UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

IN RE: APPLE iPHONE 3G AND 3GS "MMS" MARKETING AND SALES PRACTICES LITIGATION

THIS DOCUMENT RELATES TO:
Alabama: Davis-Raulston/MDAL No. 09-1133, EDLA No. 10-497; Franklin/SDAL No. 09-704, EDLA No. 10-0018
California: Sterker, et al/NDCA No. 09-4242, EDLA No. 09-7604
Florida: Mejia/MDFL No. 09-2582, EDLA No. 10-499; Novick/MDFL No. 10-002, EDLA No. 10-498
Illinois: Meeker/SDIL No. 09-607, EDLA No. 09-7607
Louisiana: Casey/EDLA No. 09-5470
Michigan: Baxter/EDMI No. 09-13938, EDLA No. 10-0019
Minnesota: Irving/D-MN No. 09-2613, EDLA No. 09-7608
Mississippi: Jackson/SDMS No. 10-003, EDLA No. 10-500
Missouri: Storner /EDMO No. 09-1480, EDLA No. 09-7609
New York: Monticello/SDNY No. 09-9505, EDLA No. 10-0020; Padden/EDNY No. 10-128, EDLA No. 10-821
Ohio: Sullivan/NDOH No. 09-1993, EDLA No. 09-7611
Texas: Aleman/SDTX No. 10-11, EDLA No. 10-502; Friloux/EDTX No. 09-618, EDLA No. 10-501

CIVIL ACTION

MDL No: 2116

2:09-md-2116

SECTION "J"
JUDGE BARBIER

MAGISTRATE JUDGE WILKINSON

PLAINTIFFS' JOINT OPPOSITION TO APPLE'S MOTIONS TO DISMISS FIRST AMENDED COMPLAINTS

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INTRODUCTION

Plaintiffs claim that defendants sold the Apple iPhone 3G and 3GS personal communication device to consumers with AT&T wireless service, while charging them for MMS capability that plaintiffs never received. In fact, Apple and AT&T required consumers to purchase the AT&T service package that included MMS service – a service available to AT&T's other customers – but not made available to iPhone customers, even though they were contractually promised and paid for MMS service. Apple never told consumers that the "smart phones" it promoted as the most advanced in the marketplace were physically capable of sending and receiving MMS messages, but that Defendants would not allow MMS services to be used. Nonetheless iPhone purchasers and users were required to pay for MMS by mandating purchase of the AT&T plan that included MMS service. In fact, unknown to consumers, Apple actually disabled the iPhone's ability to send and receive MMS messages. These material omissions are the heart of Plaintiff's case against Apple, and Apple's failure to disclose this information is actionable under the applicable state laws invoked in this litigation.

Apple ignores these allegations and pretends that this litigation centers only on misrepresentations it made about MMS in the spring and summer of 2009, when the iPhone 3GS was released. It ignores both the omissions alleged and the allegations concerning the iPhone 3G, focusing only on the 3GS. This attempt to create a straw man fails because, even if the pleadings were limited to Apple's affirmative marketing statements made between March and September 2009,

Plaintiffs have adequately pled these misrepresentations. Tellingly, Apple's motion relies heavily on a fact-intensive "disclosure" argument, which cannot be adjudicated in the context of Rule 12 and compels denial of its motion.

THE FACTUAL ALLEGATIONS

Defendants Apple and AT&T worked in tandem to promote and advertise the iPhone 3G and 3GS. Apple manufactured the iPhone and AT&T provided the only network upon which defendants allowed the iPhone to operate. Cal. FAC, ¶ 31.[1] By defendants' design, to use the Apple iPhone (whether purchased from Apple or AT&T), consumers were required to enter into a two-year service contract with AT&T. *Id.* ¶¶ 40, 62. The AT&T service contract was one of AT&T's standard plans, made available to owners of any type of "smart phone," and not one designed or priced solely for the iPhone. *Id.* ¶¶ 7, 40. The required plan was also among AT&T's most expensive. Included in the price of this plan was MMS service. But defendants did not provide MMS service, did not tell consumers they would not receive MMS service, and did not tell consumers that they nonetheless would be paying for a service that would not be made available to them on their iPhone.

The defendants' actionable conduct began before defendants' launched the iPhone 3G in July 2008. By then, picture messaging (MMS) was a standard feature of mobile phones and extremely popular. *Id.* ¶¶ 3, 10, 92. MMS allows users to send text messages, photos and videos without being connected to an internet

[1] The facts alleged in the California complaint referenced by this Statement appear in all complaints subject to Apple's currently pending motions. For the sake of simplification, Plaintiffs cite the California complaint's factual recitation, which applies to all complaints.

service. That is to say, MMS is faster, easier, and cheaper than the traditional email alternative. *Id.* ¶¶ 3, 36. MMS was such a standard feature by mid-2008 that *all other camera phones* permitted on AT&T's network offered MMS. *Id.* ¶ 3. Accordingly, in anticipation of the July 2008 launch of the iPhone 3G, in June, AT&T announced its "iPhone 3G pricing plans" that expressly included MMS service. *Id.* ¶¶ 7, 40. In reality, these price plans were standard AT&T plans, and were not unique to the iPhone. This announcement followed AT&T's widespread 2007 advertising campaign in which it promoted messaging plans with MMS. *Id.* ¶ 37. In concert with these announcements, the iPhone was promoted as the "revolutionary" reinvention of the smart phone, advertised as the most advanced personal communication device available, chock full of innovations.

Meanwhile, MMS was a standard feature on all of the phones permitted to operate on AT&T's network, other than the most rudimentary ones. In fact, for years AT&T promoted itself and the leading provider of MMS. A purchaser of the iPhone 3G could reasonably conclude that if he or she bought a 3G or 3GS iPhone, along with the obligatory AT&T plan that included MMS, MMS would be available to them. *Id.* ¶¶ 13, 14, 18, 24, 25, 28, 34, 59, 92. In fact, each purchaser paid for it.

However, just prior to the launch of the iPhone 3G, Defendants made the decision to exclude iPhone users from MMS services, but at the same time charged iPhone users for MMS service, as part of the standard messaging package. *Id.* ¶¶ 4-7, 10, 40, 66, 67, 92. iphone purchasers received less than owners of other brands of smart phones contracting with AT&T, but paid just as much.

Apple began selling the iPhone 3G in July 2008, but failed to inform purchasers that, unlike all other camera phone users who paid for the same AT&T plan, they alone (as an iPhone owner) would not have MMS service. Worse, Apple did not inform 3G purchasers that they would be charged for MMS services even though those services would not be provided to them. *Id.* ¶¶ 8, 9, 28, 68, 149.

Defendants' omissions, material since at least July 2008, continued and were compounded by a new and pervasive multi-media marketing campaign of affirmative misrepresentations with their launch and advertising of the iPhone 3GS and their continued advertising of the 3G (by this time offered at reduced prices in anticipation of the 3GS launch). Beginning in about March 2009, Apple and AT&T each initiated coordinated advertising campaigns touting the 3G and 3GS, and their picture messaging service. *Id.* ¶¶ 46, 48. For example, Apple made media presentations and issued press releases concerning the availability of MMS on 3G and 3GS iPhones when neither the 3G phone nor the soon to be sold 3GS phone would actually send or receive such messages.[2] *Id.* ¶¶ 46-47. Apple's product packaging represented that its smart phone could send and receive MMS, when it could not. *Id.* ¶ 49. Similarly, AT&T continued to promote its messaging plans to include MMS when it knew MMS would not be provided to new purchasers and continued to charge iPhone owners for it. *Id.* ¶ 48.

[2] Both of these phones were capable of performing MMS functions, as evidenced by Apple turning on the MMS switch through a software patch released on September 25, 2009—the date MMS was activated as a feature on iPhone 3G and 3Gs models.

Defendants' false and misleading advertising campaign was widespread and pervasive. In addition to all of the above, Apple and AT&T used websites, in-store displays and videos to promote the MMS ability of both the 3G and 3GS iPhones. *Id.* ¶¶ 51-58. For example, defendants' in-store displays and videos depicted iPhone users sending photos via MMS. AT&T stores displayed seven foot tall Apple kiosks with a continuously rolling video showing iPhone users sending photos via MMS. *Id.* ¶53. Apple websites contained "guided tours" for the 3GS specifically demonstrating its MMS capability. *Id.* ¶54. Throughout the class period, defendants failed to adequately or unambiguously disclose to purchasers that they would be charged for the MMS service, even though it would not be provide to them. *Id.* ¶¶ 7, 8, 68, 98, 149, 150.

LEGAL STANDARD

When considering a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), the Court must take the well-pleaded factual allegations of the complaint as true. *In re Katrina Canal Breached Litig.*, 495 F.3d 191, 205 (5th Cir. 2007). "All questions of fact and any ambiguities in the current controlling substantive law must be resolved in the plaintiff's favor." *Lewis v. Fresne,* 252 F.3d 352, 357 (5th Cir. 2001); *accord Lovick v. Ritemoney Ltd.,* 378 F.3d 433, 437 (5th Cir. 2004). Motions to dismiss under Rule 12(b)(6) are rarely granted and generally disfavored. *Rodriguez v. Rutter*, 310 Fed. Appx. 623, 626 (5th Cir. 2009).

ARGUMENT

I. Plaintiffs Have Standing under Article III.

To establish Article III standing, a plaintiff must allege (1) that he or she suffered an "injury in fact," (2) a causal connection between the injury and conduct complained of, and (3) a likelihood that the injury will be addressed by a favorable decision. *Public Citizen v. Bomer*, 274 F.3d 212, 217 (5th Cir. 2001) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)).

Apple argues that all Plaintiffs have failed to allege injury and causation, because each "does not allege that he saw any of the advertising pled in the complaint regarding MMS before purchasing his iPhone 3GS." *See*, *e.g.*, Minn. Apple Br. at 14. Apple further argues that Plaintiffs could not have been injured because of its "disclosure." *Id.*[3]

Apple, however, misunderstands the standing inquiry. Standing involves whether the Court has "statutory or constitutional *power* to adjudicate the case." *Steel Co. v. Citizens for a Better Envir.*, 523 U.S. 83, 89 (1998) (emphasis in original) (citing 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1350, p. 196, n. 8 and cases cited (2d ed. 1990). As the Supreme Court stated in *Bell v. Hood,* 327 U.S. 678, 685 (1946), "[j]urisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover."

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[3] Plaintiffs address below the need for a jury to determine, based on a complete record after full discovery, whether Apple's disclosure was sufficiently prominent and unambiguous to cure its blatant misrepresentations.

When considering standing "[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presum[e] that general allegations embrace those specific facts that are necessary to support the claim." *Bennett v. Spear,* 520 U.S. 154, 168 (1997) (internal quotation marks omitted) (quoting *Lujan,* 504 U.S. at 561); *see also Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.,* 501 U.S. 252, 264-65 (1991) ("For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint.") (citations omitted).

Plaintiffs' complaints specifically allege that each "suffered injury in fact and has lost money as a result of the Defendants' unfair competition and unlawful conduct because *inter alia* he paid more for an iPhone than he should have paid and he was charged and paid for a service he did not receive," and that Apple marketed and sold the iPhone 3G and 3GS to Plaintiff and other consumers without disclosing that they would pay for MMS service, yet not receive this service. [4] This is more than sufficient to establish Article III standing.

[4] Raulston Ala. FAC ¶¶ 18, 59-60; Franklin Ala. FAC ¶¶ 17, 59-60; Cal. FAC ¶¶ 17, 21, 22, 67-68; Mejia Fl. FAC ¶¶ 18, 58-59; Novick Fl. FAC ¶¶ 58, 66-67; Il. FAC ¶¶ 17, 59-60; La. FAC ¶¶ 17, 58-59; Mich. FAC ¶¶ 20, 62-63; Minn. FAC ¶¶ 16-17, 56-57; Miss. FAC ¶¶ 17, 60-61; Mo. FAC ¶¶ 20, 61-62; Monticelli NY FAC ¶¶ 17, 57-58; Padden NY FAC ¶¶ 17, 67-68; Oh. FAC ¶¶ 16, 56-57; Aleman Tex. FAC ¶¶ 18, 58-59; Friloux Tex. FAC ¶¶ 18, 58-59.

II. To Its Peril, Apple Ignores Plaintiffs' Allegations: That It Deceptively Failed to Tell Consumers that They Would Be Charged For MMS Service They Would Not Receive.

This case involves three bases for relief and two recovery periods. Over the entire Class Period, Plaintiffs and the class may recover for:

1) Apple's failure to disclose to iPhone purchasers—who are also captive AT&T customers—that AT&T was contractually obligated to provide MMS to them and would not do so; and

2) Apple's failure to disclose to iPhone purchasers—who are also captive AT&T customers—that AT&T would charge iPhone users for MMS but would not provide it.

For a smaller period of time, from June 2009 to September 2009, Apple also represented the immediate availability of MMS, even though defendants did not make it available. Defendants failed to unambiguously or prominently disclaim that representation.

Apple ignores the allegations covering the entire class period, focusing only on the claims concerning the smaller period of time. Apple attempts to re-characterize the case to limit its exposure to the shorter time period. While ignoring significant portions of the lawsuit, it then relies on some evidence that is not part of the pleadings to urge that the entire case be dismissed. Even while citing to this external evidence, it ignores the allegations and exhibits to the complaint.

Although Apple attempts to limit Plaintiffs' case to advertisements and a time window between June and September 2009, Plaintiffs' claims against Apple predate that time frame considerably—and have very little to do with Apple's

advertising, which is just a one part of Plaintiffs' case that comes at the end of the class period. The alleged class period begins on July 11, 2008. Plaintiffs allege that when defendants began selling the 3G, Apple and AT&T failed to disclose that AT&T would be *obligated* by contract to provide picture messaging services to iPhone users. Apple provides no argument addressing these allegations. Plaintiffs also allege that when defendants began selling the 3G, Apple and AT&T failed to inform that AT&T would actually *charge* iPhone users purchasing a messaging plan for video and picture messaging services, despite the fact that they would not receive MMS services. Apple provides no argument addressing these allegations, either. Apple repeated these failures when it began selling 3GS models on June 19 (and 3G models at a reduced price) through September 24, 2009. Apple provides no argument addressing its failure to inform its 3GS customers that its exclusive partner AT&T would be obligated to provide picture and video messaging and would charge for it, despite the fact that MMS would not be available on 3GS. *None* of these allegations—Plaintiffs' primary claims for relief—are addressed by Apple's motion.

Thus, Apple's motions rest solely upon a small portion of Plaintiffs' claims: statements in advertisements, public statements, and sales representatives' statements made between early Summer 2009 and September 24, 2009, solely regarding the *availability* of MMS. Thus, even if Apple were able to "disprove" the "availability" allegations using extrinsic evidence, it would succeed only in depriving Plaintiffs of a single legal theory and smaller recovery. The current

motions would not even impact the class period, as Apple's omissions regarding MMS obligations and charges overlapped with the misrepresentations about MMS availability. Plaintiffs will defend their unavailability claim as Apple challenges it, but they urge this Court not to take Plaintiffs' defense as any kind of argument or concession that this smaller tail should, as Apple contends, wag the dog. This case sounds in material omissions related to the obligation to provide MMS and Apple's exclusive partner, AT&T, charging iPhone users for MMS.

III. The Consumer Protection Statutes Plaintiffs Invoke Support Material Omissions As Violations, Which Plaintiffs Have Adequately Pled.

Plaintiffs have properly pled that they have been harmed by material omissions, which constitute violations of each of the consumer protection statutes at issue. Plaintiffs' pleadings also satisfy this District's Rule 9(b) pleading requirements specifically designed to address material omission, as opposed to claims of affirmative misrepresentation.

A. Apple ignores the fact that omissions violate the Consumer Protection Statutes at issue.

As discussed above, Plaintiffs' claims focus on Apple's failure to disclose that the iPhone customers would sign up for and pay for MMS service just like AT&T's other customers with the same service plan, but iPhone customers would not be permitted to use MMS.

These omissions are material and actionable under state statutory consumer fraud laws, as set forth below:

1. The Alabama Deceptive Trade Practices Act.

On its face, Alabama's DTPA, Ala. Code § 8-19-1, et seq., supports material omissions as violations. Alabama Code § 8-19-5(27) prohibits "[e]ngaging in any other unconscionable, false, misleading, or deceptive act or practice in the conduct of trade or commerce," in addition to the specifically enumerated deceptive acts set forth in the DTPA.[5] *See Register v. Rus. Of Auburn*, 193 F. Supp. 2d 1273, 1276, 1278 n.3 (M.D. Ala. 2002) (in assessing punitive damages for multi-year fraud by concealment, court noted penalties that could be assessed for similar conduct under DTPA, citing to subsection 27 as covering fraud by omission).[6]

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[5] Under both constitutional principles and choice-of-law rules, California law may be applied to non-resident class members of a nationwide class when the defendant has its principle place of business in California and the core actions and representations at issue emanated from California. *See*, *e.g.*, *Wershba v. Apple Computer*, Inc., 110 Cal. Rptr. 2d 145, 159-61 (Cal. Ct. App. 2001) (upholding application of California's false advertising law to nationwide class under constitutional principles and choice-of-law rules because Apple was located in California and false advertising emanated from the corporate headquarters); *Clothesrigger, Inc. v. GTE Corporation*, 236 Cal. Rptr. 605, 609-10 (Cal. Ct. App. 1987) (1987) (same); *Chavez v. Blue Sky Natural Beverage Co.*, 268 F.R.D. 365, 379 (N.D. Cal. 2010) (certifying nationwide false advertising class applying California law on fraud, UCL and CLRA).

Here, as in *Wershba*, Apple is headquartered in California and plaintiffs believe that discovery will show that choice-of-law rules favor application of California law to the nationwide class. Therefore, any dismissal the Court may deem appropriate under any other states' laws should be made without prejudice so that the non-California plaintiffs may obtain relief as unnamed class members of the nationwide class.

[6] *See Cooper v. Bristol-Myers Squibb Co.,* Civ. No. 07-885, 2009 WL 5206130, *8 (D.N.J. Dec. 30, 2009) ("This Court has not found any decisions in Alabama dismissing a DTPA claim for failing to identify the section of the DTPA upon which the claim is premised.")

2. The California Unfair Competition Law and Legal Remedies Act.

Both the California Business and Professions Code § 17200, et seq. (Unfair Competition Law or "UCL"), and the California Legal Remedies Act, Civil Code ("CLRA") § 1750, et seq., support material omissions claims. *Tietsworth v. Sears, Roebuck and Co.*, No. 5:09-CV-00288 JF (HRL), __ F. Supp. 2d __, 2010 WL 1268093, *9-11 (N.D. Cal. March 31, 2010) (finding plaintiffs properly alleged fraud, UCL and CLRA claims based on material omissions); *Falk v. Gen. Motors Corp.*, 496 F. Supp. 2d 1088, 1094-99 (N.D. Cal. 2007) (finding plaintiff adequately alleged omissions-based fraud and violation of the UCL and CLRA). Apple is wrong that "[o]missions alone are not sufficient to establish a CLRA violation." Def. Cal. Br. at 21. The very case it cites holds that omissions may be the basis of a CLRA violation if defendant had a duty to disclose the omitted facts, and that defendant has such a duty when it is in possession of the material facts not known to plaintiff, when it conceals the facts or when it makes partial representations but also suppresses some material facts. *Daugherty v. Amer. Honda Motor Co., Inc.*, 51 Cal. Rptr. 3d 118, 126 (Cal. Ct. App. 2006).

