

1 DAVID M. WALSH (CA SBN 120761)
DWalsh@mofo.com
2 KAI S. BARTOLOMEO (CA SBN 264033)
KBartolomeo@mofo.com
3 MORRISON & FOERSTER LLP
707 Wilshire Boulevard
4 Los Angeles, California 90017-3543
Telephone: 213.892.5200
5 Facsimile: 213.892.5454

6 TIFFANY CHEUNG (CA SBN 211497)
TCheung@mofo.com
7 MORRISON & FOERSTER LLP
425 Market Street
8 San Francisco, California 94105-2482
Telephone: 415.268.7000
9 Facsimile: 415.268.7522

10 Attorneys for Defendant
APPLE INC.

11
12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14 SAN JOSE DIVISION
15

16 ADRIENNE MOORE, On Behalf of Herself and
All Others Similarly Situated,

17 Plaintiff,

18 v.

19 APPLE INC.,

20 Defendant.
21

Case No. 5:14-cv-02269 LHK

CLASS ACTION

**DEFENDANT APPLE INC.'S
NOTICE OF MOTION AND
MOTION TO DISMISS;
MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT THEREOF**

Date: November 13, 2014
Time: 1:30 p.m.
Place: Courtroom 8 - 4th Floor
Judge: Hon. Lucy H. Koh

Complaint Filed: May 15, 2014
Trial Date: None Set

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

NOTICE OF MOTION AND MOTION TO DISMISS

TO PLAINTIFF AND HER ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on November 13, 2014, at 1:30 p.m., or as soon thereafter as the matter may be heard, before the Honorable Lucy H. Koh in Courtroom 8, located at the Robert F. Peckman Federal Building, 280 South First Street, Fifth Floor, San Jose, California, Defendant Apple Inc. (“Apple”) will and hereby does move to dismiss all of Plaintiff Adrienne Moore’s (“Plaintiff”) claims pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) for failure to state a claim upon which relief can be granted.

This motion is based upon this Notice of Motion and Motion, the Memorandum of Points and Authorities in support thereof, all other pleadings and papers on file herein, and such other argument and evidence as may be presented to the Court.

Dated: July 24, 2014

DAVID M. WALSH
TIFFANY CHEUNG
KAI S. BARTOLOMEO
MORRISON & FOERSTER LLP

By: /s/ David M. Walsh
DAVID M. WALSH

Attorneys for Defendant
APPLE INC.

TABLE OF CONTENTS

		Page
1		
2		
3	NOTICE OF MOTION AND MOTION TO DISMISS	1
4	ISSUES TO BE DECIDED	1
5	MEMORANDUM OF POINTS AND AUTHORITIES	2
6	I. INTRODUCTION AND SUMMARY OF ARGUMENT	2
7	II. FACTUAL BACKGROUND	4
8	A. What Is iMessage?	4
9	B. Plaintiff’s Allegations	5
10	III. LEGAL STANDARD	5
11	IV. PLAINTIFF SUFFERED NO INJURY-IN-FACT SO SHE CANNOT BRING THESE CLAIMS	6
12	A. iMessaging Played No Part in Plaintiff’s Decision to Purchase Her iPhone	7
13	B. Plaintiff Did Not Lose the “Full Benefit” of Her Wireless Contract as a Result of the Alleged Conduct	8
14		
15	V. PLAINTIFF CANNOT ALLEGE VIABLE CLAIMS UNDER CALIFORNIA’S CONSUMER PROTECTION STATUTES	9
16	A. Plaintiff Does Not Satisfy Rule 9(b)’s Heightened Pleading Requirements	9
17	1. UCL and CLRA Claims Sounding in Fraud Are Subject to Rule 9(b)	9
18	2. Plaintiff Does Not Allege Any Actionable Misrepresentations	10
19	3. Plaintiff Does Not Allege Any Actionable Omission	10
20	a. No Representation in Need of Correction	11
21	b. No Obligation to Disclose	11
22	4. Plaintiff Does Not Allege Reliance	12
23	a. Plaintiff Cannot Have Relied on an Unidentified, Theoretical Misrepresentation That Could Have Only Been Made after She Purchased Her iPhone	12
24	b. Conclusory Allegations of Reliance Are Insufficient	13
25	B. Plaintiff Does Not Otherwise State a Claim under California’s Unfair Competition Law	13
26		
27		
28		

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS
(continued)

