see also id.* ¶¶ 11, 13, 20, 23, 30, 42, 51-52, 72-

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to offer MMS on the iPhone 3G and 3GS, and given its inability to provide MMS, charged unreasonable rates.

75, 104-05. By improperly grouping Apple and ATTM together, plaintiff fails to make the required identification of the alleged source for each alleged 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 example, plaintiff alleges that "[d]uring the class period," ATTM had in-store displays that showed a video demonstrating the iPhone 3GS with an MMS feature. FAC ¶ 45. 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 3G, or whether plaintiff ever saw or heard them.

Third, plaintiff fails to specify the actual content of any alleged misrepresentations by ATTM. Plaintiff alleges, for instance, that "beginning in June 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 ¶ 42. This is the sole allegation in the entire Amended Complaint that ties ATTM to an alleged representation about MMS functionality on the iPhone, 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.* ¶¶ 10-11, 13, 16, 37, 39, 41, 46, 51-52, 72, 74-75, 103.

Further, plaintiff does not provide the 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 the representations by Apple and AT&T." FAC ¶ 16; *see also id.* ¶¶ 15, 51.

Plaintiff' 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 To ATTM.

In order to state a claim under the DTPA, plaintiff must allege a violation of one of the specifically enumerated acts or practices listed in § 17.46(b).[9] Tex. Bus. & Com. Code Ann. §§ 17.46(c), 17.50(a)(1)(A); *see also Smith v. Baldwin*, 611 S.W.2d 611, 616 (Tex. 1980). While not clear, plaintiff's Amended Complaint appears to allege a violation of §§ 17.46(b)(5), (7), (9), which prohibit a seller from: "[r]epresenting that goods or services have . . . characteristics . . . uses [or] benefits . . . which they do not have;" "[r]epresenting that goods or services are of a particular standard, quality, or grade . . . if they are of another;" and "[a]dvertising goods or services with intent not to sell them as advertised." *See* FAC ¶ 102. A defendant's liability under these sections, however, requires proof of an affirmative misrepresentation of material fact and cannot be premised on an omission or failure to disclose. *See Thermacor Process, L.P. v.*

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[9] Texas Business & Commerce Code §17.50(a)(2) also provides a private cause of action for "breach of an express or implied warranty." However, the DTPA does not create or define any warranties. *Sidco Prod. Mktg., Inc. v. Gulf Oil Corp.*, 858 F.2d 1095, 1099 (5th Cir. 1988). In order to state a claim under §17.50(a)(2), a plaintiff must allege facts sufficient to give rise to an express or implied warranty under state or federal warranty law. In this case, because plaintiff has not alleged and cannot allege a breach of an implied or express warranty by ATTM, plaintiff cannot rely on §17.50(a)(2) as an alternative basis for his DTPA claim.

BASF Corp., 567 F.3d 736, 740 (5th Cir. 2009) (violations of §§ 17.46(b)(5) and (7) require plaintiff to prove that defendant made a false representation); *Sergeant Oil & Gas Co., Inc.*, 861 F. Supp. 1351, 1362-63 (S.D. Tex. 1994) (failure to disclose not actionable as misrepresentation under §§ 17.46(b)(5) or (7)).[10]

Plaintiff's DTPA claim is based on the conclusory allegation that defendants misrepresented that MMS was a feature on the iPhone 3G and 3GS. This claim is fatally flawed, however, because plaintiff's allegations do not identify any affirmative misrepresentations of fact attributable to ATTM.

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

Throughout the Amended Complaint, plaintiff alleges that defendants' marketing campaigns led plaintiff to believe that the iPhone was "revolutionary," "the latest in mobile technology" and the "leader in graphics." FAC ¶¶ 5, 11, 16, 26, 76. Plaintiff relies on defendants' alleged superlatives as a basis for his claims that he "reasonably expected" that the iPhone 3G would include MMS. *Id.* ¶ 15; *see also id.* ¶ 16. Such statements of opinion are not actionable as misrepresentations under the DTPA. Statements that offer only subjective opinions about a product's superiority, such as advertising slogans and sales talk, are insufficient to rise to

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[10] Courts have limited Texas Business & Commerce Code § 17.46(b)(9), which prohibits sellers from "advertising goods or services without intent to sell them as advertised," to prohibiting "bait and switch" advertising, which typically involves attracting customers by advertising a low priced product and then switching them to another product at a higher price. *See Perez v. Hung Kien Luu*, 244 S.W.3d 444, 447 (Tex. App. 2007). Indeed, absent such a limitation, § 17.46(b)(9) would be duplicative of the prohibitions against false representations contained in §§ 17.46(b)(5) and (7). Section 17.46(b)(9) is thus not triggered by plaintiff's Amended Complaint, which does not allege that ATTM engaged in any "bait and switch" advertising.