In omissions cases, materiality exists if the omitted information would cause a reasonable consumer to behave differently if he or she were aware of the information. *In re Tobacco II Cases*, 93 Cal. Rptr. 3d 559, 581 (Cal. 2009) ("A misrepresentation is judged to be 'material' if 'a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question. . . .'") (citing *Engalla v. Permanente Medical Group, Inc.*, 64

Cal. Rptr. 2d 843, 859 (Cal. 1997)). *See also Massachusetts Mut. Life Ins. Co. v. Superior Court*, 119 Cal. Rptr. 2d 190, 198 (Cal. Ct. App. 2002) (a misrepresentation is material if it induced plaintiff to alter his position to his detriment); *Falk*, 496 F. Supp. 2d at 1095 (materiality is judged by a reasonable consumer standard).[7]

3. The Florida Deceptive and Unfair Trade Practices Act.

The Florida Supreme Court has held that "deception," within the confines of FDUTPA, Florida Stats. §§ 501.301, *et seq.*, occurs if there is a "representation, omission, or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment." *PNR, Inc. v. Beacon Prop. Mgmt. Inc.*, 842 So. 2d, 773, 777 (Fla. 2003). To establish a FDUTPA cause of action, a plaintiff must plead that they were injured "as a result of" defendant's commission of an "[u]nfair method of competition, unconscionable act[ ] or practice[ ], [or] unfair or deceptive act[ ] or practice[ ]." Fla. Stat. §§ 501.204(1), 501.211(2).

4. Illinois Consumer Fraud and Deceptive Business Practices Act.

The Illinois CFDBPA, 815 ILCS 505/1, *et seq.*, proscribes "unfair or deceptive acts or practices" including misrepresentations or "the concealment, suppression or omission of any material fact." The DTPA's catch-all provision prohibits engaging in "any other conduct which similarly creates a likelihood of confusion or

[7] Determining the materiality of Apple's omissions is a question of fact not properly resolved on a motion to dismiss. *Tobacco II*, 93 Cal. Rptr. 3d at 581 ("materiality is generally a question of fact unless the fact misrepresented is so obviously unimportant that the jury could not reasonably find that a reasonable man would have been influenced by it."). *See also*, *Engalla*, 64 Cal. Rptr. 2d at 859 (same); *In re Sunrise Tech. Sec. Litig.*, No. C-92-0948, 1992 WL 359636, *6 (N.D. Cal. Sept. 22, 1992) (materiality of omissions cannot be resolved on motion to dismiss).

misunderstanding," in addition to false advertisements. 815 ILCS 510/2(12). Plaintiff has properly pled causation for his omission claims. *See* Ill. FAC ¶ 88 (CFDBPA). "[I]t is not necessary to plead a common law duty to disclose nor to show actual reliance in order to state a valid claim based on an omission or concealment under the Consumer Fraud Act." *Lipinski v. Martin J. Kelly Oldsmobile, Inc.*, 759 N.E.2d 66, 70 (Ill. App. Ct. 2001). "Because this case involves a failure to disclose, reliance is presumed. No individualized inquiry is required." *Saltzman v. Pella Corp.*, 257 F.R.D. 471, 479-80 (N.D. Ill. 2009), *aff'd*, 606 F.3d 391 (7th Cir. 2010); s*ee also IWOI, LLC v. Monaco Coach Corp.*, 581 F. Supp. 2d 994, 1002 (N.D. Ill. 2008) ("[I]t is not necessary to plead either a common law duty to disclose or actual reliance to state a valid claim based on an omission or concealment under the Consumer Fraud Act. Concealment is actionable where it is employed as a device to mislead.") (citations omitted); *Grossman v. Waste Mgmt., Inc.*, 589 F. Supp. 395, 400 (N.D. Ill. 1984) ("However, since under *Affiliated Ute* reliance is essentially 'presumed' to exist in an omissions case if the omission is material, the defendant bears the burden of showing that the plaintiff's non-discovery was attributable to his own conduct.").

5. Louisiana's Unfair Trade Practices and Consumer Protection Law.

Plaintiff Casey has adequately pled facts sufficient to sustain a recovery under Louisiana's Unfair Trade Practices and Consumer Protection Law (UTPCPL),

La. R.S. § 51:1405.A.[8] The UTPCPA tracks the language of the FTC Act, 15 U.S.C. § 45(a), regarding prohibited practices, and federal court interpretations of the FTC Act guide interpretation of the UTPCPL. *State ex rel. Guste v. Orkin Exterminating Co., Inc.*, 528 So.2d 198, 200-01 (La. Ct. App. 1988) ("[T]he federal jurisprudence under the FTCA is incorporated into the Louisiana statute"); *Gour v. Daray Motor Co.*, Inc., 373 So.2d 571, 577-78 (La. Ct. App. 1979).

Material omissions violate the FTC Act. *See*, *e.g.*, *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1029 (7th Cir. 1988); *Simeon Mgmt. Corp. v. FTC*, 579 F.2d 1137, 1145 (9th Cir. 1978); *FTC v. Wilcox*, 926 F. Supp. 1091, 1098 (S.D. Fla. 1995). Materially misleading omission in consumer communications thus likewise violate Louisiana's UTPCPL. Under the UTPCPL, "[a]ny person who suffers any ascertainable loss of money . . . as a result of the use or employment by another person of an unfair or deceptive method, act or practice declared unlawful by R.S. 51:1405, may bring an action . . . ." La. R.S. § 51:1409.A. Plaintiff Casey has alleged an ascertainable loss due to Apple's material omissions.

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[8] Plaintiff Casey pled the factual basis for a statutory fraud case under UTPCPA, but did not specifically cite section 51:1405.A. However, under Louisiana law, it is not necessary for a party to characterize his or her cause of action or state the theory of his or her case. Plaintiffs are entitled to relief under any theory of law which may be justified under the relevant facts properly proven at trial. *Comeaux v. Pennsylvania General Ins. Co.*, 490 So. 2d 1191, 1194 (La. App. 1986) (finding it unnecessary for plaintiff to plead relief under the insurance code for his fraud allegations since he specifically pleaded fraud and factual basis therefor). Plaintiff has satisfied Louisiana law by pleading with particularity the elements of the statutory fraud theory. If the Court deems it necessary for Plaintiff's complaint to cite the statutory provisions, however, Plaintiffs are willing and able to amend the complaint to make such an averment.

6. Michigan's Consumer Protection Act.

Under MCLA § 445.903(1), a plaintiff need not assert an affirmative fraud in order to establish a violation of the consumer protection statute; rather, plaintiffs need only allege that the defendant's conduct was "unfair" or "unconscionable." *Mayhall v. A.H. Pond Co.*, 341 N.W.2d 268, 270 (Mich. Ct. App. 1983). This includes the "[f]ail[ure] to reveal a material fact, the omission of which tends to mislead or deceive." MCL § 445.903(1)(s); *see also* § 445.0903(1)(cc). Under Michigan law, an omission is deemed material if it is important to the transaction or affects the customer's decision to enter into the transaction. *Zine v. Chrysler Corp.*, 600 N.W.2d 384, 398 (Mich. Ct. App. 1999).

7. Minnesota Prevention of Consumer Fraud Act, Unlawful Trade Practices Act, and Uniform Deceptive Trade Practices Act.

Minnesota's consumer protection statutes, Minn. Stats. §§ 325F.69, 325D.13, and 325D.44 support material omissions as violations that cause injury. *Cashman v. Allied Prod. Corp.*, 761 F.2d 1250, 1255 (8th Cir. 1985); *Minnesota ex rel. Hatch v. Fleet Mortgage Corp.*, 158 F. Supp. 2d 962, 967 (D. Minn. 2001).

Any person injured by a violation of Minnesota's consumer protection statutes may bring a suit for damages and other equitable relief the Court deems proper. Minn. Stat. § 8.31, subd. 3a. Causation (i.e., "injury") is established in an omissions action where an omission is deemed "material," meaning it must naturally affect the person's decision or conduct. *Cashman*, 761 F.2d at 1255; *Fleet Mortgage*, 158 F. Supp. 2d at 966-67. The materiality of an omission is an objective standard, not subject to findings of subjective reliance: under Minnesota law, the

materiality of an omission is an objective standard, not subject to findings of subjective reliance. *See Simonsen v. BTH Props.*, 410 N.W.2d 458, 461 (Minn. Ct. App. 1987) (court found that it was "natural conclusion" that an advertisement for a six-unit building meant six legally rentable units, but where seller of building omitted fact that it was zoned for five units only); *Yost v. Millhouse*, 373 N.W.2d 826, 830 (Minn. Ct. App. 1985) ("A statement of fact is material if it would *naturally affect* the conduct of the party addressed.") (cited in *Fleet Mortgage*, 158 F. Supp. 2d at 967, as applicable to consumer statutes). As such, causation is objectively demonstrated when an omission supporting a deceptive practice claim is "material." Plaintiff has sufficiently pled causation. Minn. FAC at ¶¶ 82-84.

8. Mississippi Consumer Protection Act.

Mississippi's Consumer Protection Act, Miss. Code Ann. § 75-24-1 et seq. on its face encompasses omissions; the statute prohibits "unfair or deceptive trade practices." *Id.* at 75-24-5. The Act supports a claim that the defendant is liable for a material omission that causes injury. *See*, *e.g.*, *Holman v. Howard Wilson Chrysler Jeep, Inc.*, 972 So.2d 564, 571 (Miss. 2008) (Consumer Protection Act supported claim that dealer had duty to disclose that new vehicle had been damaged and repaired).

9. Missouri Merchandising Practices Act.

The MMPA supports material omissions as violations. Section 407.020(1) defines unlawful practices to include "concealment, suppression, or omission of any material fact." The MMPA does not require than an unlawful practice cause a "purchase." *Plubell v. Merck & Co., Inc.,* 289 S.W.3d 707, 714 (Mo. Ct. App. 2009).

Rather, it merely requires Plaintiffs to allege that that they paid "anything of value" lost in relation to the purchase. *Amburgy v. Express Scripts, Inc.*, 671 F. Supp. 2d 1046, 1057-58 (E.D. Mo. 2009). Plaintiffs have clearly done so. Mo. FAC ¶ 79.

10. Ohio Consumer Sales Practices Act.

On its face, the OCSPA prohibits material omissions as it prohibits any "unfair or deceptive act or practice in connection with a consumer transaction." Ohio Rev. Code § 1345.02; *Delahunt v. Cytodyne Technologies*, 241 F. Supp. 2d 827, 835-36 (S.D. Ohio 2003). Proximate cause is properly alleged where a plaintiff asserts an injury stemming from a failure to disclose material information. *Nessle v. Whirlpool Corporation*, No. 1:07CV3009, 2008 WL 2967703, *3 (N.D. Ohio Jul. 25, 2008).

11. New York General Business Law § 349.

New York General Business Laws §§ 349 makes unlawful "deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in the state." Omissions are actionable under this section. *Held v. Macy's, Inc.*, 901 N.Y.S.2d 906, 2009 WL 3465945, *11 (Table) (N.Y. Sup. Ct. Oct. 19, 2009) (citing *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.,* 647 N.E.2d 741, 745 (N.Y. 1995)).

12. Texas Deceptive Trade Practices Act and Consumer Protection Act.

The DTPA supports material omissions as a violation. Tex. Bus. & Com. Code Ann. § 17.46(b)(24); *see also Sergeant Oil & Gas Co., Inc. v. Nat'l. Maint. & Repair, Inc.*, 861 F. Supp. 1351, 1363 (S.D. Tex. 1994).[9]

To prevail on a claim for failure to disclose under section 17.46(b)(24), a plaintiff must prove four elements: "(1) a failure to disclose information concerning goods or services, (2) which was known at the time of the transaction, (3) if such failure was intended to induce the consumer into a transaction, (4) which the consumer would not have entered had the information been disclosed." *Head v. U.S. Inspect DFW, Inc.*, 159 S.W.3d 731, 744 (Tex. Ct. App. 2005). Intent should be presumed where the information withheld is material, the information was known by the defendant, and the defendant did not disclose it. *Jones v. Ray Ins. Agency*, 59 S.W.3d 739, 750 (Tex. Ct. App. 2001).]

B. All Plaintiffs satisfy Rule 9(b)'s Fraud by Omission Standards.

Rule 9(b) requires that circumstances constituting fraud be alleged in the complaint with "particularity." Fed. R. Civ. P. 9(b). "'What constitutes

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[9] "It is well settled that an action brought under the DTPA, the plaintiffs do not have to plead the particular subdivisions of the Act upon which they relied." *Holland Mortgage & Investment Corp. v. Bone*, 751 S.W.2d 515, 519 (Tex. Ct. App. 1987). A petition need not even set forth the formal title of the DTPA, or indicate the specific sections in order to allege a DTPA claim. *Brown v. Henderson*, 941 S.W.2d 190, 192 (Tex. Ct. App. 1996). "The pleading is 'sufficient if it gives fair and adequate notice of the facts upon which the pleader bases his claim.'" *Id.* (citation omitted). The Texas Plaintiffs plead facts sufficient to show a violation of subsection (24) of the laundry list. 751 S.W.2d at 519; *see also, Brown,* 941 S.W. 2d at 192 (no need to indicate specific sections of the DTPA).

"particularity" will necessarily differ with the facts of each case[.]'" *Benchmark Elect., Inc. v. J.M. Huber Corp.,* 343 F.3d 719, 724 (5th Cir. 2003) (quoting *Guidry v. Bank of LaPlace,* 954 F.2d 278, 288 (5th Cir. 1992)).

Courts in this District have noted that "fraud by silence is by its very nature, difficult to plead with particularity," resulting in a standard different from that applicable to affirmative misrepresentations. *Chrysler Credit Corp. v. Whitney Nat'l Bank*, 824 F. Supp. 587, 598 (E.D. La. 1993) (quoting *Daher v. G.D. Searle & Co.*, 695 F. Supp. 436, 440 (D. Minn. 1988)). *See also Giardina v. Ruth Fertel, Inc.*, No. Civ. A. 00-1674, 2000 WL 1708283 (E.D. La. Nov. 14, 2000). "Because it does not involve an affirmative misrepresentation, it often does not occur at a specific place or precise time, or involve specific persons." *Chrysler Credit Corp.*, 824 F. Supp at 598. Thus, a plaintiff pleading omissions should allege the following with reasonable particularity: (1) the information that was withheld, (2) the general time period during which the fraudulent conduct occurred, (3) the relationship giving rise to the duty to speak, and (4) what the person or entity engaged in the fraudulent conduct gained by withholding the information. *Id.*

Apple leaves virtually unaddressed the material omissions all Plaintiffs actually plead in compliance with both state statutes and Rule 9(b). Here, Plaintiffs have alleged the following:

(1) *Information withheld*: As exclusive manufacturer of the iPhone, and in light of its contractual arrangement that made AT&T the exclusive phone and

texting service provider for that unique phone, Apple failed to disclose the following material information to consumers:

> (a) unambiguously and conspicuously inform iPhone purchasers that AT&T was required to provide MMS services pursuant to AT&T's own consumer contract;[10]
>
> (b) unambiguously and conspicuously inform iPhone purchasers that AT&T would *charge* them for MMS services; and[11]
>
> (c) unambiguously and conspicuously inform iPhone purchasers that they would not be able to send or receive MMS messages.[12]

(2) *General time period during which the fraudulent conduct occurred*: Summer 2008–September 2009.[13]

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[10] Minn. FAC ¶¶ 26, 29, 70-71, 82; Raulston Ala. FAC ¶¶ 30, 33, 87-88; Franklin Ala. FAC ¶¶ 29, 32, 87-88; Cal. FAC ¶¶ 37, 40, 125-26, 150; Mejia Fl. FAC ¶¶ 28, 31, 58; Novick Fl. FAC ¶¶ 28, 31, 57-58; Ill. FAC ¶¶ 30, 33, 96-97, 84; La. FAC ¶¶ 28, 31, 84-85, 116; Mich. FAC ¶¶ 32, 35, 97-98, 129; Miss. FAC ¶¶ 30, 33, 81-82; Mo. FAC ¶¶ 31-34, 86-87; Monticelli NY FAC ¶¶ 28, 31, 89-90; Padden NY FAC ¶¶ 39, 42, 94-95; Ohio FAC ¶¶ 26, 29, 97-98, 74; Aleman Tex. FAC ¶¶ 29, 32, 87-88; Friloux Tex. FAC ¶¶ 29, 32, 87-88.

[11] Minn. FAC ¶¶ 8, 29, 54, 72; Raulston Ala. FAC ¶¶ 8, 33, 89; Franklin Ala. FAC ¶¶ 8, 32, 57, 89; Cal. FAC ¶¶ 8, 40, 65, 127; Mejia Fl. FAC ¶¶ 8, 31, 57-58; Novick Fl. FAC ¶¶ 8, 31, 57-58; Ill. FAC ¶¶ 30, 33, 59-61; La. FAC ¶¶ 8, 31, 57-59; Mich. FAC ¶¶ 8, 35, 60, 99; Miss. FAC ¶¶ 8, 33, 58, 83; Mo. FAC ¶¶ 8, 34, 59, 88; Monticelli NY FAC ¶¶ 8, 31, 54, 91; Padden NY FAC ¶¶ 12, 42, 64, 97; Ohio FAC ¶¶ 8, 29, 54, 99; Aleman Tex. FAC ¶¶ 10, 32, 57, 111; Friloux Tex. FAC ¶¶ 10, 32, 57, 111.

[12] Minn. FAC ¶¶ 8, 12, 82, 87; Raulston Ala. FAC ¶¶ 8, 12; Franklin Ala. FAC ¶¶ 8, 12; Cal. FAC ¶¶ 8, 12, 95, 97; Mejia Fl. FAC ¶¶ 8, 12; Novick Fl. FAC ¶¶ 8, 12; Ill. FAC ¶¶ 8, 12, 84; La. FAC ¶¶ 8, 12, 60, 112, 118; Mich. FAC ¶¶ 8, 13, 77, 79; Miss. FAC ¶¶ 8, 12, 61; Mo. FAC ¶¶ 8, 12, 62, 76; Monticelli NY FAC ¶¶ 8, 12, 58, 125; Padden NY FAC ¶¶ 12, 16, 68, 104; Ohio FAC ¶¶ 8, 12, 58, 74, 76; Aleman Tex. FAC ¶¶ 10, 13, 59, 74; Friloux Tex. FAC ¶¶ 10, 13, 59, 74.

[13] Minn. FAC ¶¶ 27, 29, 34-41, 58; Raulston Ala. FAC ¶¶ 31, 33, 38-45, 61; Franklin Ala. FAC ¶¶ 30, 32, 37-44, 61; Cal. FAC ¶¶ 39, 40, 45-52, 69; Mejia Fl. FAC ¶¶ 29,

(3) *Relationship giving rise to the duty to speak*: Plaintiffs are consumers injured by a violation of each of their respective state's consumer protection laws, which support material omissions as violations. *See* section III(A), *supra*. (demonstrating Plaintiffs' pleading of omissions satisfies the elements of each state's consumer protection statute). Apple, which qualifies as an entity subject to those laws, is the exclusive manufacturer of the iPhone 3G and 3GS and made certain material omissions regarding MMS to Plaintiffs, who purchased iPhones.[14]

(4) *What the person or entity engaged in the fraudulent conduct gained by withholding the information*: Increased sales of iPhones and Defendant's profit from sales.[15] *Giardina*, 2000 WL 1708283, at *2. ("what the defendants allegedly gained

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31, 36-43, 60; Novick Fl. FAC ¶¶ 29, 31, 36-43, 70; Ill. FAC ¶¶ 31, 33, 38-45, 62; La. FAC ¶¶ 29, 31, 36-43, 60; Mich. FAC ¶¶ 33, 35, 40-47, 64; Miss. FAC ¶¶31, 33, 38-45, 62; Mo. FAC ¶¶ 32, 34, 39-46, 63; Monticelli NY FAC ¶¶ 29, 31, 36-43, 59; Padden NY FAC ¶¶ 40, 42, 39-52, 70; Ohio FAC ¶¶ 27, 29, 34-42, 58; Aleman Tex. FAC ¶¶ 30, 32, 36-44, 60; Friloux Tex. FAC ¶¶ 30, 32, 36-44, 60.

[14] Minn. FAC ¶¶ 8, 9, 13-17, 21, 24, 30, 35-48; Raulston Ala. FAC ¶¶ 8, 9, 13-18, 25, 28, 34, 39-52; Franklin Ala. FAC ¶¶ 8, 9, 13-17, 24, 27, 33, 38-51; Cal. FAC ¶¶ 8, 9, 13-28, 32, 35, 41, 46-58; Mejia Fl. FAC ¶¶ 8, 9, 13-18, 23, 26, 32, 37-50; Novick Fl. FAC ¶¶8, 9, 13-17, 23, 26, 32, 37-50; Ill. FAC ¶¶ 8, 9, 13-20, 25, 28, 35, 39-52; La. FAC ¶¶ 8, 9 13-19, 23, 26, 32, 37-50; Mich. FAC ¶¶ 8, 9, 14-24, 27, 30, 36, 41-54; Miss. FAC ¶¶ 8, 9, 13-20, 25, 28, 34, 39-52; Mo. FAC ¶¶ 8, 9, 13-23, 22, 29, 35, 40-53; Monticelli NY FAC ¶¶ 8, 9, 13-19, 23, 26, 32, 37-50; Padden NY FAC ¶¶ 8, 9, 19-31, 34, 37, 43, 48-60; Ohio FAC ¶¶ 8, 9 13-19, 18, 24, 30, 35-48; Aleman Tex. FAC ¶¶ 10, 11, 14-20, 24, 27, 33, 37-51; Friloux Tex. FAC ¶¶ 10, 11, 14-20, 24, 27, 33, 37-51.

[15] Minn FAC ¶¶ 30, 31, 34; Raulston Ala. FAC ¶¶ 34, 35, 38; Franklin Ala. FAC ¶¶ 33, 34, 37; Cal. FAC ¶¶ 41, 42, 45; Mejia Fl. FAC ¶¶ 32, 33, 36; Novick Fl. FAC ¶¶ 32, 33, 36; Ill. FAC ¶¶ 34, 35, 38; La. FAC ¶¶ 32, 33, 36; Mich. FAC ¶¶ 36, 37, 40; Miss. FAC ¶¶ 34, 35, 38; Mo. FAC ¶¶ 35, 36, 39; Monticelli NY FAC ¶¶ 32, 33, 36; Padden NY FAC ¶¶ 43, 44, 47; Ohio FAC ¶¶ 30, 31, 34; Aleman Tex. FAC ¶¶ 33, 34,36; Friloux Tex. FAC ¶¶ 33, 34, 36.

by withholding the information can reasonably be inferred from the complaint the sale of Giardina's stock back to RUFI increased the value of the company and the defendants' interests in it.")

Plaintiffs also adequately plead that they sustained injury because of Apple's omissions; i.e., the omissions were material.[16] Plaintiffs need not plead nor prove more. *See Edens v. Goodyear Tire & Rubber Co.*, 858 F.2d 198, 206-07 (4th Cir. 1988) ("[T]he actionable independent fraudulent act here was . . . [Goodyear's] affirmative concealment of the extension of the completion date. And, direct proof of reliance on the concealment was not required for it was practically impossible to prove, by direct evidence, reliance on that which had been intentionally concealed."); *see also Varacallo v. Massachusetts Mut. Life Ins. Co.*, 752 A.2d 807, 817-18 (N.J. Super. Ct. App. Div. 2000) ("The presumption or inference of reliance and causation, where omissions of material fact are common to the class, has been extended in the context of both common law and statutory fraud."); *Cope v. Metro. Life Ins. Co.*, 696 N.E.2d 1001, 1008 (Ohio 1998) ("It is not necessary to establish inducement and reliance upon material omissions by direct evidence. When there is nondisclosure of a material fact, courts permit inferences or presumptions of inducement and

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[16] Minn FAC ¶¶ 12, 15, 17, 57, 82-84; Raulston Ala. FAC ¶¶ 12, 15, 18, 60, 114, 117; Franklin Ala. FAC ¶¶ 12, 15, 17, 60, 115, 117; Cal. FAC ¶¶ 12, 14, 19, 20, 89, 95-96, 99; Mejia Fl. FAC ¶¶ 12, 14, 18, 59, 72-73; Novick Fl. FAC ¶¶ 12, 68, 61, 82, 111, 114; Ill. FAC ¶¶ 12, 16, 20, 61 ,76, 84; La. FAC ¶¶ 12, 15, 17, 59, 112, 116-117; Mich. FAC ¶¶ 12, 17, 20, 63, 75-77; Miss. FAC ¶¶ 12, 18, 17, 61, 110, 113; Mo. FAC ¶¶ 12, 16, 20, 62, 75-76; Monticelli NY FAC ¶¶ 12, 15, 17, 58, 80, 82-83, 106; Padden NY FAC ¶¶ 16, 60, 87, 68, 82-83, 104-105; Ohio FAC ¶¶ 12, 14, 16, 57, 74-75; Aleman Tex. FAC ¶¶ 13, 16, 18, 59, 74, 103-104; Friloux Tex. FAC ¶¶ 13, 16, 18, 59, 74, 103-104 .

reliance. Thus, cases involving common omissions across the entire class are generally certified as class actions, notwithstanding the need for each class member to prove these elements.").

Notably, Apple has not challenged Plaintiffs' claims of omissions as set forth herein. Nor can it, as Apple cannot dispute that it did not disclose these facts to consumers. Apple contends that "Plaintiff cannot seriously suggest that ATTM's generic data plans defined iPhone-specific features, in particular MMS, without any specific representation to that effect." But that is *precisely* what Apple got itself into by choosing AT&T to be iPhone's exclusive provider of phone service. AT&T's promises and obligations concerning its general data plans are directly applicable to all iPhone customers. Apple is directly responsible for putting its customers in that position. Thus, Apple bears a responsibility to inform its customers that AT&T was going to violate its own contract with iPhone purchasers and would charge iPhone purchasers for MMS services they would not be receiving. Apple is correct in noting that Plaintiffs do not allege that Apple made any representations regarding AT&T's messaging plans. But Plaintiffs have correctly alleged that Apple should have done so, as detailed by the omission allegations.

Apple's only argument (asserted in its motion to dismiss the California Plaintiffs' complaint) that could possibly be linked to the July 2008–September 2009 material omissions is that its omissions concerning MMS "could not possibly have been material to [] [plaintiffs'] purchases." Apple Br. at 26. First, this is contrary to Plaintiffs' allegations of materiality (Cal. FAC, ¶¶14, 19, 24, 95, 118, 150) and is not

properly resolved on a motion to dismiss. *See*, *e.g.*, *Tobacco II*, 207 P.3d at 39-40. Second, Apple's contention that MMS "could not possibly matter" to consumers also belies Apple's own advertising campaign whereby it extensively promoted MMS in its product packaging, on its website, in store dislays and in videos. Cal. FAC, ¶¶46, 49-58. If MMS "could not possibly matter" to consumers, Apple wasted a lot of costly advertising space. Third, Plaintiffs are entitled to discovery of Defendants' internal documents related to its sales and marketing analyses regarding MMS in order to establish materiality. *See In re Dockers Roundtrip Airfare Promotion Sales Practices Litig.*, No. 2:09-cv-2847, *8 (C.D. Cal. Aug. 1, 2010)[17] (granting motion to compel sales data records as relevant to the issue of materiality in deceptive trade practice case).

V. Plaintiffs Plead Statutory Misrepresentations with Particularity.

Even if this case were only about the affirmative misrepresentations Apple made during the spring and summer of 2009, Apple's motion would fail because these misrepresentations are adequately pled. First, the fact that it relies on facts and documents not included in the complaint compels denial of this motion to dismiss. *See infra* Section V(C)(1). At a minimum, the Court should continue the motion until after the close of discovery. Second, even if the Court were to consider the extrinsic evidence offered by Apple, the elements of Plaintiffs' misrepresentation theory are not limited to the statements themselves. Rather, the finder of fact will need to hear testimony regarding the impact of the statements on consumers.

[17] Opinion attached as Ex. A.

A. Plaintiffs meet the standards set forth in Rule 9(b).

There is a different 9(b) standard for affirmative misrepresentation claims (as opposed to omission claims), which "requires allegations of the particulars of time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby.'" *Benchmark Elecs.,* 343 F.3d at 724 (quoting *Tel-Phonic Servs., Inc. v. TBS Int'l, Inc.,* 975 F.2d 1134, 1139 (5th Cir. 1992)). "Put simply, Rule 9(b) requires the 'who, what, when, where, and how' to be laid out." *Id.* (quotation omitted). The Fifth Circuit has explained that Rule 9(b) "supplement[s] but does not supplant Rule 8(a)'s notice pleading" and requires only "simple, concise, and direct" allegations of the "circumstances constituting fraud." *United States ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 185-86 (5th Cir. 2009). At the outset, Plaintiffs have pled the "who, what, when, where, and how" of their statutory misrepresentation claims,[18] and Apple does not contend otherwise, except to challenge Plaintiffs' specificity as to "what" (the specificity of the misrepresentations at issue).

Rather, Apple asserts several broad challenges regarding the particularity of Plaintiffs' pleading of misrepresentations of MMS under statutory causes of action. First, Apple argues that Plaintiffs fail to plead a violation of any consumer protection statutes because Apple accurately represented all facts regarding MMS availability through a "disclosure." Next, Apple protests that Plaintiffs are not able to identify the exact ad copy they relied on or that caused them damages after

[18] See attached chart, attached as Ex. B.

exposure to Apple's nationwide iPhone marketing blitz. Each of these challenges fails.

B. Plaintiffs adequately allege the "What" of their misrepresentation claims.

First, Plaintiffs specifically allege the misrepresentations at issue. Each Plaintiff alleging misrepresentation claims specifies that he or she relied on Apple's representations that MMS would be available.[19] The Amended Complaints then details the time, place, and content of Apple's advertising regarding MMS. *See, e.g.* Cal. FAC ¶¶ 45-61; Ex. B[20]

For example, the Amended Complaints specify that Apple's advertising campaign launched in the Spring of 2009, and that in March 2009, Apple began marketing the MMS feature for iPhones, *id*. at 46; that specifically, on March 17, 2009 Apple gave a media presentation including a video presentation by Scott Forestall, Apple's Senior VP for iPhone software, where he stated, "But the big news for the messages application is we're adding support for MMS. So this, this is support for multimedia, you can now send and receive photos . . . so now you have one app to send and receive text, photos . . . That is what we're doing with messages. . . . Several minutes later, Mr. Forstall says, "messages now support for MMS," *id.* at 47; On June 10, 2009, AT&T continued to falsely promote the iPhone

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[19] Cal. FAC ¶¶ 5, 18; Mich. FAC ¶¶ 17, 54, 78, 90; Minn. FAC ¶¶ 16-17, 48; Miss. FAC ¶¶ 15, 52, 73; Mo. FAC ¶¶ 16, 53, 78; Monticelli NY FAC ¶¶ 13-15, 50,76; Ohio FAC ¶¶ 14, 18; Friloux Tex. FAC ¶ 16.

[20] Although Apple confuses the inquiries, the separate question of the adequacy of Plaintiff's pleading of reliance on misrepresentations, which is not required under any state's consumer fraud statute at issue is addressed below at Section V(C)(1).

and its messaging service by advertising on its website, without any late summer disclaimer, that the iPhone 3GS had MMS functionality, Apple posted on its website, on the "iPhone OS 3.0 Software Update" page, that MMS would be available, so that customers could "send MMS messages and include photos, audio, and contact info. Even tap to snap a picture right inside Messages." A graphic showed the iPhone text message bubbles with a picture inserted, *id.* at 50, 51; a similar graphic appeared on Apple's website promoting the iPhone 3G and its ability to "send photos, video, audio and more" with a mouse print-sized disclaimer indicating "MMS Support from AT&T coming in late summer," *id.* at 52; both Apple and AT&T had in-store displays and/or videos that showed the iPhone sending photos via text messaging. AT&T stores had seven foot-tall white Apple kiosks, which showed a continuously rolling video demonstrating all the features of the iPhone 3GS, including a specific section about MMS demonstrating someone sending a video of kids playing on the beach and sending a picture of a sailboat via MMS, *id.* at 53; Apple's "Guided Tour," with an entire section devoted to the iPhone's camera and claims that the user can now "MMS" pictures, *id.* at 54, 55; website information on MMS, *id.* at 56-58; and on July 21, 2009, a month after the launch of the 3GS, Apple held an Investors Conference Call. Apple mentioned the availability of MMS (incorrectly stated it was "MMF"), *id.* at 61.

These allegations clearly put Apple on notice of the "what" of Plaintiffs' allegations of fraud; this is all the particularity required.[21]

C. Apple's representations were deceptive, its "disclosure" was wholly inadequate, and taken together, they present a factual inquiry inappropriate for adjudication on a motion to dismiss.

1. Apple relies on extrinsic evidence which on its face presents a fact dispute.

First, Apple's argument that it only provided accurate information regarding MMS to iPhone consumers, though cloaked in 9(b) apparel, is a fact-based argument that is inappropriate for adjudication on a motion to dismiss pursuant to Rule 12(b)(6). That is, Apple's argument that it did nothing wrong, i.e., that it did not commit deceptive acts under the state consumer protection statutes, is a factual, not a particularity, argument.

Furthermore, when deciding a Rule 12(b)(6) motion, courts generally do not consider matters outside the pleadings. *Xavier v. Belfor USA Group, Inc.*, No. 06-491, 2007 WL 4224320, *1 (E.D. La. Nov. 26, 2007). Apple argues that it qualifies for the exception to the rule. However, Apple's interpretation of a narrow exception to the general rule renders the general rule meaningless. Predictably, the cases Apple cites do not authorize the submission of just any document a defendant thinks will help it, but instead documents with independent legal significance to the matter at issue, like a contract referenced in the complaint. *See Collins v. Morgan*

[21] Although Apple cites to case law in its motions to support its argument that Plaintiffs do not sufficiently plead and put them on notice of "what" misrepresentations are at issue, none of these cases contradict the 9(b) pleading standards applied in the Fifth Circuit, or stand for any proposition other than that particularity is required. And of course Apple itself contends that the Fifth Circuit 9(b) pleading standards apply to all motions. *See, e.g.,* Cal. Apple Br. at 17, n. 12.

Stanley Dean Witter, 224 F.3d 496, 497-99 (5th Cir. 2000) (permitting defendant to attach copy of written agreement at issue in case); *Borders v. Chase Home Fin., L.L.C.*, No. 09-3020, 2009 WL 1870916, *5 (E.D. La. Jun. 29, 2009) (permitting consideration of settlement agreement where plaintiff alleged breach of settlement agreement). This is a well-known, limited exception to the rule.[22] While misrepresentations referred to in a complaint may sometimes be attached to a complaint or a motion to dismiss and considered by courts, they generally require courts to convert a motion to dismiss into one for summary judgment and require discovery. *See Petri v. Gatlin*, 997 F. Supp. 956, 981 n.18 (N.D. Ill. 1997) (refusing to convert motion to summary judgment or to consider attached sample invoices allegedly disproving plaintiff's misrepresentation claim because, "[A]t this stage it is uncertain whether the two *sample* invoices (which were presumably handpicked by the defendants) are in fact central to the plaintiffs' claim.") (emphasis in original).

Extrinsic evidence is not permitted where a plaintiff merely makes general reference to certain facts, but the complaint does *not* refer to *a specific document*. In *Seal v. Gateway Cos., Inc. of Delaware*, No. 01-1322, 2001 WL 1018362 (E.D. La. Sep. 4, 2001), the plaintiff asserted in her complaint that "the arrangement which existed between Gateway and Service Zone amounted to a joint venture under the laws of the State of Louisiana such as to render Gateway liable for the delictual actions of Service Zone." *Id.* at *3. The defendants attached the service contract

[22] This Court has already recognized the limitation on the exception: "Now, sometimes documents come into play [on a Rule 12 motion]. For example, if you're suing on a contract, then the contract would be relevant to a Motion to Dismiss." Transcript of March 12, 2010, Status Conference, at 6.

between Gateway and Service Zone. *Id.* The Court refused to consider the contract in the context of a Rule 12 motion because the plaintiff did not specifically refer to it in the complaint, but instead referred to a broader "business arrangement," which could have been proven by more than one document or by the course of dealings between the parties. *Id.* Here, Plaintiffs refer to statements made by Apple in its fulsome marketing campaign: some printed, some reported by third parties, and some made orally by Apple and AT&T employees, not an isolated ad copy or video.[23] Furthermore, Apple cites no authority for the proposition that a written

[23] Apple carelessly asperses Plaintiffs' Complaints for omitting Apple's "disclosure" regarding late summer 2009 availability. This is patently false; Plaintiffs repeatedly address Apple's inadequate disclosures:

- "Apple made affirmative representations that such a service was available on the iPhone, including large in-store videos showing people texting pictures with small, fine print disclosures about when the service was available, intentionally designed so that consumers would not see or understand them." Cal. FAC at ¶ 8.
- "At certain times during the class period, a similar graphic appeared on Apple's website promoting the iPhone 3G and its ability to 'send photos, video, audio and more' with a mouse print-sized disclaimer indicating 'MMS Support from AT&T coming in late summer.'" Cal. FAC at ¶ 54.
- "The disclaimers provided by Defendants were inadequate, hard to find, and not prominent enough to leave an accurate, unambiguous impression." Cal. FAC at ¶¶ 99, 122, 156; see also Cal. FAC at ¶ 98.
- "[E]ven if the disclaimer prominently and unambiguously communicated that AT&T and iPhone would not provide MMS services until September 24, 2009, it failed to inform consumers that they would still be charged for MMS services, the same as AT&T customers with different cell phones who actually received MMS services." Cal. FAC at ¶¶ 100, 123, 157.