the level of actionable misrepresentations under the DTPA. *Douglas v. Delp*, 987 S.W.2d 879, 886 (Tex. 1999). Texas courts have recognized that vague, unverifiable statements such as "blockbuster," "the best" and "tradition of excellence," cannot support DTPA claims because no reasonable consumer would rely on them. *Presidio Enters., Inc. v. Warner Bros. Distrib. Corp.*, 784 F.2d 674, 679 (5th Cir. 1986); *Humble Nat'l Bank v. Nat'l Maint. & Repair, Inc.* 933 S.W.2d 224, 231 (Tex. App. 1996); *Heard v. Monsanto Co.*, No. 07-06-0402-CV, 2008 WL 1777989, at *3-4 (Tex. App. June 6, 2008). Alleged statements that the iPhone is "revolutionary," "the latest in mobile technology" and the "leader in graphics" fall squarely within the definition of non-actionable opinion, because they are not factual and, at best, are subjective opinions and are not likely to deceive the average consumer.

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 DTPA claims. Plaintiff's DTPA claims are based on allegations that during the class period, ATTM advertised an unlimited messaging plan that included MMS. FAC ¶¶ 7, 29, 32, 42, 55, 58. 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 actually false. *See Thermacor*, 567 F.3d at 741 (statement that defendant manufactured a "Hi-Temp" foam spray did not falsely misrepresent that defendant's spray would withstand specific range of high temperatures).

As plaintiff acknowledges, the ATTM advertisements he references in his Amended Complaint were general, non-device-specific promotions for its unlimited messaging plans.

FAC ¶ 7 ("AT&T promoted and sold unlimited texting plans to all it[s] customers."). Plaintiff does not allege that these advertisements made any reference to the iPhone or the availability of MMS on the iPhone. *Id.* ¶¶ 7, 29. Plaintiff also acknowledges that when ATTM announced the messaging plan rates for the iPhone 3G in June 2008, ATTM made no reference to or promises regarding the availability of MMS. *Id.* ¶ 32. Plaintiff's DTPA claim fails because there are no specific, plausible allegations in the Amended Complaint that ATTM made affirmative representations regarding the availability of MMS on the iPhone 3G or iPhone 3GS. *See Griffith v. Levi Strauss & Co.*, 85 F.3d 185, 187 (5th Cir. 1996) (no DTPA violation absent evidence of affirmative misrepresentation of material fact); *Hight v. Dublin Veterinary Clinic*, 22 S.W.3d 614, 624 (Tex. App. 2000) (statement that clinic was a "reputable and established" goat breeding facility was not false or misleading as to standard of veterinary care, surgical treatment or postoperative treatment clinic provided).

3. Plaintiff's Allegations Fail To Establish An Omission Actionable Under The DTPA.

To the extent plaintiff intends to base his DTPA claim on alleged omissions, plaintiff must allege a violation of § 17.46(24), which prohibits "failing to disclose information concerning goods or services which was known at the time of the transaction if such failure to disclose such information was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed." In interpreting this section, Texas courts have made it clear that the "mere nondisclosure of material information is not enough to establish and actionable DTPA claim." *Century 21 Real Estate Corp. v. Hometown Real Estate Co.*, 890 S.W.2d 118, 126 (Tex. App. 1994). An omission is not actionable absent an affirmative representation that is inconsistent with and rendered misleading by the omitted facts. *See Nwaigwe v. Prudential Prop. & Cas. Ins. Co.*, 27 S.W.3d 558, 560

(Tex. App. 2000) (DTPA claim based on failure to disclose coverage limitations in insurance policy failed absent evidence of affirmative misrepresentations regarding scope of coverage); *Nw. Otolaryngology Assocs. v. Mobilease, Inc.*, 786 S.W.2d 399, 405 (Tex. App. 1990) (DTPA claim based on failure to disclose seller's purchase price failed absent misrepresentation as to purchase price); *cf. Smith v. Herco, Inc.*, 900 S.W.2d 852, 859 (Tex. App. 1995) (nondisclosure actionable where facts omitted contradicted affirmative representations).