Plaintiffs do not hide from Apple's deceptive "disclosures" but allege that they are inadequate to cure Apple's misrepresentations, and that they are deliberately designed to be difficult to find, to read, and to understand, creating even more confusion.

"disclosure," no matter how ambiguous, obscure or muted, appearing on the face of a document or video containing a misrepresentation, can in isolation defeat the misrepresentation claim as a matter of law. Thus, as discussed below, the existence of a "disclosure" alone—not yet proven to be effective in curing a material misrepresentation—is insufficient to excuse liability on a motion to dismiss.

When a court considers matters outside the pleadings in the context of a motion to dismiss under Rule 12, it must convert the motion into one for summary judgment under Rule 56.[24] Fed. R. Civ. P. 12(d); *Young v. Biggers*, 938 F.2d 565, 568 (5th Cir. 1991); *Mitsui Sumitomo Ins. Co. (H.K.) Ltd. v. P&O Ports Louisiana, Inc.*, No. 07-1538, 2007 WL 2463308, *2 (E.D. La. Aug. 28, 2007); *O'Neal v. Campbell*, No. 5:09CV110, 2009 WL 3489868, *3 (S.D. Miss. Oct. 23, 2009). Once a motion is treated as one for summary judgment, "All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion." Fed. R. Civ. P. 12(d); *Murphy v. Inexco Oil Co.*, 611 F.2d 570, 573 (5th Cir. 1980); *see also Young*, 938 F.2d at 568, 570 (reversing judgment on pleadings where district court considered extrinsic material but where plaintiff asserted he did not have reasonable opportunity to conduct discovery). Where discovery has not taken place, and where a defendant merely presents cherry-picked documents in support of a motion to dismiss, it is not proper for a court to consider the extrinsic material at

[24] Apple admits that the introduction of documents related to "what disclosures and representations were made" requires conversion of the present motions to "limited summary judgment motion[s] to introduce such documents," and that Plaintiffs should be permitted to take discovery. Doc. 39 at 3. Plaintiffs simply disagree as to the scope of discovery. As demonstrated here, the evidence and claims cannot be so limited.

all, let alone convert the motion to one for summary judgment. *Maritrend, Inc. v. Galveston Wharves*, 152 F.R.D. 543, 548 (S.D. Tex. 1993); *O'Neal*, 2009 WL 3489868 at *4.

The court may not consider matters outside the pleadings when only the movant has access to all relevant information relating to extraneous material and the opposing party has not had an opportunity for discovery of the extraneous material. *Lyman v. Board of Educ. Of City of Chicago*, 605 F. Supp. 193, 196 (N.D. Ill. 1985) ("For this Court to grant summary judgment without giving the plaintiff equal access to such information through the process of discovery would be unjust. Summary judgment in favor of the defendants at this point in the proceedings would be to deny the plaintiff her day in court without even according her the benefits of discovery.").

Given that Apple has agreed that extrinsic material is necessary to address Plaintiffs' complaints, Plaintiffs invoke Federal Rule of Civil Procedure 56(f), which allows the non-moving party to keep open the doors of discovery in order to adequately combat a summary judgment motion. *See Wichita Falls Office Assoc. v. Banc One Corp.*, 978 F.2d 915 (5th Cir. 1992). Such "continuance of a motion for summary judgment for purposes of discovery should be granted almost as a matter of course" unless "the non-moving party has not diligently pursued discovery of the evidence." *Int'l Shortstop, Inc. v. Rally's, Inc.,* 939 F.2d 1257, 1267 (5th Cir. 1991). Since no discovery has been taken, Apple's motion should be denied.

2. Apple's "disclosure" is not determinative on a motion to dismiss.

Apple's mantra regarding its "disclosure" (e.g., "MMS support from AT&T coming in late summer") is in no way determinative. The phrase is in not a real disclosure, either in substance (as it is unclear as to what the statement means, as "support" suggests some facet of customer service, not capability to provide MMS) or form (the statement is presented in a way that consumers would be highly unlikely to see or read it). *See Lewis v. Fresne,* 252 F.3d 352, 357 (5th Cir.2001) (on a motion to dismiss, all questions of fact must be resolved in plaintiff's favor.) Basically, the question Apple asks, merely whether there was a "misrepresentation" and a "disclosure" contradicting the misrepresentation, is overly simplistic. The correct questions are: How robust was the misrepresentation versus the disclosure? How much did Apple repeat and reinforce the misrepresentation through oral statements to the publc, press, and customers? How ambiguous was the disclosure? How prominent was the disclosure? Was the disclosure strong enough to counterbalance Apple's colorful, multi-media MMS marketing campaign? From an expert's point of view, what impact would a misrepresentation like that have on consumers; what impact would the "disclosure" have? What was the reasonable consumer expectation, given the MMS capabilities of less revolutionary smart phones, and even dumb phones with MMS capabilities? Did Apple and AT&T admit in their documents that people expect MMS capabilities for the iPhone, or that people value MMS and find it an important feature? What communications did Apple have with AT&T over the importance and timing of MMS capability? Did Apple train its

employees to downplay the unavailability of MMS for the 3G and 3GS? Rather than using the ambiguous statement "MMS support from AT&T coming in late summer" with regard to the 3GS, should Apple have unambiguously told people (in the same size font and with the same, colorful fanfare, that "MMS does not work on iPhone; MMS will not work until very late September 2009, even though AT&T is contractually obligated to provide MMS, and even though texting plan purchasers will be charged for MMS"? Is the term, "MMS support" confusing, in light of the fact that purchasers of electronic products are likely to associate that term with "customer support for MMS" or "technical support for MMS," and not the availability of a basic feature?

In short, Apple cannot ignore Plaintiffs' actual allegations, create its own black box of liability, isolate one or two phrases in it, and then climb out of it by means of a motion to dismiss. The MMS-availability allegations are far broader than Apple contends, and these allegations cannot be circumvented by presenting isolated ad copy and claiming that, through them, Plaintiffs' claims are fully represented and ripe for summary adjudication.

Apple's "limited" evidence of "disclosures" also cannot create a silver bullet because a disclosure in one or two advertisements is but one piece of information for the Court to consider in the context of the "overall, net impression made" by its entire iPhone text messaging marketing campaign.

Decisions interpreting the FTC Act, which "makes it unlawful to engage in unfair or deceptive commercial practices, 15 U.S.C. § 45, or to induce consumers to

purchase certain products through advertising that is misleading in a material respect,"[25] are relevant to a fair understanding of the issues evoked in the cases arrayed in this MDL because that Act forms the basis for virtually all state-based consumer protection law.[26] In determining whether a defendant's conduct was deceptive or misleading in a material way, courts "examine the overall net impression of an ad." *Kraft, Inc.*, 970 F.2d at 314; *see also Beneficial Corp. v. FTC*, 542 F.2d 611, 617 (3d Cir. 1976) ("[t]he tendency of the advertising to deceive must be judged by viewing it as a whole, without emphasizing isolated words or phrases apart from their context.")

There are no technical disclosure exceptions to the "overall net impression" analysis. In fact, disclosures and disclaimers must be viewed by courts in the context of the marketing campaign itself. Disclosures seeking to qualify a deceptive or misleading statement creating an inaccurate impression must be "prominent, unambiguous." *Kraft, Inc.*, 970 F.2d at 314; *see also Removatron Intern. Corp. v. F.T.C.*, 884 F.2d 1489, 1497 (1st Cir. 1989) (citations omitted) ("Disclaimers or qualifications in any particular ad are not adequate to avoid liability unless they are sufficiently prominent and unambiguous to change the apparent meaning of the

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[25] *Kraft, Inc. v. F.T.C.*, 970 F.2d 311, 314 (7th Cir. 1992).

[26] Virtually every UDAP law in the nation traces its origin to the FTC Act, 15 U.S.C. § 45(a)-(m) or one of two contemporaneous model consumer acts that were developed and promulgated in the 1960s. Jonathan Sheldon et al., *Unfair and Deceptive Acts and Practices* §§ 1.1; 3.4.2.2 and Appendix "A" (listing statutes) (6th Ed. 2005) ("*Sheldon*"); Anthony P. Dunbar, Comment, *Consumer Protection: The Practical Effectiveness of State Deceptive Trade Practices Legislation*, 59 Tul. L. Rev. 427, 488 (1984) ("*Dunbar*"). Depending upon how one classifies the various UDAPs, the FTC Act and the FTC's UTPCPA served as the basis for as many as 44 states' consumer protection laws.

claims and to leave an accurate impression. Anything less is only likely to cause confusion by creating contradictory double meanings."); *F.T.C. v. US Sales Corp.*, 785 F. Supp. 737, 740 & 742 n.4 (N.D. Ill. 1992) (advertisement found deceptive despite presence of express disclosure where "the court was able to read the 'fine print' disclosures only after viewing the commercials repeatedly and 'pausing' the videotape").

The shadowy "disclaimers" Apple seeks now to blow up on a screen must also be viewed in the larger context of its ads, representations, and omissions. *See Removatron Int'l.*, 884 F.2d at 1496-97 ("even if other advertisements contain accurate, non-deceptive claims, a violation may occur with respect to the deceptive ads"). The effectiveness of its disclaimer is also subject to this Court's subjective impressions, as well as extrinsic evidence of confusion by consumers or analysis by experts. *US Sales Corp.*, 785 F. Supp. at 742 n.4 (court considered affidavit of consumer testifying to difficulty of seeing disclaimer on advertisement); *Removatron Int'l*, 884 F.2d at 1496 ("[F]indings with respect to what representations are made in advertisements are factual."); *Federal Express Corp. v. U.S. Postal Service*, 40 F. Supp. 2d 943, 953 (W.D. Tenn. 1999) ("Although materiality is a legal determination, such a determination should be informed by factual evidence concerning the relevant consumer market. When a court assesses materiality, the relevant perspective is that of the consumers.").

Not only are the "disclosures" in the exhibits offered by Apple difficult to read, even to notice, they create further confusion even if deciphered because a

reasonable person would assume that, if MMS were not available on iPhone, then certainly AT&T would not charge for it, which it did. Clearly, there is much more to Apple's marketing efforts than a few ad copies. In addition, Plaintiffs are entitled to present expert testimony and Defendants' own internal statements regarding reasonable consumer impact. None of these issues are addressed by Apple's extrinsic evidence. Accordingly, Apple's contention that it has committed no deceptive acts under the relevant state statutes is necessarily a factual question that should be resolved in Plaintiffs' favor on motion to dismiss.[27]

D. Plaintiffs do not need to plead the exact ad copy they saw or heard.

Even though reliance, the consumer's state of mind when deciding to purchase an iPhone, is not required under Rule 9(b) or under *any* of the state consumer protection laws pled by Plaintiffs alleging misrepresentation claims, Plaintiffs have still adequately pled reliance on Apple's misrepresentations, as discussed below.

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[27] To the extent that Apple is arguing that any reliance on its statements was unreasonable in light of its "disclosure," the reasonableness of reliance is also inappropriate for resolution at this stage of the litigation. *See e.g., Kenneally v. Bank of Nova Scotia*, No. 09cv2039-WGH-JMA, 2010 U.S. Dist. LEXIS 41744 at *25-*26 (S.D. Cal. April 28, 2010) (denying motion to dismiss, court stated that "[a]t the motion to dismiss stage" it could not conclude that the disclosures rendered "plaintiff's alleged reliance unreasonable as a matter of law."). *See also Tobacco II*, 207 P.3d at 40 ("an allegation of reliance is not defeated merely because there was alternative information available to the consumer-plaintiff"); *Wiegand v. Walser Auto. Groups, Inc.*, 683 N.W.2d 807, 812 (Minn. 2004) (existence of a written disclosure does not necessarily cure an affirmative misrepresentation, rejecting the defendant's argument that causation could not be established as a matter of law because a disclosure contradicted the alleged misrepresentation).

1. Reliance is not required under any State Consumer Protection Law.[28]

If reliance is not an element of a statutory claim, it does not need to be pled with particularity under Rule 9(b). The Fifth Circuit recently addressed this exact issue in *Grubbs*, 565 F.3d 180, in deciding the pleading standards for a claim brought under the False Claims Act. The court noted that "'Rule 9(b)'s ultimate meaning is context-specific,' and thus there is no single construction of Rule 9(b) that applies in all contexts. Depending on the claim, a plaintiff may sufficiently 'state with particularity the circumstances constituting fraud or mistake' without including all the details of any single court-articulated standard—*it depends on the elements of the claim at hand*.'" *Id.* at 188 (quoting *Williams v. WMX Techs., Inc.*, 112 F.3d 175, 178 (5th Cir. 1997)) (emphasis added). Thus the court concluded that a Plaintiff pleading an FCA claim need not plead reliance with particularity because it is not an element of the claim. Here, reliance is not an element of any of Plaintiffs' statutory misrepresentation claims.[29] Accordingly, Plaintiffs need not plead reliance at all. Despite this, each Plaintiff has pled both reliance on Apple's misrepresentations and that these misrepresentations caused them to suffer monetary damages.

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[28] Alabama, Florida, Illinois, Louisiana, and New York law regarding misrepresentations are not addressed herein, as Plaintiffs Raulston, Franklin, Meeker, Casey, Monticelli, Padden, and Aleman purchased 3G iPhones prior to Apple's Spring/Summer 2009 misrepresentations and ad campaign and thus pursue only omissions-based claims. This is also the case for California Plaintiffs Kamarian and Guenther, and Missouri Plaintiff Storner.

[29] With the exception of California and Texas statutory claims, as discussed below.

a. California.

Apple attempts to argue that Plaintiffs' misrepresentation claims should be dismissed because Plaintiffs do not allege the exact advertisements relied on and therefore do not adequately allege reliance.[30] Cal. Apple Br. at 2, 3, 12, 16, 18, 19, and 24. Apple cites no supporting authority because it has none. The California Supreme Court in *In re Tobacco II Cases*, 207 P.3d 34, recently addressed this very issue in a false advertising and consumer fraud case. *Id.* 326 and n.17. Applying these well-settled principles, the Supreme Court held that to demonstrate reliance:

> (i) plaintiff must show that the misrepresentation played a substantial part in influencing his decision, but need not show that it was the sole or even the predominate factor influencing his conduct;
>
> (ii) a presumption of reliance arises wherever there is a showing that a misrepresentation is material and that materiality is a question of fact; and
>
> (iii) plaintiff need not plead or prove reliance on particular advertisements or statements if the misrepresentations are part of an extensive or long term advertising campaign.

Tobacco II, 207 P.3d at 39-40; *see also, Morgan v. AT&T Wireless Servs., Inc.,* 99 Cal. Rptr. 3d 768, 786-87 (Cal. Ct. App. 2009) (plaintiff need not allege particular advertisements relied on where advertising campaign was "alleged to have taken place over many months, in several different media…."); *Plascencia v. Lending First*

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[30] Reliance is ***not*** an element of the UCL cause of action. Reliance/causation comes in only for the named plaintiffs to establish standing with allegations that they lost money or property "as a result of" the unfair business practice. Bus. & Prof. Code § 17204. Once standing is met by the named plaintiff, the UCL claim based on the "fraudulent" prong is established by showing the members of the public are "likely to be deceived" by the representations or omissions. *Bank of the West v. Superior Court*, 2 Cal. 4th 1254, 1267 (Cal. Ct. App. 1992).

Mortgage, 259 F.R.D. 437, 448 (N.D. Cal. 2009) ("the court in *In re Tobacco II Cases* set out a liberal approach to the reliance inquiry."); *Comm. on Children's Television, Inc. v. Gen. Foods Corp.*, 673 P.2d 660, 674 (Cal. 1983) (plaintiffs can base their fraud cause of action upon "an allegation that they acted in response to an advertising campaign even if they cannot recall the specific advertisements.") (superseded by statute on other grounds).

Here, Plaintiffs allege that defendants orchestrated an extensive months-long advertising campaign utilizing a wide range of different media to claim that the iPhone had MMS capability. Cal. FAC ¶¶46, 51, 52, 54-8. Further, these advertisements followed upon AT&T's prior advertisements claiming that its Messaging Unlimited Plan included MMS, though this was not true for iPhone users. *Id.* ¶¶7, 28, 37, 40, 48, 68. Plaintiffs Sterker and Williams, who both purchased 3GS iPhones in July 2009, allege that they relied on Apple's advertisements and representations to form their belief that MMS would be provided. *Id.* ¶¶5, 18. Both allege that they would not have purchased the iPhone if they had known MMS was not available at the time of their purchase. *Id.* ¶¶15, 18. Plaintiffs allege that they suffered damages caused by Apple's conduct. *Id.* ¶¶ 17, 21, 22. Plaintiffs have thus properly pled reliance on Apple's direct statements to them or on statements made in the advertising campaign.[31]

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[31] Apple's citation to *Cohen v. DIRECTV, Inc.*, 178 Cal. App. 4th 966, 978-79 (Cal. Ct. App. 2009) and *Pfizer Inc. v. Superior Court*, 182 Cal. App. 4th 622, 63 (2010), do not help it. *See* Apple Mem., pp. 22-23. Both cases were decided on motions for class certification, not motions to dismiss. The cases were discussing class certification requirements, such as commonality and whether the class as

b. Michigan.

Although Apple argues specifically that Plaintiff's reliance pleading does not satisfy Rule 9(b)'s particularity requirement, this argument is without merit. Reliance is not required under the MCPA (although, as set forth below, Plaintiff has alleged such reliance in any event). Notably, there is no language in the MCPA statutes themselves to support a reliance requirement, and case law makes clear that no such requirement exists. The Michigan Supreme Court's decision in *Dix v. American Bankers Life Assur. Co. of Florida*, 415 N.W.2d 206 (Mich. 1987), is instructive. In that case, the circuit court denied class certification, and the appellate court affirmed. The Michigan Supreme Court reversed the order with respect to the claim for violation of the MCPA, holding that "members of a class proceeding under the Consumer Protection Act need not individually prove reliance on the alleged misrepresentations. It is sufficient if the class can establish that a reasonable person would have relied on the representations." *Id.* at 209 (footnote omitted). *See also Gilkey v. Central Clearing Col.*, 202 F.R.D. 515, 525-26 (E.D. Mich. 2001) (citing *Dix* court's holding that individual reliance is not required in order to prove MCPA claim and certifying class claims for violation of MCPA despite

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defined was ascertainable. Most important here, neither case impacts the well-established principals, recently affirmed by the California Supreme Court in *Tobacco II, supra*, that to establish standing for the UCL, or reliance/causation for the CLRA or fraud, plaintiff need not recall the specific advertisement(s) relied on if the misrepresentations were part of an extensive advertising campaign. Moreover, in omissions cases, reliance may be presumed if the omission was material. Here, the presumption of reliance is not needed for the named Plaintiffs since the Plaintiffs' each allege that had they known that MMS was not available at the time of purchase (but that they would be charged for a service not provided), they would not have purchased an iPhone. Cal. FAC, ¶¶ 14, 19, 24, 25, 26.

plaintiff's testimony that he did not rely on defendant's representations); *Van Vels v. Premier Athletic Center of Plainfield, Inc.*, 182 F.R.D. 500, 509 (W.D. Mich. 1998) ("Unlike common law fraud, misrepresentation claims under the MCPA do not require proof of individual reliance.") (citing *Dix*). Because the MCPA applies an objective standard, individual reliance is not required, and Plaintiff need only prove at trial that a reasonable person would have relied on Apple's representations and omissions.

The cases Apple cites do not hold to the contrary. In the unpublished decision in *Jackson v. Telegraph Chrysler Jeep, Inc.*, No. 07-10489, 2009 WL 928224 (E.D. Mich. Mar. 31, 2009) (which involved summary judgment, not a motion to dismiss), the court's references to reliance in connection with plaintiffs' MCPA claim arise out of the court's consideration of the claim "'with reference to the common-law tort of fraud.'" *Id.* at *4 (citation omitted). In fact, the court's discussion of reliance was specifically tethered to "[t]he elements which the Plaintiffs must prove in order to sustain their claims *of fraud*." *Id.* (emphasis added). Moreover, the merits issue addressed in *Jackson* was not whether reliance was required in order to state a claim under the MCPA (which the *Dix* court made clear is not), but whether, in the context of summary judgment, the plaintiffs' reliance was reasonable under the circumstances. *Id.* at *4-5.

The unpublished decision in *Kussy v. Home Depot U.S.A. Inc.*, No. 06-12899, 2006 WL 3447146 (E.D. Mich. Nov. 28, 2006), is similarly unhelpful to Apple's argument here. The court there also looked at plaintiffs' MCPA claim with

reference to fraud and held that plaintiff could not show "reasonable reliance" under the circumstances. While the court in *Kussy* did state that the MCPA requires reliance even after the *Dix* decision, the case it cites for this proposition, *McClain v. Coverdell & Co.*, 272 F. Supp. 2d 631, 640, n.7 (E.D. Mich. 2003), admittedly held only that "*Dix* does not hold that reliance is not an element of common law fraud claims." *Kussy*, 2006 WL 3447146, at *7. The question here is whether reliance is required for MCPA claims, not common law fraud claims, which Plaintiff has not even asserted in his complaint. The other two cases Apple cites, *Novak v. Nationwide Mut. Ins. Co.*, 599 N.W.2d 546 (Mich. Ct. App. 1999), and *Nieves v. Bell Indus.*, 517 N.W. 2d 235 (Mich. Ct. App. 1994), did not even involve MCPA claims and are therefore completely irrelevant.

As the above authorities make clear, reliance is not even required in order for Plaintiff to state an MCPA claim, and Apple's entire argument in this regard should be rejected outright.

Nonetheless, Plaintiff Baxter has alleged reliance on the fraud (FAC, ¶¶ 17, 54, 78, 90) and the injury resulting from the fraud (FAC, ¶ 20, 91). Mr. Baxter even pled that he would not have purchased the phone if he had known that picture messaging was not available at the time of purchase. (FAC, ¶ 17).

c. Minnesota.

Plaintiffs claiming a remedy for violations of Minnesota's consumer protection statutes need not *plead* individual reliance. In *Group Health Plan, Inc. v. Philip Morris USA, Inc.*, the Minnesota Supreme Court held that "[I]t it *is not necessary for plaintiffs to plead reliance by individual purchasers* of defendants'

products in order to properly plead a claim under these statutes." 621 N.W.2d 2, 4 (Minn. 2001) (emphasis added). The inquiry should end there.

The court in *Group Health*, however, went further, holding that a plaintiff need not prove causation of compensable injury by demonstrating reliance by individual consumers. *Id.* at 14-15. Although the court acknowledged that a plaintiff seeking damages bears the burden to prove that the defendant's conduct caused the injury, the court specifically tailored its opinion to refute the notion that Minnesota's consumer protection statutes require individual proof of reliance in establishing the causation element. *See* 621 N.W.2d at 14 ("[W]e reject the view expressed in two federal court [class action] decisions that our misrepresentation in sales laws require proof of individual reliance in all actions seeking damages.") Instead, the court held that the legislature relaxed Plaintiff's burden of showing individual proof in order to demonstrate causation related to the alleged deception:

> [T]he showing of reliance that must be made to prove a causal nexus *need not include direct evidence of reliance by individual consumers* of Defendant's products. Rather, the causal nexus and its reliance component may be established by other direct or circumstantial evidence that the district court determines is relevant and probative as to the relationship between the claimed damages and the alleged prohibited conduct.
>
> * * *
>
> To impose a requirement of proof of *individual reliance in the guise of causation* would reinstate the strict common law reliance standard that we have concluded the legislature meant to lower for these statutory actions.

Id. at 14-15 (emphasis added). Apple's citations to *Group Health* belie the clear holding and reasoning unambiguously stated in the Supreme Court's opinion. As

the Court pointed out in that case, "Significantly, that conduct is prohibited 'whether or not any person has in fact been misled, deceived, or damaged thereby.'" *Id.* at 12.

Group Health specifically addressed a course of conduct affecting a group of people. The Supreme Court stated,

> More to the point, in cases such as this, where the Plaintiffs' damages are alleged to be caused by *a lengthy course of prohibited conduct that affected a large number of consumers*, the showing of reliance that must be made to prove a causal nexus need *not include direct evidence of reliance by individual consumers* of Defendant's products. Rather, the causal nexus and its reliance component may be established by other direct or circumstantial evidence that the district court determines is relevant and probative as to the relationship between the claimed damages and the alleged prohibited conduct.

621 N.W.2d at 14 (emphasis added). Therefore, Apple's contention that Mr. Irving must "plead a causal nexus between the alleged misrepresentation and his alleged injury" (Def. Minn. Br. at 18) seeks to impose the old common law reliance standard "in the guise of causation." *Group Health*, 621 N.W.2d at 14-15. Furthermore, the "causal nexus" standard is one of proof to be addressed at later stage, not one of pleading. *See Wiegand v. Walser Auto. Groups, Inc.*, 683 N.W.2d 807, 813 (Minn. 2004) (Minnesota Supreme Court held that, at Rule 12 motion to dismiss stage, "it is not necessary for us to determine precisely what might be required for Wiegand to prove a causal nexus and its reliance component in this private consumer fraud action" and found that district court had erred in dismissing the complaint); *Group Health*, 621 N.W.2d at 14 (in context of Rule 12 motion, which tests adequacy of the

pleadings, it was not appropriate for court to require delineation of proof required to establish causation under consumer protection statutes).

Apple cites *Group Health Plan, Inc. v. Philip Morris USA, Inc.*, 188 F. Supp. 2d 1122, 1226 (D. Minn. 2002) (*Group Health II*) for the proposition that Minnesota law forbids courts from applying a "presumption of causation." This is a minor point because Plaintiff pled both material omissions and reliance. While out of an abundance of caution he pled in the alternative that causation could be "presumed where an affirmative statement is materially and blatantly false on its face," Plaintiff has *no* obligation to plead factual detail of causation under the consumer statutes.

Furthermore, although *Group Health II* was affirmed on appeal, the Eighth Circuit did not consider whether a presumption of causation was available. However, because dissenting Circuit Judge David Hansen would have reversed the decision, he did reach the issue, pointing out that the district court clearly misread the Minnesota Supreme Court's express language regarding the availability of the rebuttable presumption:

> [T]he district court erred in concluding that the Minnesota Supreme Court's opinion [in *Group Health*] "militates against" the availability of a presumption to establish causation in the consumer protection claims. In footnote 11 of its opinion answering the certified questions, . . . [t]he court explicitly cited cases in which plaintiffs were entitled to presumptions of consumer confusion where defendants engaged in certain intentional conduct.

Group Health Plan, Inc. v. Philip Morris USA, Inc., 344 F.3d 753, 764 (8th Cir. 2003) (Hansen, J., dissenting). With all due respect to the *Group Health II* court,

this Court is bound by the Minnesota Supreme Court, and not a district court whose opinion contravenes the express language of Minnesota's highest court. *See Minn. Supply Co. v. Raymond Corp.*, 472 F.3d 524, 534 (8th Cir. 2006).

Apple relies on only one other case in support of its claim that Plaintiff Irving has failed to state a claim. However, in that case, the court granted *summary judgment on a full record* and did not address the pleading standards of Minnesota's statutes. In *Bykov v. Radisson Hotels Int'l Inc.*, No. Civ. 05-1280, 2006 WL 752942, *5-6 (D. Minn. Mar. 22, 2006), an affirmative misrepresentation case, the court granted summary judgment because the plaintiff had not seen or heard any misrepresentations at all, and that in any case defendant's representations were true. Mr. Irving, to the contrary, has specifically pled that he read Apple's misrepresentations and received them orally during the sales process as well. Thus, *Bykov* is inapposite—even if it were applicable to motions to dismiss, which it is not.

Nonetheless, Plaintiff Irving pled that he did rely on Apple's misrepresentations in forming his belief that his iPhone 3GS would have MMS capability, Minn. FAC ¶¶ 16, 48, that he would not have purchased his phone if he had known that MMS was not available, *id.* at ¶ 16, and that Apple's misrepresentations caused him damages. *Id.* at ¶¶ 17, 92, 96.

d. Mississippi.

Plaintiff has properly pled violations of Mississippi's Consumer Protection Act (Miss. Code Ann. § 75-24-1 et seq.), which affords a private right of action to consumers who are the victims of various unfair or deceptive trade practices (the "Act"). Apple contends that the "FAC never identifies which advertisement

regarding MMS Plaintiff allegedly saw prior to her purchases," Apple Miss. Br. at 16) and that the FAC does not "adequately plead the element of reliance," Apple Miss. Br. at 18. However, on its face, the Act does not require a private plaintiff to plead individual reliance at all.

Nonetheless, Plaintiff Jackson has alleged reliance on Apple's fraud, Miss. FAC, ¶¶ 15, 52, 73, and the injury resulting from the fraud, *id.* ¶ 17, 74. Plaintiff even pled that she would not have purchased the phone if she had known that picture messaging was not available at the time of purchase. *Id.* at ¶ 15.

e. Missouri.

Missouri Plaintiff Lierman alleges that Apple violated the Missouri Merchandising Practices Act ("MMPA"), Mo. Stat. § 407.020. The statute eliminates the need to prove either an intent to defraud or reliance on the part of the consumer. *Schuchmann v. Air Services Heating & Air*, 199 S.W.3d 228 (Mo. App. 2006); *see also Hess v. Chase Manhattan Bank*, 220 S.W.3d 758 (Mo. 2007) (holding that a fraud claim requires both proof of reliance and intent to induce reliance, while an MPA claim expressly does not). In addition, a violation of the MMPA exists whether the act, use or employment is committed "before, during or after the sale, advertisement or solicitation." *State ex rel. Webster v. Areaco Investment Co.*, 756 S.W.2d 633, 635 (Mo. Ct. App. 1988). The MMPA does not require that an unlawful practice cause a "purchase." *Plubell v. Merck & Co., Inc.,* 289 S.W.3d 707, 714 (Mo. App. W.D. 2009). Rather, it merely requires Plaintiff to allege that that she paid "anything of value" lost in relation to the purchase. *Amburgy v. Express Scripts, Inc.*, 671 F. Supp. 2d 1046, 1057-58 (E.D. Mo. 2009).

Nonetheless, Plaintiff Lierman has alleged reliance on the fraud, Mo. FAC, ¶¶ 16, 53, 78, and the injury resulting from the fraud. Mo. FAC ¶¶ 20, 79. Plaintiff even pled that she would not have purchased the phone if she had known that picture messaging was not available at the time of purchase. *Id.* ¶ 16.

f. Ohio.

Apple attempts to argue that Plaintiff's misrepresentation claims under the OCSPA and DTPA should be dismissed because Plaintiff does not allege the exact advertisements relied on and therefore do not adequately allege causation. In essence, Apple urges the Court to require Plaintiff to plead reliance under the statutes. Plaintiff is not required to allege reliance for claims pursuant to the OCSPA. "Section 1345.02 does not require Plaintiff to allege reliance on or damages arising out of the deceptive scheme…." *Ferron v. Subscriber Base Holdings, Inc.*, No. 08-cv-760, 2009 WL 650731, *6 (S.D. Ohio Mar. 11, 2009). Although some courts have held that a casual nexus must be established to sustain OCSPA claims, the courts that have addressed this requirement have held that minimal allegations are sufficient to fulfill this causal nexus requirement.

In *Nessle v. Whirlpool Corporation*, No. 07-cv-3009, 2008 WL 2967703, at *3 (N.D. Ohio Jul. 25, 2008), the court addressed the nature of allegations sufficient to establish the sometimes incorrectly labeled "reliance" or cause and effect relationship in the context of an OCSPA claim. In rejecting the defendant's argument that plaintiff's allegation of cause and effect was insufficient, the court described the defendant's argument and why it was unpersuasive:

> Defendant argues Plaintiff does not contend any of Defendant's alleged unfair and deceptive acts specifically induced her to purchase her refrigerator, and therefore she has failed to state a claim under the OCSPA. Defendant points to the fact that Plaintiff does not contend the "Gold" label affected her decision to buy her refrigerator, and that Plaintiff did not read, hear, or see any other statements of fact by Whirlpool prior to purchasing the refrigerator. Defendant's argument, however, is largely unpersuasive. In her Complaint, Plaintiff alleges "[a]s a direct and proximate result of Whirlpool's violations of the [O]CSPA, Plaintiff and members of the Class have been injured." There is no provision in the statute itself requiring Plaintiff to show reliance on any statement of fact or omission. The Sixth Circuit has held proximate cause is an essential element of a OCSPA claim, but noted "a showing of subjective reliance is probably not necessary to prove a violation of the OCSPA." *Butler v. Sterling, Inc.,* No. 98-3223, 2000 WL 353502 at *4 (6th Cir. Mar. 31, 2000). In this case, Plaintiff does not allege reliance on specific representations made by Whirlpool; however, she does assert the alleged violations proximately caused the injuries to herself and other members of the Class.

The court in *Nessle* further explained its rational for rejecting the defendant's arguments that plaintiff had failed to properly plead reliance:

> The Eighth District Court of Appeals for Cuyahoga County, Ohio has held an individual reliance requirement is not necessary, specifically with regard to class action suits. *Amato v. General Motors Corp.*, 11 Ohio App.3d 124, 126 (Ohio 1982). In *Amato*, the Court specifically noted: "[C]onsumer claims would amount to little if acceptance of the representations made for the product could be manifested only by one-on-one proof of individual exposure." *Id*. Furthermore, a recent District Court decision has held where Defendant is alleged to have made material misrepresentations or misstatements, there must be a cause and effect relationship between the defendant's acts and the plaintiff's injuries. *Lilly, Jr. v. Hewlett-Packard Co.,* 2006 WL 1064063 at *5 (S.D. Ohio April 21, 2006). Here, Plaintiff alleges Whirlpool failed to disclose the defect in the refrigerators, which resulted in injuries to her and other member of the Class. Therefore, Plaintiff has

> satisfied the minimal proximate cause requirement required to sustain her OSCPA claim at this time.

Nessle at *3. In the present case, Plaintiff alleges that the Defendants misrepresented the MMS capability of the iPhone and failed to disclose that the Plaintiff would be required to sign up for MMS service and be charged for MMS service even though it was disabled on the iPhone 3G that the Plaintiff purchased from the Defendants. Ohio FAC ¶¶ 7, 8, 9, 10, 13, 22, 26, 29, 56, 57, 74-77, 79. Plaintiff also alleges that failure of the Defendants' misrepresentations and omissions concerning MMS service were the proximate cause of the injuries to himself and the Class. *Id.* ¶¶ 14-16, 92. Nothing more is required to sustain Plaintiff's OCSPA claim.[32]

Apple's similar argument as to the DTPA is also meritless. Under the DTPA, Plaintiff must eventually *prove*: (1) a false or misleading statement; (2) which statement actually deceived or has the tendency to deceive a substantial segment of the target audience; (3) the deception is material in that it is likely to influence a purchasing decision; and (4) the plaintiff has been or is likely to be injured as a result. *Int'l Diamond Exch. Jewelers, Inc. v. United States Diamond & Gold Jewelers, Inc.,* 591 N.E.2d 881, 887 (Ohio Ct. App. 1991). Plaintiff has adequately

[32] Apple mistakenly relies upon *Lilly, Jr. v. Hewlett-Packard Co., supra,* to support its argument that Plaintiff has failed to allege a "cause and effect" between Apple's conduct and Plaintiff's injury. Apple's reliance on *Lilly* is misplaced. In *Lilly,* the Plaintiff alleged misrepresentations but did not allege any type of reliance or cause and effect of those misrepresentations and his injury, or that he even saw the misrepresentations. *Lilly,* at *5. In contrast Plaintiff in the present case clearly alleges he heard and saw multiple misrepresentations and that the Defendants omitted critical information that affected his decision to purchase the iPhone 3G. Oh. FAC ¶¶ 7, 8, 9, 10, 13, 14-15, 22, 26, 29, 56, 57, 74-77, 79.

alleged a "causal link between the challenged statements and harm to the plaintiff." *Reed Elsevier Inc. v. TheLaw.net Corp*., 269 F. Supp. 2d 942, 951 (S.D. Ohio 2003); Ohio FAC ¶¶ 91-92.[33]

Plaintiff has also alleged reliance on Apple's fraud, despite the fact that reliance is not required under Ohio law. Ohio FAC ¶¶ 14, 48.

g. Texas.

Plaintiff Friloux has properly pled violations of the Texas Deceptive Practices Act (DTPA), which affords a private right of action to consumers who are the victims of various unfair or deceptive trade practices (the "Act"). "Section 17.46(a) of the DTPA states 'false, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful….' Section 17.46(b) lists twenty-three specific acts declared by law to be 'false, misleading, or deceptive.'" *Fortner v. Fannin Bank in Windom*, 634 S.W.2d 74, 77 (Tex. Ct. App. 1982). The acts (or subsections) enumerated in section 17.46(b) are often referred to as the "laundry list." *See, e.g.*, *Helena Chemical Co. v. Wilkins*, 47 S.W.3d 486, 501 (Tex. 2001) ("Section 17.46(b) is a laundry list of specifically prohibited acts").

[33] The DTPA is not limited to actions between competitors. In *Bower v. IBM,* 495 F.Supp. 2d 837 (S.D. Ohio 2007), the court addressed this argument. As in the instant case, *Bower* involved a consumer class action, in which the plaintiff consumer challenged the defendant's advertising under the DTPA. The court, examining the plain language of the statute, as required by Ohio rules of statutory construction, determined that the DTPA covers consumer transactions, concluding that "the statute by its plain language places no limitation on the type of individuals who are considered to be a 'person' and may pursue a claim. . . . Therefore, Defendant's argument that the Plaintiffs cannot maintain a cause of action based on a violation of the DTPA, because the DTPA applies only to commercial entities and not consumers, is deemed by this Court to be not well taken." *Id*. at 843.