Plaintiff alleges that ATTM did not disclose two facts: (1) that its network did not support MMS on the iPhone 3G and 3GS; and (2) that 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, during the time that MMS was not available on the iPhone 3G and 3GS. Plaintiff's allegations are insufficient to state a claim under §17.46(24), however, because plaintiff does not allege that ATTM made any misrepresentations regarding the capacity of its network to support MMS on the iPhone 3G or the rates it charged for its iPhone unlimited messaging plans.[11]

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[11] Plaintiff's allegations regarding statements about MMS on ATTM's invoices and account statements of "certain Class members" other than plaintiff (FAC ¶¶ 56-57) 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. *Tex. Cookie Co. v. Hendricks & Peralta, Inc.*, 747 S.W.2d 873, 880 (Tex. App. 1988) (post-transaction representations are not subject to DTPA actions). Similarly, plaintiff's vague allegation about in-store displays in ATTM stores (FAC ¶ 48) 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's Failure To Plead Reliance Is Fatal.

To state a DTPA claim, plaintiff must allege that ATTM's alleged misrepresentations or omissions were a "producing cause" of plaintiff's injury. Tex. Bus. & Com. Code Ann. § 17.50(a); *McLaughlin, Nic. v. Northstar Drilling Techs., Inc.*, 138 S.W.3d 24, 30 (Tex. App. 2004). Texas courts have held that proof of actual reliance is required to establish that an act or practice is a "producing cause." *Morgan Bldgs. & Spas, Inc. v. Humane Society of Se. Tex.*, 249 S.W.3d 480, 490 (Tex. App. 2008) ("Reliance is an element of a cause of action for the alleged violations of the DTPA.").

Here, plaintiff does not allege facts sufficient to establish reliance. Plaintiff alleges, in boilerplate fashion, that he "reasonably relied upon the representations by Apple and AT&T in their advertisements and his general understanding of the 'revolutionary' nature of the 3G to form his belief that his iPhone 3G had the ability to send picture messages by text." FAC ¶ 16. The Amended Complaint is devoid of any facts regarding which ATTM representations plaintiff relied upon, when they were made, and by whom.

Plaintiff alleges that he purchased his iPhone 3G at some unspecified time in 2009 (FAC ¶ 14), but he alleges no connection between any of ATTM's alleged advertisements and his purchase. The Amended Complaint identifies an ATTM television commercial regarding its unlimited messaging plan that allegedly aired in October 2007 (*id.* ¶ 29), more than one year 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 at some point in 2009. Furthermore, many of the purported representations regarding the availability of MMS on the iPhone in the Amended Complaint were allegedly made in 2007 or 2008, many months before he purchased his iPhone (*see, e.g., id.* ¶¶ 2, 26, 31-32, 35), making it either extremely implausible or

impossible that those statements caused him to purchase an iPhone. Because plaintiff has not alleged reliance on ATTM's alleged statements, plaintiff's DTPA claim cannot proceed.

D. Plaintiff's DTPA Claims Should Be Dismissed Because Plaintiff Failed To Comply With The DTPA's Pre-Litigation Notice Requirement.

Before filing a DTPA action seeking damages, a plaintiff *must* give the defendant 60 days' written notice of plaintiff's specific complaint and the amount of actual damages and expenses. Tex. Bus & Com Code Ann. § 17.505(a). Plaintiff has the burden to plead and prove compliance with this notice requirement. *Keith v. Stoelting, Inc.*, 915 F.2d 996, 998 (5th Cir. 1990) (absent alleging compliance with notice provision, plaintiff "states no cause of action under the DTPA"). The primary purpose of the DTPA notice requirement is to discourage litigation and encourage settlement. *Boyd Int'l, Ltd. v. Honeywell, Inc.*, 837 F.2d 1312, 1314 (5th Cir. 1988). The notice requirement is a prerequisite to filing suit and is not satisfied or rendered moot by including a DTPA in a complaint that is subsequently amended. *Miller v. Kossey*, 802 S.W.2d 873, 876-77 (Tex. App. 1991).

While the notice statute provides that plaintiff's failure to comply results in abatement, dismissal is appropriate in some circumstances, such as here, where a plaintiff who failed to provide notice prior to commencing his action subsequently fails to provide notice after being granted an opportunity to file an amended complaint. *Richardson v. Foster & Sear, LLP*, 257 S.W.3d 782, 785 (Tex. App. 2008); *Miller*, 802 S.W.2d at 876. In this case, plaintiff failed to provide notice before filing his original complaint on December 16, 2009, which included a DTPA claim for damages. More than six months later, after being given more than sufficient time to provide 60 days' written notice, plaintiff filed the Amended Complaint, which also includes a DTPA damages claim, without complying with the notice requirement. Plaintiff's repeated refusal to comply with the DTPA's mandatory notice requirement should result in the

dismissal of plaintiff's complaint. *Miller*, 802 S.W.2d at 877 (case dismissed when plaintiff failed to provide notice in the six months prior to filing amended complaint).