To prevail on a DTPA claim based on a laundry list violation, a consumer plaintiff must establish that: (1) the defendant used or employed a false, misleading or deceptive act or practice which is enumerated in the laundry list[34]; (2) the consumer detrimentally relied on this act or practice; and (3) the violation was a producing cause of economic or mental anguish damages. *Allstar Nat. Ins. Agency v. Johnson*, No. 01-09-00322-cv, 2010 WL 2991058, at *5 (Tex. Ct. App., July 29, 2010) (emphasis added); *see also* Tex. Bus. & Com. Code § 17.50(a)(1).

Plaintiff Friloux properly alleges reliance on the wrongful acts, and pled that he would not have purchased the iPhone if he knew it did not have MMS capabilities.[35] Plaintiff Friloux also alleges that the wrongful conduct caused him damages.[36]

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[34] The Texas Plaintiffs satisfy the first element of a DTPA claim because they have specifically alleged acts enumerated in the following laundry list of violations: (5), (7), and (9). *See generally* Friloux Tex. FAC ¶102.

[35] *See* ¶14: At the time he purchased his iPhone 3G and AT&T messaging service, Friloux expected that the iPhone would have the ability to text pictures and specifically was charged for a texting plan that AT&T represented included texting pictures, when in fact it would not; ¶15: Friloux reasonably expected that the iPhone would have the capacity and ability to send picture messages. The ability to send a picture by text message was a material part of the purchase of the iPhone to Friloux; ¶16 Friloux would not have purchased the 3G if he had known that picture messaging was not available at the time of purchase. Friloux 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; ¶77: Friloux relied on representations made in Defendants' uniform campaign of untrue and/or misleading marketing when choosing to purchase an iPhone 3G and messaging plan as set forth above.

[36] *See* ¶59: iPhone users had to pay for MMS if they wanted unlimited AT&T messaging plans; ¶78: Plaintiff Friloux has suffered injury in fact and has lost money or property as a result of Defendants' unfair [conduct]; ¶107: Defendants

2. Apple's "revolutionary puffery" argument fails.

Apple's argument that its use of the term "revolutionary" in describing the iPhone is "non-actionable puffery" reads too much significance into Plaintiffs' inclusion of that term in the complaints. In isolation, Plaintiffs agree, the term "revolutionary" can be "puffery," which refers to "a seller's privilege to lie his head off, so long as he says nothing specific." *Castrol Inc. v. Pennzoil Co.*, 987 F.2d 939, 945 (3d Cir. 1993). Plaintiffs agree with Apple that "revolutionary" cannot be the sole basis one which to hinge their claims. *See Barbara's Sales, Inc. v. Intel Corp.*, 879 N.E.2d 910, 927 (Ill. 2007) ("[P]uffery is based on the sound reasoning that no reasonable consumer would rely on such an implicit assertion as *the sole basis* for making a purchase.") (emphasis added). The iPhone was and remains a revolutionary device in many ways, a fact recognized by the public and the market even without Apple's saying so. That is why the lack of MMS was such a surprise disappointment to many purchasers.

However, Apple's "revolutionary" representations were much more than the mere generalized opinions of a single salesperson. Rather, Apple's "revolutionary" representations were based on specific capabilities that the iPhone possessed which were superior to those in other wireless phones. *See, e.g.*, Motion at 5 ("Apple advertised the iPhone 2G as 'revolutionary' because it 'reinvented the phone' by combining, for the first time, multiple products into one handheld device…"). In

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engaged in a scheme to cheat a large number of consumers out of individually small sums of money. To establish causation, a plaintiff must prove that the DTPA violation was a "producing cause" of the plaintiff's injuries, which in most cases is a question of fact. *Vanasek v. Underkofler*, 50 S.W.3d 1, 11 (Tex. Ct. App. 2001)*, rev'd on other grounds, Underkofler v. Vanasek*, 53 S.W.3d 343 (Tex. 2001).

other words, Apple fully admits that its "revolutionary" representations were made in the context of specific product traits which are not so generalized as to constitute non-actionable puffery. *See, e.g.*, *Stiffel Co. v. Westwood Lighting Group*, 658 F. Supp. 1103, 1108-15 (D.N.J. 1987) (representations that product was "[a] new revolutionary protection system that outperforms the competition" and concerned a "revolutionary breakthrough in quality finishing technology" "do more than simply allege general superiority" and therefore do not qualify as non-actionable puffery).

To be clear, Plaintiffs do not assert that the term "revolutionary" is a stand-alone, material misrepresentation. Rather, Plaintiffs have alleged that, because all picture-taking phones, and most cell phones in general, provide MMS services, a reasonable consumer would naturally believe that, absent a prominent and unambiguous statement to the contrary, the picture-taking iPhone 3G and 3GS would, concomitantly, have that feature as well. Cal. FAC ¶ 3 (MMS is "a standard feature of mobile phones and extremely popular"; all other camera phones on AT&T's network offered MMS). Apple's marketing of the iPhone using the term "revolutionary" gave no reasonable consumer any reason to alter his or her thinking, as the MMS revolution occurred years earlier. That is the limit and extent of Plaintiffs' reference to Apple's use of the term.[37]

[37] Analogously, not only would a person purchasing a car in 1990 reasonably expect that it would have air conditioning, but that person's same expectation in purchasing a Cadillac also would not be defeated if GM decided to market the model as "revolutionary." To the contrary. The air-conditioning-in-cars revolution occurred in 1940, and consumers expected such systems by the 1980s.

Interestingly, despite its eagerness to provide limited and hand-picked documents as a basis to prejudice this Court's consideration of the pleadings, Apple provides no internal documents revealing its own thoughts as to consumers' expectations regarding the MMS feature, or its communications with AT&T concerning the importance of putting MMS on line as soon as possible in relation to those expectations. Perhaps Apple could provide those documents—and all others it held back that are applicable to Plaintiffs' claims of materiality, an element of their legal theory. It is difficult to believe that no such documents exist.

In any case, even if reference to the "revolutionary" nature of the iPhone were removed from the complaints, it would have no impact, as Plaintiffs have specifically pled that Apple stated that iPhone would send picture messages, which was not true during the class period. *See* Cal. FAC ¶¶ 55 ("messaging application on iPhone 3GS now supports MMS"), 56 ("Send MMS[:] Take a photo or shoot some video, then send it via Messages."), 57 ("Sharing Photos and Videos[:] You can take a photo or make a video (iPhone 3 GS only) from within Messages and include it in your conversation with another MMS-capable device."). Plaintiffs also alleged that these representations were made orally by Defendant's employees.

VI. Apple's Further State-Specific Challenges to the Consumer Protection Claims Are Meritless.

A. Apple's challenge to Plaintiff's Minnesota Consumer Protection claims are meritless.

1. A successful suit in this case will benefit the public.

In order to survive a Rule 12(b)(6) challenge to whether Plaintiffs have properly alleged a public benefit under Minnesota consumer fraud statutes,

Plaintiffs need only allege that Defendants' deceptive practices were aimed at the public at large. *ADT Security Servs., Inc. v. Swenson, ex rel. Estate of Lee*, 687 F. Supp. 2d 884, 892 (D. Minn. 2009). Although the Minnesota Supreme Court has not articulated a boilerplate "test" establishing when a lawsuit benefits the public, the decisions in *Ly* and *Collins* clearly provide the key elements. In *Ly v. Nystrom*, the court held,

> Appellant was defrauded in a single one-on-one transaction in which *the fraudulent misrepresentation*, while evincing reprehensible conduct, *was made only to appellant*. A *successful prosecution* of his fraud claim does not *advance state interests and enforcement* has no public benefit . . . .

Ly v. Nystrom, 615 N.W.2d 302, 314 (Minn. 2000) (emphasis added). The court in *Collins* contrasted the holding in *Ly* with what happens when violative conduct is directed toward the public at large and actually harms a group of people suing for relief, however small:

> Applying *Nystrom,* the district court found that *only a relatively small group of persons were injured* by MSB's fraudulent activities; thus, respondents failed to demonstrate a public benefit. In determining whether respondents' claims benefited the public, the court focused on the number of "persons who were injured." In doing so, the court misapplied the holding in *Nystrom* by ignoring the fact that *MSB misrepresented the nature of its program to the public at large.*

Collins v. Minnesota School of Business, Inc., 655 N.W.2d 320, 330 (Minn. 2003) (emphasis added). Thus, taken together, *Ly* and *Collins* stand for the proposition that a public benefit is established when a private plaintiff establishes that 1) a practice violated laws enumerated in section 8.31, subdivision 1, 2) the practice was

directed to the public at large, and 3) successful prosecution of the claim advances state interests, even if the group of persons benefitting is small. Public benefit is not measured by how many people were injured, but by whether the violative conduct was aimed at the public at large. *See also ADT Security Servs., Inc.*, 687 F. Supp. 2d at 892 (holding that, in context of individual lawsuit, consumers survived 12(b)(6) challenge to public benefit of counterclaim where defendants alleged that security company's representations were received by consumers "throughout the country"); *Kinetic Co. v. Medtronic, Inc.*, 672 F. Supp. 2d 933 (D. Minn. 2009) (finding "there is a public benefit in eliminating false or misleading advertising" where "other 'potential consumers might have been injured in the same manner'") (quoting *Collins*, 636 N.W.2d at 820-21); *In re Levaquin Prods. Liability Litig.*, No. 08-cv-5743, slip op. at 12 (D. Minn. No. 8, 2010) ("[A]fter *Collins*, it seems reasonable to infer that the Minnesota Supreme Court is as much if not more concerned with the *degree* to which defendants' alleged misrepresentations affect the public – a factor in plaintiffs' favor.") (Ex. C).

Apple argues that, where a deceptive practice has ended (in this case MMS is now fully functional), no public benefit can be established. This is clearly wrong, as Plaintiff and class members have not received complete relief, including damages. In *In re Nat'l Arbitration Forum Trade Practices Litig.*, the court rejected the defendants' argument that, where deceptive conduct has ceased, a private lawsuit could no longer effect a public benefit:

> [T]he allegations in this case indicate that there may be a public benefit to Plaintiffs' lawsuit despite the Attorney General's consent

> decree. That consent decree merely required NAF to cease and desist its consumer arbitration operations. Thus, *Plaintiffs' continued pursuit of monetary damages for the class against NAF has a public benefit*. At this stage of the litigation, Plaintiffs's consumer-protection claims can go forward.

704 F. Supp. 2d 832, 839 (D. Minn. 2010). Thus, an action for class damages satisfies the public benefit requirement, regardless of whether the deceptive practice no longer needs to be enjoined.

2. Plaintiffs may sue for damages under the MUDTPA, pursuant to the rights provided by the Legislature under Section 8.31, Subdivisions 1 and 3a.

As Apple notes, Minnesota's UDTPA (Minn. Stat. § 325D.44) itself carves out a private right of action for injunctive relief. Based on this clause, Apple concludes that a plaintiff is *limited* to injunctive relief and cannot maintain an action for damages under the MUDTPA, despite the existence of the Private Attorney General statute (Minn. Stat. § 8.31, subd. 3a), which expressly permits a private cause of action for damages for violation of any law related to unfair trade practices. Apple also notes that there is case law in the Minnesota intermediate appellate court and in the District of Minnesota limiting the scope of private actions, brought pursuant to the MUDTPA, to injunctive relief. While Plaintiff acknowledges the existence of those opinions, Plaintiff also hasten to point out that the Minnesota Supreme Court—the only court that matters when federal courts are called upon to interpret state law—has never addressed the issue. *See Minn. Supply Co.*, 472 F.3d at 534. Furthermore, this Court should uphold Plaintiff's MUDTPA pleading for several compelling reasons, not addressed by the decisions cited by Apple.

First, according to the Private Attorney General statute, a private plaintiff may sue under *any* of "the laws referred to in subdivision one" of section 8.31. Minn. Stat. § 8.31, subd. 3a. Subdivision one of that section expressly refers to "the law of this state respecting *unfair*, discriminatory, and *other unlawful practices in business, commerce, or trade*, and specifically, *but not exclusively*, [various statutory sections] *and other laws against false or fraudulent advertising* . . . . *Id.*, subd. 1 (emphasis added). From the outset, the legislature made clear that subdivision 1 expressly states that the statutes listed there are *not exclusive*. Thus, although not enumerated, section 325D.44 is clearly a law of Minnesota respecting an unfair practice in business, commerce, or trade.[38] Moreover, the prohibitions found in the MUDTPA relate solely to unfair trade practices in the sale of goods and misrepresentations in advertising. *Cf.* § 325D.44, subd. 1(1), (2), (3), (4), (5), (7), (9),

[38] Further evidence of this is the fact that the MUDTPA falls within the general statuory title "Trade Regulations, Consumer Protection." Minn. Stat. Ann. (West 2004), Vol. 20C, pp. 132 *et seq*. More specifically, Chapter 325D is titled "Restraint of Trade." Of course, 324D.44's section title is "Deceptive Trade Practices," a phrase echoed in the Prevention of Consumer Fraud Act, a parallel section expressly enumerated in section 8.31, subdivision 1. *See* Minn. Stat. § 325F.69, subd. 1 (establishing that a "deceptive practice . . . in connection with the sale of any merchandise" is prohibited). In addition, the Minnesota Supreme Court has identified the MUDTPA as one of the provisions counted among Minnesota's "consumer fraud statutes." *See Humphrey v. Alpine Air Prods.*, 500 N.W.2d 788, 789-90 (Minn. 1993); *see also Hatch v. Fleet Mortgage*, 158 F. Supp. 2d 962 (considering together sections 325D.44 and 325F.69 and characterizing them as "consumer protection statutes"). These judicial precedents reveal that Minnesota courts have historically permitted the Attorney General to bring claims under the MUDTPA. Because a private plaintiff's authority to sue is co-extensive with that provided to the Attorney General, *see Ly v. Nystrom*, 615 N.W.2d 302, 313 (Minn. 2000) ("[T]he role and duties of the attorney general with respect to enforcing the fraudulent business practices laws must define the limits of the private claimant under the statute."), injured plaintiffs may sue for a violation of any law the Attorney General is given authority to defend (i.e., those described in subdivision 1).

(10), and (11); *see also Lenscrafters, Inc. v. Vision World, Inc.*, 943 F. Supp. 1481, 1487-88 (D. Minn. 1996) (describing Lanham Act as a "false or deceptive advertising" statute and labeling a plaintiff's parallel claims under Minnesota's UDTPA "substantially similar," applying "the same analysis" for purposes of establishing a substantive violation).

Second, despite the non-exclusivity language of section 8.31, subdivision 1, Apple implies that Plaintiffs may not pursue their MUDTPA claims as private attorneys general because the legislature intended to exclude the MUDTPA's merely based on its absence from the list. Def. Minn. Br. at 22 n.16. This approach fails, despite the citation to inferior authority. Because the Minnesota Legislature passed both the MUDTPA and the Private Attorney General statute in 1973,[39] the language used for the attorney general act, when the bill was introduced, would not have included any references to the MUDTPA *because the MUDTPA was not yet a law*. This fact stands in sharp contrast to the reason that the attorney general act expressly incorporated the Consumer Fraud Act and the False Statement in Advertisement Act: the CFA[40] and FSAA[41] had become law long before the private attorney general bill was even introduced, whereas the UDTPA had not yet come into being.

Subsequent enactments also demonstrate the legislature's intent the UDTPA should be considered an unfair trade law. Several other Minnesota statutory

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[39] 1973 Minn. Laws 296 (private AG statute); 1973 Minn. Laws 420 (MUTDPA).
[40] Minnesota's Consumer Fraud Act was adopted in 1963, Act of May 23, 1963, ch. 842, § 1, 1963 Minn. Laws 1533, 1534.
[41] The FSAA was initially adopted in 1913, Minn. Stat. § 8903 (supp. 1913).

provisions adopted since 1973 have expressly included the UDTPA along side Minnesota's other consumer protection laws.[42] Most notably, section 325F.71 creates "liability for a civil penalty pursuant to sections 325D.43 to 325D.48, regarding deceptive trade practices; 325F.67, regarding false advertising; and 325F.68-70, regarding consumer fraud[.]" Because only the Attorney General may "sue for and recover for the state . . . a civil penalty" (Minn. Stat. § 8.31, subd. 3(b)), the legislature clearly intended for section 325D.44 to come within the purview of section 8.31, subdivision 1, i.e., the description of laws the Attorney General may enforce via a civil penalty.

Thus, because the legislature clearly intended section 325D.44 to support an action for private damages, Plaintiff's claims should not be limited to injunctive relief under that section. Based on these authorities, arguments, and statutory history (which none of Apple's authorities consider), and based on the fact that the Minnesota Supreme Court has previously grouped the MUDPTA with other laws enumerated in section 8.31, subdivision 1, this Court should predict that the Minnesota Supreme Court would permit a claim for damages under the MUDPTA to survive a motion to dismiss.

B. Apple's challenge to Plaintiff's Mississippi Consumer Protection claim is meritless because this court is not bound by the law's procedural components.

Apple argues that Plaintiff's statutory claim fails because she did not attempt to resolve her claim through an informal dispute settlement program approved by the state's Attorney General. This is incorrect. The *Erie* doctrine governs when

[42] Minn. Stat. §§ 58.08, 325F.71, 325G.505, and 609.2336.

state law applies to diversity actions in federal court. Federal courts sitting in diversity apply the substantive law of the forum state, but apply federal procedural law. *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). Thus, federal courts are not bound by state procedural rules, such as the Mississippi rule requiring a plaintiff pursuing a private action under the Act to pursue an informal dispute settlement program approved by the state Attorney General. The exception is when the state procedural rule would be "outcome determinative." *Hanna v. Plumer,* 380 U.S. 460, 468 (1965). A procedural rule is "outcome determinative" if there is nothing about the rule that would make "so important a difference" to the result of the litigation as to encourage forum shopping. *Id.* Here, the Mississippi rule requiring pursuit of an informal dispute settlement program has no effect on the outcome of this litigation.

VII. Plaintiffs Have Adequately Pled Material Omissions Under Common Law.[43]

To state a claim for fraud by omission, Plaintiffs must allege: (1) the omission of a material fact; (2) a duty to disclose the fact to Plaintiff; (3) intent; (4) causation, i.e., Plaintiff would not have acted as he did if he had known of the omitted fact; and (5) damage. *Hahn v. Mirda*, 54 Cal. Rptr.. 3d 527, 532 (Cal. Ct. App. 2007). *See also Allstate Ins. Co. v. Ware*, 824 So. 2d 739, 744 (Ala. 2002) (same); *Lama Holding*

[43] Fraud by omission is alleged in the Alabama, California, Illinois, Louisiana, Mississippi and New York complaints. Plaintiff Casey does not oppose Apple's motion to dismiss his fraud claim based on Louisiana Civil Code art. 1953. He does oppose the motion to dismiss as to fraud based on Civil Code art. 2315.