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 "[a]s part of their two year service agreements, Class members purchased messaging plans." FAC ¶ 85.[12] His breach of contract claim rests on the allegation that ATTM "expressly and/or impliedly promised Plaintiff and Class members that the iPhone 3G and 3GS messaging plans included the ability to send pictures by text message." *Id.* ¶ 87; *see also id.* ¶ 88.

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 Villarreal v. Art Inst. of Houston, Inc.*, 20 S.W.3d 792, 798 (Tex. App. 2000) ("Because [plaintiff] has not shown the existence of a valid contract containing [the alleged] terms, her breach of contract claims must fail as a matter of law."); *Barnett v. Mentor H/S, Inc.*, 133 F. Supp. 2d 507, 512 (N.D. Tex. 2001) (Plaintiff's "breach of contract claim still fails as a matter of law because Plaintiff has not established that the contract between [the parties] included the terms he alleges.") 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 or 3GS before late summer 2009. Thus, his breach of express contract claim fails as a matter of law.

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[12] Plaintiff does not allege that he was *required* by ATTM to purchase a messaging plan. *See* FAC ¶ 85.

Plaintiff also fails to state a claim for breach of an implied contract. It is well settled under Texas law that "there can be no implied contract where the subject matter is covered by a valid express contract." *Morales v. Dalworth Oil Co., Inc.*, 698 S.W.2d 772, 774 (Tex. App. 1985); *see also Notley v. Sterling Bank*, No. 05-07-00891-CV, 2008 WL 4952835, at *3 (Tex. App. Nov. 21, 2008) ("[A]s a general rule, the existence of an express contract covering the same subject matter precludes finding the existence of an implied contract, whether in fact or in law."). 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.

Rives Decl., filed in support of ATTM's Motions to Compel Arbitration, ¶ 5 & Ex. 3 (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.*; Mahone-Gonzalez Decl., filed in support of ATTM's Motions to Compel Arbitration, ¶ 14 & Ex. 22; Mahone-Gonzalez Decl., filed in support of ATTM's Motions to Dismiss, ¶ 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" (FAC ¶ 88) but it provided the picture messaging functionality only to non-iPhone

users (*see id.* ¶ 89). 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.

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

Express disclaimers of warranty are valid and enforceable in Texas. *See, e.g., Willowbrook Foods, Inc. v. Grinnell Corp.*, 147 S.W.3d 492, 500 (Tex. App. 2004); *P.C. Dynamics Corp. v. Executive Sec. Sys., Inc.*, No. 05-98-00004-CV, 2000 WL 356375, at *2 (Tex. App. Apr. 7, 2000). Words or conduct may be construed to exclude an express warranty where reasonable. Tex. Bus. & Com. Code Ann. § 2.316(a). Parties may exclude the implied warranty of merchantability so long as the disclaimer mentions merchantability and is conspicuous. *Id.* § 2.316(b). Similarly, the implied warranty of fitness may be excluded if the exclusion is in writing and conspicuous. *Id.*

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

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

Rives Decl., filed in support of ATTM's Motions to Compel Arbitration, ¶ 5 & Ex. 3. 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 Implied Warranty Claim.

Under Texas 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. Tex. Bus. & Com. Code Ann. §§ 2.314, .315.

Such warranties are available only against a seller of goods, *id.* (describing warranties in context of "goods"), or a seller of services relating to the repair or modification of existing tangible goods or property, *Rocky Mountain Helicopters, Inc. v. Lubbock County Hosp. Dist.*, 987 S.W.2d 50, 52-53 (Tex. 1998), or to the sale of a new home. *Centex Homes v. Buencher*, 95 S.W.3d 266, 273 (Tex. 2002), *overruled on other grounds*, *Gym-N-I- Playgrounds, Inc. v. Snider*, 220 S.W.3d 905, 913 (Tex. 2007). Thus, plaintiff's warranty claim based on ATTM furnishing services under the messaging plan for his iPhone 3G (*see, e.g.,* FAC ¶ 116) is barred.

Further, plaintiff's warranty claim based on an ATTM sale of an iPhone 3G should also be dismissed because plaintiff fails to adequately plead breach of implied warranty of merchantability or fitness for particular purpose.