Co. v. Smith Barney Inc., 88 N.Y. 2d 413, 421 (N.Y. 1996) (same); *Stickle Enters. v. CPC Int'l*, No. 96-C-3123, 1997 WL 49177, at *5 (N.D. Ill. Jan. 30, 1997) (same).

Here, Plaintiffs allege that Apple omitted to disclose material facts in connection with its sale of the iPhones (charges for MMS that would not be provided), that Apple had a duty to disclose the material facts and honestly represent the unavailability of MMS on its iPhones, that Apple intended to defraud Plaintiffs, and that Plaintiffs would not have acted as they did if they had known of the omitted facts, and were damaged thereby. *See* Cal. FAC ¶¶148-157.[44] These allegations properly support a fraud by omission cause of action.[45]

Apple first raises the red herring argument that plaintiffs must allege the exact advertisements/misrepresentations they relied on. Since the fraud claims are based on Apple's omissions of material fact, not its deceptive advertisements, this argument must fail. *See e.g.*, Cal. FAC, ¶149. In contrast, in fraud by omission cases, causation/reliance is a function of the materiality of the omitted fact. *Grossman v. Waste Mgmt.*, 589 F. Supp. 395, 400 (N.D. Ill. 1984) ("reliance is essentially 'presumed' to exist in an omissions case if the omission is material . . ."); *Tobacco II*, 207 P.3d 20, 39-40 (under well-settled principles regarding reliance in fraud actions, a presumption of reliance arises upon a showing that the misrepresentation or omission is material). Here, Plaintiffs each allege that the

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[44] *See also*, Miss. FAC ¶¶87, 88, 109-115; La. FAC ¶¶110-120; Ill. FAC ¶¶122-128; Monticelli NY FAC ¶¶95-108; Padden NY FAC ¶¶103-114; Franklin Ala. FAC ¶¶ 113-119; Raulston Ala. FAC ¶¶ 113-119.

[45] Where the fraud consists largely of omissions by defendants the heightened pleading standards are relaxed. See cases law cited above in Section IV.B.

availability of MMS was material to them and they would not have purchased iPhones if they had known MMS would not be provided at the time of purchase.[46] Plaintiffs have properly alleged reliance/causation.

Apple next argues that fraud by omission requires a duty to disclose based on a confidential or fiduciary relationship and that no such relationship exists in this case. The law is not so narrow.

In Louisiana, courts impose a duty to speak "when the circumstances are such that a duty to disclose would violate a standard requiring conformity to what the ordinary ethical person would have disclosed." *Bunge Corp., v. GATX Corp.*, 557 So. 2d 1376, 1384 (La. 1990) (superseded by statute on other grounds). "Relevant factors include whether the obligation is being imposed on the seller, who is more likely to be required to disclose; the importance of the fact not disclosed; the relationship of the parties; and the nature of the fact not disclosed." *Id.* *See also In re Ford Motor Co. Vehicle Paint Litig.*, No. MDL 1063, 1997 WL 539665, at *4 (E.D. La. Aug. 27, 1997) (duty to disclose defective paint to buyers).

In Alabama, a duty to disclose depends upon the particular circumstances of a case, including the relation of the parties, the value of the fact not disclosed (i.e., materiality), the relative knowledge of the parties, and other circumstances. *Hines v. Riverside Chevrolet-Olds, Inc.*, 655 So. 2d 909, 918 (Ala. 1994) (overruled on other grounds).

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[46] *See*, Cal. FAC, ¶¶15, 19, 22, 26; Miss. FAC ¶¶14, 15, 18; La. FAC ¶¶14, 15; Ill. FAC ¶¶16, 17; Monticelli NY FAC ¶¶14, 15; Padden NY FAC ¶109; Franklin Ala. FAC ¶¶14, 15; Raulston Ala. FAC ¶¶14, 15.

In California, a duty to disclose arises when defendant has exclusive knowledge of material facts not known to the plaintiff. *Falk v. Gen. Motors Corp.*, 496 F. Supp. 2d 1088, 1095 (N.D. Cal. 2007).

In New York, a duty to disclose arises under the "special facts" doctrine, i.e., "where one party's superior knowledge of essential facts renders a transaction without disclosure inherently unfair." *P.T. Bank Central Asia v. ABN AMRO Bank N.V.*, 301 A.D. 2d 373, 378 (N.Y. Ct. App. 2003). *See also, Banque Arabe et Internationale D'Investissement v. Maryland Nat. Bank*, 57 F.3d 146, 155 (2d. Cir. 1995) ("special facts" doctrine applies when one party has superior knowledge of certain information, that information is not readily available to the other, and the first party knows that the other is acting on the basis of mistaken knowledge).

In Illinois, a duty to disclose may arise "when defendant's acts contributed to the plaintiff's misapprehension of a material fact and the defendant intentionally fails to correct plaintiff's misapprehension." *Coca-Cola Co. Foods Div. v. Olmarc Packaging Co.*, 620 F. Supp. 966, 973 (N.D. Ill. 1985). *See also Tibor Mach. Products, Inc. v. Freudenberg-Nok Gen. P'ship*, 1996 WL 99896 at *4 (N.D. Ill. Feb. 29, 1996) (motion to dismiss and motion to strike denied); *Lefebvre Intergraphics, Inc. v. Sanden Mach. Ltd.*, 946 F. Supp. 1358, 1366 (N.D. Ill. 1996).

And in Mississippi, there is a duty to disclose "facts basic to the transaction" if one party knows the other is mistaken as to the facts and the other (because of the relationship between them, customs of the trade or other objective

circumstances) would reasonably expect a disclosure of those facts. *Holman v. Howard Wilson Chrysler Jeep, Inc.,* 972 So. 2d 564, 568-69 (Miss. 2008).

Here, under each of the standards, Plaintiffs have alleged facts supporting a duty to disclose. Plaintiffs allege that the availability of MMS was a material fact in their transaction. The other facts special to the transaction are that Apple ***required*** Plaintiffs to enter into service contracts with AT&T, that Apple knew AT&T was obligated to provide MMS to Plaintiffs and other captive customers but that MMS would not be provided, and that Apple knew Plaintiffs would be charged for MMS services that would not be provided to them. Apple without doubt had superior and exclusive knowledge of facts not known or readily available to Plaintiffs, including knowing that AT&T's network had not been upgraded and that as a purchaser of an Apple iPhone, Plaintiffs would be excluded from MMS (in preference to all others) until upgrades were completed. *See e.g.,* Cal. FAC ¶¶ 4-6, 8, 9. Under these circumstances, Apple had a duty to disclose the facts material to the purchase; i.e., correcting Plaintiffs' misapprehension that MMS was available to iPhone purchasers.

Finally, whether a duty to disclose ultimately is found to exist is generally a question of fact not properly resolved on a motion to dismiss. *See e.g., Banque Arabe*, 57 F. 3d at 156; *Saltzman v. Pella Corp*., 06 C 4481, 2007 WL 844883 at * 3 (N.D. Ill. March 20, 2007) (to succeed on a motion to dismiss, plaintiff need only plead that the defendant contributed to their misapprehension of material facts and intentionally failed to correct the misapprehension); *Morgan v. AT&T*, 99 Cal. Rptr.

3d 768, 787 (Cal. Ct. App. 2009) (whether omission is "material" and leads to a duty to disclose is a question of fact).

VIII. Plaintiffs Have Adequately Pled Breach of Warranty Claims.

A. Plaintiffs have stated a claim for breach of express warranty.

Apple's argument for dismissal of the express warranty claim is the same as made in connection with its attack on the consumer protection and fraud claims; namely, Apple argues that Plaintiffs either (1) purchased the phones prior to its advertisements promising MMS was available; or (2) could not have reasonably relied on the advertisements because of Apple's footnote disclosures.

An express warranty is created when a seller makes an affirmation of fact or promise about the goods, or provides a description of the goods, which is part of the basis of the bargain.[47] In most states, the affirmation or description of the goods by

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[47] **California**: Cal. U. Com. Code § 2313 (1)(a) and (b) an express warranty is created by the seller when there is "[a]ny affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain …." or "[a]ny description of the goods which is made part of the basis of the bargain …."; **Michigan**: MCLA § 440.2313(1)(a) and (b) an express warranty is created by "[a]n affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain" or "[a] description of the goods which is made part of the basis of the bargain"; **Mississippi**: Miss. Code Ann. § 75-2-313 (express warranties are created by (1) "[a]ny affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain;" (2) "[a]ny description of the goods which is made part of the basis of the bargain."); **Texas**: Tex. Bus. & Com. Code § 2.313 (a)(1) and (3) (any affirmation of fact or promise or any sample or model which is made part of the basis of the bargain creates an express warranty.). *See also Church & Dwight Co. v. Huey*, 961 S.W.2d 560, 568 (Tex. App. 1997) (1)(a)-(b) (express warranty created by any affirmation of fact or promise made by the seller which relates to the goods and any description of the goods made part of the basis of the bargain); **Florida**: § 672.313 Florida Statutes (1997) (express warranty created by affirmation, promise, description, sample or conduct); **Missouri:** Mo. Rev. Stat. §

the seller creates an express warranty regardless of whether the purchaser specifically saw the warranty or relied on the warranty prior to his or her purchase. As concisely stated in Comment 3 to the Michigan commercial code (emphasis added):

> In actual practice affirmations of fact made by the seller about the goods during a bargain are regarded as part of the description of those goods; ***hence no particular reliance on such statements need be shown in order to weave them into the fabric of the agreement***.[48]

In short, proof of reliance is not required to establish the existence of an express warranty, and Apple's motion to dismiss the express warranty claims for lack of reliance must fail.

Of the states at issue, only Mississippi, Texas, Florida, and New York have a reliance requirement for a warranty claim. However, Plaintiffs Jackson (Mississippi), Friloux and Aleman (Texas), Mejia and Novick (Florida), and Monticelli (New York), each allege that they relied on the advertisements and representations made by Apple and AT&T concerning MMS. *See* Miss. FAC, ¶18;

400.2-313(1)(a) (an express warranty may be created by an affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain.); **New York**: UCC § 2-313 (1)(a) and (b) (an express warranty is created by a seller's affirmation of fact or promise made to the buyer which relates to the goods and becomes part of the basis of the bargain, as well as any description of the goods which is made part of the basis of the bargain).

[48] *See also*: **California**: *Weinstat v. Dentsply Int'l, Inc.*, 103 Cal. Rptr. 3d 614, 626 (Cal. Ct. App. 2010); **Illinois**: *Weng v. Allison*, 678 N.E.2d 1254, 1256 (Ill. Ct. App. 1997) (proof of reliance is not required to establish the existence of an express warranty); **Minnesota**: *In re Zurn Pex Plumbing Prods. Liability Litig.*, 267 F.R.D. 549, 564 (D. Minn. 2010) (reliance is not a requirement of a breach of warranty claim under Minnesota law); **Missouri**: *Walker v. Woolbright Motors, Inc.*, 620 S.W.2d 451, 453 (Mo. Ct. App. 1981) (no particular reliance on an express warranty is required)

Friloux Tex. FAC, ¶16; Fl. Mejia FAC, ¶14; Monticelli NY FAC, ¶¶13, 14. Thus, the motion to dismiss also fails as to these Plaintiffs.

B. Plaintiffs have stated a claim for breach of implied warranty.

Plaintiffs have also adequately alleged claims for breach of the implied warranty of merchantability. An implied warranty of merchantability provides that goods must be "fit for the ordinary purposes for which such goods are used." M.C.L.A. § 440.2314(2)(c).[49] The laws do not limit the possible attributes of merchantability because "the warranty of merchantability is that the goods are of average quality within the industry." *Bosway Tube & Steel Corp. v. McKay Mach. Co.*, 237 N.W.2d 488, 490 (Mich. Ct. App. 1975). *See also Carey v. Chaparral Boats, Inc.*, 514 F. Supp. 2d 1152, 1156 (D. Minn. 2007) (implied warranty breached when the product is defective to "a normal buyer making ordinary use of the product.");

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[49] *See also* **California**: Cal. U. Com. Code § 2314 (goods violate the warranty of merchantability if they are not fit for the ordinary purpose for which they are used), *Isip v. Mercedes-Benz USA, LLC*, 65 Cal. Rptr. 3d 695 (Cal. Ct. App. 2007) (under the implied warranty of merchantability, consumer goods must be "for the ordinary purposes for which such goods are used."); **Illinois**: 810 ILCS 5/2-314 ("Goods to be merchantable must be at least such as ... are fit for the ordinary purpose for which such goods are sold."); **Texas**: Tex. Bus. & Com. Code § 2.314(b)(3) (goods must be fit for the ordinary purpose for which such goods are sold); **Mississippi**: Miss. Code Ann. § 75-2-314(2)(c) (for goods to be merchantable, they "are fit for the ordinary purposes for which such goods are used."); **Minnesota**: Minn. Stat. § 335.2-314(2)(c) (implied warranty of merchantability provides that goods must be "fit for the ordinary purposes for which such goods are used."); **Florida**: § 672.314 Fla. Stat. (implied warranty of merchantability requires that the goods be fit for the ordinary purpose of such goods); **Illinois**: 810 ILCS 5/2-314 (goods to be merchantable must be at least such as … are fit for the ordinary purposes for which such goods are used); **Michigan**: M.C.L.A. § 440.2314 (2)(c) (an implied warranty of merchantability provides that goods must be "fit for the ordinary purposes for which such goods are used."); **Missouri**: § 400.2-314 2 Mo. Stat. Ann. (implied warranty of merchantability, … warrants that goods must be at least "fit for the ordinary purposes for which such goods are used.").

Piotrowski v. Southworth Prods. Corp., 15 F.3d 748, 751 (8th Cir. 1994) (under Minnesota law, "ordinary use" means that the product must work "when put to its intended use."); *Christenson v. Milde*, 402 N.W. 2d 610, 613 (Minn. Ct. App. 1987) (cabin not fit for ordinary use when improperly waterproofed, even though still habitable); *Isip v. Mercedes-Benz USA, LLC*, 65 Cal. Rptr. 3d at 695 (a vehicle is not fit for its ordinary purpose when it "smells, lurches, clanks, and emits smoke over an extended period of time" even though still drivable).

Apple argues that even though the plaintiffs couldn't use MMS, the iPhones were "good enough" because they could be used as a phone and had other functions. Apple is wrong. First, the law is not so narrow. The above authority makes clear that if a product is not of ***average quality within the industry***, it may not be merchantable even if it performs some basic functions. Even Apple concedes that the iPhone "has as an ordinary purpose use as a phone, a music player, and an Internet devise." *See*, *e.g.*, Tx. Mem. at 24. It then nonetheless argues that this "ordinary use" as a phone, a music player and as an Internet devise does not include MMS text messaging as a matter of law (even though MMS was a standard feature on all camera phones at that time).

Second, at best, Apple's argument on the "ordinary use" of the iPhone raises a factual dispute not properly resolved on a motion to dismiss.[50] *See*, *e.g.*, *Stearns v.*

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[50] Apple's citation to *Birdsong v. Apple, Inc.*, 590 F.3d 955 (9th Cir. 2009) is irrelevant. The iPod at issue in *Birdsong* was intended for the sole purpose of playing music, and there was no question that the iPod was able to play music. *Id.* at 958. Here, the iPhone was touted by Apple as a technologically-advanced multi-tasking product with hundreds of features, one of which included MMS capabilities,

Select Comfort Retail Corp., No. 08-2746 JF, 2009 WL 1635931, *8 (N.D. Cal. June 5, 2009) ("the fact that a person may still sleep on a moldy bed does not bar as a matter of law a claim for breach of the implied warranty of merchantability."); *Dacor Corp. v. Sierra Precision*, No. 93-2708, 1994 WL 83303, *3-4 (7th Cir. Mar. 14, 1994) (finding that product was not fit for it ordinary purpose was made after two-day bench trial); *R.A. Jones & Sons, Inc. v. Holman*, 470 So. 2d 60, 64 (Fla. Ct. App. 1985) (the ordinary use of engines under implied warranty of merchantability should be decided by a jury); *Independent School Dist. No. 197 v. W.R. Grace & Co.,* 752 F. Supp. 286, 302 (D. Minn. 1990) (whether asbestos in fireproofing materials was a part of ordinary use of such materials was a question of fact).[51]

C. Apple had notice of its warranty breaches.

Apple next contends that the warranty claims should be dismissed because Apple did not receive notice that it failed to provide MMS. Stating this argument aloud should alone suffice to reject it. By its own admission, Apple was aware that MMS would not be provided until "late summer 2009" as evidenced by its deceptive marketing of the iPhone. When the seller has actual knowledge of the defect of a particular produce, direct notice from a particular consumer is not required. *Malawy v. Richards Mfg. Co.*, 501 N.E.2d 376, 384-85 (Ill. Ct. App. 1986). *See also Arcor, Inc. v. Textron, Inc.*, 960 F.2d 710, 715 (7th Cir. 1992) ("[T]he buyer is

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and there is no question that the iPhone ***lacked*** MMS capabilities during the class period.

[51] Plaintiffs do not oppose Apple's motion to dismiss the warranty claims under Alabama law (as to plaintiff Franklin only), Illinois law or the implied warranty claim under Ohio law based on lack of privity. The other Alabama plaintiff (Mr. Raulston) purchased his iPhone from Apple. (MDAL FAC, ¶13).

deemed to have met the notice requirement when the seller has actual knowledge of the product's failure based on the seller's own observations"); *Gershengorin v. Vienna Beef, Ltd.*, No. 06-C-6820, 2007 WL 2840476, at *4 (N.D. Ill. 2007) (same); *Metowski v. Traid Corp.*, 104 Cal. Rptr. 599, 606 (Cal. Ct. App. 1972) ("Where the merchandise was sold under circumstances which indicate that the seller … was aware of the breach at the time of the sale, demand for notice of the breach from each and every member of the class may be a meaningless ritual."); *In re Bridgestone/Firestone, Inc. v. Wilderness Tires Prods. Liab. Litig.*, 155 F. Supp. 2d 1069, 1109-1110, n.48 (S.D. Ind. 2001) ("the majority of cases find actual notice to suffice") (overruled on other grounds); *Fargo Machine & Tool Co. v. Kearney & Trecker Corp.*, 428 F. Supp. 364, 375 (E.D. Mich. 1977) (the notice requirement is not rigorous); *Church of Nativity of Our Lord v. WatPro, Inc.*, 491 N.W.2d 1, 5 (Minn. 1992) (notice requirement "is designed to defeat commercial bad faith, not to deprive a good faith consumer of his remedy.") (overturned by statute on other grounds); S*outh Texas Elec. Co-op. v. Dresser-Rand Co., Inc.*, 575 F.3d 504, 508-509 (5th Cir. 2009) (the purpose of the notice provision was fully effectuated when the evidence showed that the defendant was aware of the "root cause" of the issues "as early as the design/build phase of the project . . . yet it never fulfilled its warranty obligations by remedying those defects."). Since Apple "had ample notice of the defect in the products well before the lawsuit was filed, and, indeed, allegedly well before Plaintiffs themselves did, and chose not to remedy those defects, no purpose

would be served" by requiring plaintiffs to provide additional notice. *In re Bridgestone*, 155 F. Supp. At 1109.

Second, as early as September 17, 2009, California plaintiffs and consumers by certified letter gave notice to Apple concerning its failure to provide MMS and requested that Apple rectify the problem. Cal. FAC, ¶¶114-116. This notice is sufficient and timely. *In re HP Inkjet Printer Litig.*, No. C 05-3580JF, 2006 WL 563048, *5-6 (N.D. Cal. March 7, 2006). In addition, one of the Alabama plaintiffs, Mr. Franklin, notified Apple of its failure to provide MMS. Franklin Ala. FAC, ¶16. Further, this notice sent by California and Alabama consumers is sufficient to inform Apple of the warranty issues as to all iPhone 3G and 3GS purchasers. *Metowski*, 104 Cal. Rptr. at 606 (notice for warranty claims is satisfied by proof of complaints from "some but not all buyers of the product."); *Church of Nativity*, 491 N.W.2d at 5 ("[w]here the record discloses prior knowledge of similar complaints, the defendant ... cannot argue that it is prejudiced by any delay in receiving notice of the specific complaint.").

Third, notice is not required at all where delivery of the product was not made according to the parties' agreement. The rationale being that in cases of non-delivery, the seller as well as the buyer knows of the breach and needs no further notice. *Chemetron Corp. v. McLouth Steel Corp.*, 381 F. Supp. 245, 254 (N.D. Ill. 1974). Apple knows that it sold iPhones without the MMS capability it promised, obviating the need for notice from Plaintiffs.

Finally, timeliness and sufficiency of notice for a breach of warranty claim are questions of fact not properly determined on a motion to dismiss. *See Barrington Corp. v. Patrick Lumber Co., Inc.*, 447 So. 2d 785, 789 (Ala. 1984) ("Whether sufficient notice was give[] [for warranty claim] is a question of fact."); *Bakhico Co., Ltd. v. Shasta Beverages, Inc.*, 1998 WL 25572, at *5 (N.D. Tex. Jan. 15, 1998) ("[T]imeliness is ordinarily a question of fact to be determined from all the circumstances of the case."); *Church of Nativity*, 491 N.W.2d at 5 ("The sufficiency of notice of a breach of warranty is a jury question." "In deciding whether the notice requirement has been complied with, the jury must evaluate 'the factual setting of each case and the circumstances of the party involved.'"); *Spinella v Atlantic Tug & Equipment Co.*, 283 AD 259, 262 (N.Y. Ct. App. 1954) (based on various circumstances, it is a jury question whether plaintiff notified defendant within a reasonable time).

The breach of warranty claims are legally sufficient and Apple's motion to dismiss these claims should be denied.

D. Louisiana Plaintiff Casey states a claim in redhibition.

In Louisiana, product warranty claims are governed by Louisiana Civil Code article 2520 and called claims of "redhibition." Though substantially similar to breach of warranty claims in other states, Louisiana's redhibition statute provides more protection to consumers and is without a doubt properly plead by Plaintiff Casey in this action.

The Louisiana Civil Code article 2520 provides:

> A defect is redhibitory when it renders the thing useless, or its use so inconvenient that it must be presumed that a buyer would not have bought the thing had he known of the defect. The existence of such a defect gives a buyer the right to obtain rescission of the sale. A defect is redhibitory also when, without rendering the thing totally useless, it diminishes its usefulness or its value so that it must be presumed that a buyer would still have bought it but for a lesser price. The existence of such a defect limits the right of a buyer to a reduction of the price.

A manufacturer is a seller for purposes of redhibition if the defect existed at the time the thing sold left the manufacturer's possession. *Womack & Adcock v. 3M Bus. Prods. Sales, Inc.*, 316 So.2d 795, 796 (La. Ct. App. 1975); *see also Media Prod. Consultants, Inc. v. Mercedes-Benz of N. Am., Inc.*, 262 So. 2d 377, 380 (La. 1972).

A claim in redhibition also lies when the seller knowingly omits to declare the existence of a defect. Louisiana Civil Code article 2545 provides:

> A seller who knows that the thing he sells has a defect but omits to declare it, or a seller who declares that the thing has a quality that he knows it does not have, is liable to the buyer for the return of the price with interest from the time it was paid, for the reimbursement of the reasonable expenses occasioned by the sale and those incurred for the preservation of the thing, and also for damages and reasonable attorney fees. If the use made of the thing, or the fruits it might have yielded, were of some value to the buyer, such a seller may be allowed credit for such use or fruits. A seller is deemed to know that the thing he sells has a redhibitory defect when he is a manufacturer of that thing.

Plaintiff Casey alleges that Apple knew at the time of sale that his iPhone would not have the MMS capability, and yet Apple omitted to inform plaintiff of this fact, and further failed to inform Casey that he would be charged for the MMS services his iPhone was incapable of providing. La. FAC ¶¶ 8, 97. Indeed, by Apple's own admission, it made no mention of the MMS defect until March of 2009,

months after Casey purchased his iPhone. This knowing omission of a defect gives rise to a redhibition claim under LSA-C.C. art. 2545.

In spite of the foregoing, Apple argues that Casey's redhibition claim must fail because: (i) Casey has not identified a representation or omission that induced him to purchase the iPhone; (ii) Casey should have known of the defect; and (iii) plaintiff was required to return the iPhone prior to filing a claim. All three arguments fail.

1. A claim in redhibition does not require reliance.

Apple's chief argument is its contention that Casey does not identify any representations or omissions that induced him to purchase his iPhone. First, Apple is wrong on the law. The plain language of Article 2520 provides and Louisiana courts have recognized that redhibition does not require reliance. LSA-C.C. art. 2520; *Mire v. EatelCorp, Inc.*, 849 So.2d 608, 614 (La. Ct. App. 2003) *writ denied*, 855 So.2d 317 (La. 2003). Instead, the focus is on the nature of defect in the thing sold, and whether the defect is such that it could be *presumed* that a reasonable buyer would not have bought the thing or would have bought it for a lesser price. As one Louisiana court explained:

> [T]he inquiry under a redhibition claim does not involve the buyer's subjective knowledge or reliance, but rather is an objective inquiry into the deficiency and whether it diminishes the product's value or renders it so inconvenient that the reasonable buyer would not have purchased it had he known of the deficiency.

Mire, 849 So. 2d at 614.

Moreover, "[t]he existence of a redhibitory defect is a question of fact." *Grimaldi Constr. Inc. v. JP & Sons Contractors Inc.*, 686 So. 2d 935, 939 (La. Ct. App. 1996); *Fogal v. Boudreaux,* 497 So.2d 366, 369 (La. Ct. App. 1986); *Red Arrow Sales, Inc. v. Dixie Motors, Inc.*, 442 So.2d 570, 573 (La. Ct. App. 1983).

Second, Apple is wrong on the facts. Plaintiff Casey alleges that he would not have purchased the iPhone if he had know of its redhibitory defect (*i.e.*, that it could not send or receive MMS). La. FAC ¶¶15, 124**.**

2. Casey did not know of the defect.

Apple next argues that Casey should have known that his iPhone didn't have MMS because its literature and advertising disclosed the timing and availability of MMS. By its own admission, however, Apple's promotional materials made no mention of the iPhone's MMS capability until March of 2009, several months ***after*** Casey purchased his iPhone. La. FAC ¶¶ 5, 6; Cal FAC ¶¶5, 6. On this basis alone, Apple's argument collapses. In addition, whether a buyer was adequately informed or had knowledge of a defect is a factual question not resolved at this juncture. *See Landaiche v. Supreme Chevrolet*, 602 So.2d 1127, 1131 (La. Ct. App. 1992); *Ditcharo v. Stepanek*, 538 So. 2d 309, 312-13 (La. Ct. App.), *writ denied* 541 So.2d 858 (La. 1989). Indeed, even when the seller has told the buyer of the actual condition complained of, there may still remain a factual question as to whether that

disclosure was adequate to advise the buyer of the defect. *Buck v. Adams*, 446 So. 2d 895, 898, 899 (La. Ct. App. 1984).[52]

3. Casey did not need to return his iPhone.

Finally, Apple asserts that LSA-C.C. art. 2522 requires that Plaintiff tender his iPhone to Apple prior to filing suit. Apple is wrong. There is no presentment or notice requirement when the seller has actual knowledge of the defect. Article 2522 provides: "Such notice is not required when the seller has actual knowledge of the existence of a redhibitory defect in the thing sold." LSA-C.C. art. 2522. Apple had actual knowledge that its iPhones did not have MMS capability throughout the class period. La. FAC ¶¶ 8, 59, 97, 123.

Moreover, even if notice were required (it isn't), the failure to provide notice only affects plaintiff's claim "to the extent that the seller can show that the defect could have been repaired or that the repairs would have been less burdensome, had he received notice." LSA-C.C. art. 2522. Here, even with notice, MMS could not have been provided during the class period.

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[52] The cases on which Apple relies in support of this point are easily distinguished. In each, the products were sold with owners' manuals and/or warnings which expressly warned of the redhibitory defect alleged. *See*, *e.g.*, *Johnson v. CHL Enters.*, 115 F. Supp. 2d 723, 728 (W.D. La 2000); *Air Bag Products Liability Litigation*, 7 F. Supp. 2d at 792, 782 (E.D. La. 1998) (warnings about air bag action appeared in automobiles and in owners' manuals); *In re Ford Motor Co. Bronco II Product Liability Litigation* ("*Bronco II*"), 982 F. Supp. 388 (E.D. La. 1997). Here, Apple was silent on MMS at the time of Casey's purchase.

XI. Plaintiffs Have Properly Pled That Apple Was Unjustly Enriched.

To establish an unjust enrichment claim, the plaintiff must show that: (1) defendant received a benefit (2) that it unjustly retained. *See*, *e.g.*, *Sweet Air Inv., Inc. v. Kenney*, 739 N.W.2d 656, 663 (Mich. Ct. App. 2007); *Miletak v. Allstate Ins. Co.*, No. C 06-03778, 2010 WL 809579 at *8 (N.D. Cal. March 5, 2010); *ServiceMaster of St. Cloud v. GAB Bus. Serv., Inc.*, 544 N.W. 2d 302, 306 (Minn. 1996); *Austin v. Duval*, 735 S.W. 2d 647, 649 (Tex. Ct. App. 1987); *Powell v. Campbell*, 912 So. 2d 978, 982 (Miss. 2005); *HPI Health Care Servs., Inc. v. Mt. Vernon Hosp., Inc.*, 131 Ill.2d 145, 160 (Ill. 1989); *Beth Israel Med. Ctr. v. Horizon Blue Cross and Blue Shield of New Jersey*, 448 F.3d 573, 586 (2d Cir. 2006) (New York law); *Hillman Constr. Corp. v. Wainer,* 636 So. 2d 576, 577 (Fla. Ct. App. 1994); *Dickinson v. Cosmos Broadcasting Co., Inc.,* 782 So. 2d 260, 266 (Ala. 2000). Each complaint properly alleges these elements. *See*, *e.g.*, Cal. FAC, ¶¶143-147.[53]

Apple also contends that unjust enrichment is not a separate cause of action, but a theory of relief, that cannot stand on its own and should be dismissed if all other causes of action are dismissed. Apple is wrong. First, some states recognize unjust enrichment as a separate cause of action. For example, Michigan law does not require the survival of underlying claims in order for an unjust enrichment

[53] Apple's sole basis for dismissing the unjust enrichment claim in the Alabama complaints is that plaintiffs did not allege that Apple is "unjustly" retaining a benefit. Apple is wrong. Both Alabama plaintiffs allege, *inter alia*, that Apple sold them iPhones without disclosing that they would be charged for MMS messaging even though MMS was not available on their iPhones. MDAL at ¶¶13, 100 and SDAL at ¶13, 16, 100. These allegations alone are sufficient to sustain the unjust enrichment claim.

claim to survive. *See*, *e.g.*, *Cardizem*, 105 F. Supp. 2d at 669 (rejecting defendants' position that "the success of Plaintiffs' common law unjust enrichment claims necessarily depends upon the success of their statutory claims. To the contrary, the courts often award equitable remedies under common law claims for unjust enrichment in circumstances where claims based upon contract or other state law violations prove unsuccessful.").

Similarly, the Texas Supreme Court has recognized unjust enrichment claims. *See State Farm Bank, F.S.B. v. Manheim Auto. Fin. Serv., Inc.*, No. 3:10-CV-00519-L, 2010 WL 3156008, at *4 (N.D. Tex. Aug. 6, 2010) (citing *HECI Exploration Co. v. Neel*, 982 S.W.2d 881, 891 (Tex. 1998); *Elledge v. Friberg-Cooper Water Supply Corp.*, 240 S.W.3d 869, 869-70 (Tex. 2007)); *Ed & F Man Biofuels Ltd. v. MV FASE*, No. H-08-3406, 2010 WL 2950307, at *6 (S.D. Tex. July 23, 2010) ("The Texas Supreme Court has spoken of a 'cause of action' for unjust enrichment and still refers to 'claims for unjust enrichment.'") (citations omitted).

Likewise, "unjust enrichment can be pleaded as a separate cause of action in Illinois." *Scholes v. Ames*, 850 F. Supp. 707, 711 (N.D. Ill. 1994). *See also Peddinghaus v. Peddinghaus*, 692 N.E.2d 1221, 1225 (Ill. Ct. App. 1998) (Illinois Supreme Court recognizes unjust enrichment as a cause of action). In fact, single count complaints for unjust enrichment are viable in Illinois. *See*, *e.g.*, *Thycon Construction, Inc. v. National Equip. Servs., Inc.*, No. 08-C-824, 2009 WL 723040 (N.D. Ill. Mar. 2, 2009). And unjust enrichment claims may stand even if the requirements of Illinois' consumer fraud statute are not met. *See Christie Clinic,*

P.C. v. Multiplan, Inc., No. 08-cv-2065, 2008 WL 4615435, at *17-18 (C.D. Ill. Oct. 15, 2008) (plaintiff's CFDBPA claim failed because it was not a consumer; however, the court allowed unjust enrichment claim to stand because it met the Rule 8 standard).[54]

California has also refused to dismiss unjust enrichment claims as merely duplicative of other causes of action. *Miletak*, 2010 WL 809579 at *8 (unjust enrichment is not duplicative of the consumer claims because it is a broader principle than restitution in that it supports disgorgement of benefits unjustly obtain even if the plaintiff has not suffered any loss).

Second, whether unjust enrichment is a separate cause of action or an additional theory of recovery to redress Apple's violation of the consumer fraud statutes and fraud is largely beside the point since plaintiffs may seek relief on an unjust enrichment theory in relation to the other well-pled causes of action. *See*, *e.g.*, *Miletak*, 2010 WL 809579 at *8 (denying motion to dismiss unjust enrichment); *Allstate Ins. Co. v. Rozenberg*, 590 F. Supp. 2d 384, 395 (E.D.N.Y. 2008) (denying motion to dismiss unjust enrichment cause of action).[55]

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[54] Apple's reliance on *Charles Hester Enter. Inc. v. Ill. Founders Ins. Co.,* 484 N.E. 2d 349 (Ill. Ct. App. 1985), is wholly misplaced. Illinois courts have specifically rejected the argument that *Hester* stands for the proposition that unjust enrichment is not a separate cause of action. *See ABN AMRO, Inc. v. Capital Int'l Ltd.*, 595 F. Supp. 2d 805, 850-51 (N.D. Ill. 2008) ("*Hester* merely held that unjust enrichment could not be the basis of a claim to impose a constructive trust. Rather, actual fraud or abuse of a fiduciary relationship is what is required to give rise to a constructive trust, neither of which had been alleged in that case.").

[55] Contrary to Apple's argument, Ohio does not preclude unjust enrichment just because the plaintiff purchased the Apple iPhone from an AT&T store. Even the case cited by Apple (*Johnson v. Microsoft Corp.*, 834 N.E.2d 791, 799 (Ohio 2005))

XII. The Court Should Ignore Apple's FCA Preemption Argument.

Apple buries, in a footnote, a skeletal argument related to FCA preemption. *See, e.g.* Cal. FAC at 3, n. 3. Apple asserts that FCA preemption is an "obstacle" to Plaintiffs' claims because AT&T is an indispensable party to claims regarding its network and thus all claims against it are dependent on FCA preemption as to AT&T. Courts routinely hold that such arguments raised in footnotes are waived. *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F. 3d. 1312, 1320 (Fed. Cir. 2006) (arguments raised in footnote are waived); *Fuji Photo Film Co. v. Jazz Photo Corp.,* 394 F.3d 1368, 1375 n. 4 (Fed. Cir. 2005) (finding that an argument raised in a footnote in an opening cross-appeal brief and then more fully in the reply brief, was not properly raised); *Cross Med. Prods., Inc. v. Medtronic Sofamor Danek, Inc.,* 424 F.3d 1293, 1320-21 n. 3 (Fed. Cir. 2005) (holding that an argument raised in a footnote in an opening brief was waived as not properly raised); *Laborers' Int'l Union of N. Am. v. Foster Wheeler Corp.,* 26 F.3d 375, 398 (3d Cir.1994), *cert denied,* 513 U.S. 946 (1994) ("An issue is waived unless a party raises it in its opening brief, and for those purposes 'a passing reference to an issue . . . will not suffice to bring that issue before this court.'") (quotation omitted); *United States v. Dunkel,* 927 F.2d 955, 956 (7th Cir.1991) ("A skeletal 'argument', really nothing more than an assertion, does not preserve a claim . . . Especially not when the brief presents a passel of other arguments . . . Judges are not like pigs, hunting for truffles buried in

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states that unjust enrichment is available if a benefit was conferred on the defendant by the purchaser. Here, Plaintiff Sullivan alleges that Apple unjustly received a benefit in the form of money and profits from the sales of iPhones. Ohio FAC, ¶115.

briefs."). *See also, Beazley v. Johnson*, 242 F.3d 248, 270 (5th Cir. 2001) (conclusory argument in footnote is insufficient to raise argument for appellate review); *Baser v. Shinseki*, No. 08-1032, 2010 WL 1583841, *5 (Vet. App. Apr. 21, 2010) ("Raising an argument in a footnote connotes the author's uncertainty of the argument's strength. If an argument is worth raising at all, the better practice is to raise it in the body of the brief, rather than bury it in a footnote").

Although Apple has not properly sought dismissal based on FCA preemption, to the extent the Court considers issues related to the applicability of FCA preemption to Apple, Plaintiffs request that they be permitted to respond by sur-reply.

CONCLUSION

Based on the foregoing points and authorities, Plaintiffs respectfully request that this Court DENY, in their entirety, each of Apple's motions to dismiss.

Dated: November 16, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been served upon all counsel of record via ECF this 16th day of November, 2010.

/s/Scott R. Bickford

SCOTT R. BICKFORD