Texas law provides that goods are merchantable if they: "(1) pass without objection in the trade under the contract description;" "(2) in the case of fungible goods, are of fair average quality within the description;" "(3) are fit for the ordinary purposes for which such goods are used;" "(4) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved;" "(5) are adequately contained, packaged, and labeled as the agreement may require;" and "(6) conform to the promises or affirmations of fact made on the container or label if any." Tex. Bus. & Com. Code Ann. § 2.314(b).

The only prong of § 2.314(b) that arguably could apply to plaintiff's allegations is paragraph (6), as plaintiff alleges that in June 2009, "the Apple packaging that came with the iPhone claimed the availability of MMS." FAC ¶ 41. Plaintiff, however, does not sufficiently state a claim under paragraph (f), because plaintiff fails to allege that he bought his iPhone 3G on or after that date. Thus, there are no facts alleged to support a breach of the implied warranty of merchantability.

An implied warranty of fitness exists where "the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods." Tex. Bus. & Com. Code Ann. § 2.315. "A 'particular purpose' differs from the ordinary purpose for which the goods are used in that it envisages a specific use by the buyer which is peculiar to the nature of his business whereas the ordinary purposes for which goods are used are those envisaged in the concept of merchantability and go to uses which are customarily made of the goods in question." *Id.* cmt. 2; *see also Bren-Tex Tractor Co. v. Massey-Ferguson, Inc.*, 97 S.W.3d 155, 159 n.8 (Tex. App. 2002) (defendant did not have "reason to know of any particular purpose for which the tractor was acquired (i.e., beyond the ordinary purposes for which such tractors are used) . . . so as to support liability under the implied warranty of fitness for a particular purpose.").

Here, plaintiff does not allege a particular purpose or specific use for the iPhone 3G that is different than the ordinary purpose of making and receiving calls, sending e-mails, browsing the web, and sending text messages. Plaintiff also does not allege that ATTM had any reason to know, at the time plaintiff bought his iPhone 3G, that plaintiff was relying on ATTM's skill or judgment to select a suitable mobile phone for his needs.

Instead, plaintiff merely alleges that ATTM "made representations regarding the iPhone 3G and 3GS's MMS capabilities through advertising, public statements, statements on their websites, and in packaging materials including the product brochure" and that "[t]hese representations were part of the basis of the bargain or the contract of sale between Plaintiff" and defendants. FAC ¶ 116. Therefore, plaintiff has not sufficiently plead a breach of an implied warranty for merchantability or fitness for a particular purpose.

V. Plaintiff Fails To State A Claim For Breach Of The Implied Covenant Of Good Faith And Fair Dealing.

Plaintiff alleges that ATTM breached the implied covenant of good faith and fair dealing set forth in ATTM's wireless service agreement by, in bad faith, "promis[ing] to provide an iPhone and messaging service plan that included MMS, and charg[ing] for that functionality, while knowing that during the class period [it] could not and/or would not provide MMS with the iPhone 3G or 3GS and messaging plans." FAC ¶ 111. Under Texas law, "[t]here is no general duty of good faith and fair dealing in ordinary, arms-length commercial transactions." *Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 52 (Tex. 1998); *see also S. Plains Switching, Ltd. Co. v. BNSF Ry. Co.*, 255 S.W.3d 690, 702 (Tex. App. 2008). Even if such a covenant applied to a commercial contract, the failure to act in good faith does not state an independent cause of action. *Cent. Sav. & Loan Ass'n v. Stemmons Nw. Bank, N.A.*, 848 S.W.2d 232, 239 (Tex. App. 1992). For these reasons, plaintiff's attempted claim for breach of the implied covenant of good faith and fair dealing cannot survive.[13]

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[13] This claim also does not survive under an alternate tort theory. A cause of action in tort for breach of good faith and fair dealing arises "only in the limited circumstances where a 'special

(continued…)

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

Plaintiff asserts a claim for unjust enrichment, but there is no such cause of action where a valid, express contract governs the parties' relationship and the same subject matter. *Burlington N. R.R. Co. v. Sw. Elec. Power Co*., 925 S.W.2d 92, 97 (Tex. App. 1996); *see also Walker v. Cotter Props.*, 181 S.W.3d 895, 900 (Tex. App. 2006) ("Unjust enrichment is not an independent cause of action but rather . . . applies principles of restitution to disputes where there is no actual contract.").

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 ¶¶ 85, 91. In his unjust enrichment count, after incorporating 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.* ¶¶ 122-23. 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.

(continued)

relationship' exists between the parties to a contract." *Cent. Sav. & Loan Ass'n*, 848 S.W.2d at 239. Plaintiff does not and cannot allege any special relationship with 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