	Page
1. Plaintiff Does Not Allege a Predicate “Unlawful” Act.....	13
2. Plaintiff Has Not Pled Any “Unfair” Acts under the UCL	14
C. Plaintiff Cannot State a Claim under California’s Consumers Legal Remedies Act	15
1. Because iOS 5, Messages, and iMessage Were Free, There Was Necessarily No “Sale or Lease”	15
2. Plaintiff Does Not Allege a Misrepresentation “At or Before Time of Sale”	16
3. The CLRA Does Not Apply to Software	16
VI. PLAINTIFF’S TORTIOUS INTERFERENCE WITH CONTRACT CLAIM SHOULD BE DISMISSED	17
VII. CONCLUSION	19

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Annunziato v. eMachines, Inc.</i> , 402 F. Supp. 2d 1133 (C.D. Cal. 2005).....	10
<i>Aron v. U-Haul Co. of Cal.</i> , 143 Cal. App. 4th 796 (2006).....	7
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009).....	6
<i>Baba v. Hewlett-Packard Co.</i> , No. C 09-05946 RS, 2011 WL 2486353 (N.D. Cal. June 16, 2011)	12
<i>Baba v. Hewlett-Packard Co.</i> , No. C 09-05946 RS, 2011 WL 317650 (N.D. Cal. Jan. 28, 2011)	16
<i>Baltazar v. Apple, Inc.</i> , No. CV-10-3231-JF, 2011 WL 588209 (N.D. Cal. Feb. 10, 2011)	10, 13
<i>Bell Atl. Corp. v. Twombly</i> , 550 U.S. 544 (2007).....	6
<i>Berry v. Am. Exp. Publ'g, Inc.</i> , 147 Cal. App. 4th 224 (2007).....	15, 17
<i>Birdsong v. Apple Inc.</i> , 590 F.3d 955 (9th Cir. 2009).....	7
<i>Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co.</i> , 20 Cal. 4th 163 (1999)	13, 14
<i>Consumer Advocates v. Echostar Satellite Corp.</i> , 113 Cal. App. 4th 1351 (2003).....	10
<i>Daugherty v. Am. Honda Motor Co. Inc.</i> , 144 Cal. App. 4th 824 (2006).....	11, 14
<i>Drum v. San Fernando Valley Bar Ass'n</i> , 182 Cal. App. 4th 247 (2010).....	15
<i>Durell v. Sharp Healthcare</i> , 183 Cal. App. 4th 1350 (2010).....	7, 12
<i>Ebeid ex rel. U.S. v. Lungwitz</i> , 616 F.3d 993 (9th Cir. 2010).....	10

1 *Farmers Ins. Exch. v. Superior Court,*
 2 2 Cal. 4th 377 (1992) 14

3 *Ferrington v. McAfee, Inc.,*
 4 No. 10-CV-01455-LHK 2010 WL 3910169 (N.D. Cal. Oct. 5, 2010) 17

5 *Freeman v. Wal-Mart Stores, Inc.,*
 6 111 Cal. App. 4th 660 (2003)..... 16

7 *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.,*
 8 528 U.S. 167 (2000)..... 6

9 *Gonzalez v. Drew Indus., Inc.,*
 10 No. CV 06-08233 DDP, 2010 WL 3894791 (C.D. Cal. Sept. 30, 2010)..... 7

11 *Hensley-Maclean v. Safeway, Inc.,*
 12 No. CV 11-01230 RS, 2014 WL 1364906 (N.D. Cal. Apr. 7, 2014)..... 12

13 *Herrington v. Johnson & Johnson Consumer Cos. Inc.,*
 14 No. C 09-1597 CW, 2010 WL 3448531 (N.D. Cal. Sept. 1, 2010) 9, 13

15 *Herskowitz v. Apple Inc.,*
 16 940 F. Supp. 2d 1131 (N.D. Cal. 2013) 14, 15

17 *Hodges v. Apple Inc.,*
 18 No. 13-CV-01128-WHO, 2013 WL 4393545 (N.D. Cal. Aug. 12, 2013)..... 14

19 *Hovsepian v. Apple, Inc.,*
 20 No. 08-5788 JF (PVT), 2009 WL 5069144 (N.D. Cal. Dec. 17, 2009)..... 9

21 *Image Online Design, Inc. v. Internet Corp. for Assigned Names &*
 22 *Numbers*, No. CV 12-08968 DDP (JCX), 2013 WL 489899 (C.D. Cal. Feb. 7, 2013)..... 18

23 *In re Actimmune Mktg. Litig.,*
 24 No. C 08-02376 MHP, 2010 U.S. Dist. LEXIS 90480 (N.D. Cal. Aug. 31, 2010), *aff'd*,
 25 464 F. App'x 651 (9th Cir. 2011) 6

26 *In re Facebook PPC Adver. Litig.,*
 27 No. 5:09-3043-JF, 2010 WL 3341062 (N.D. Cal. Aug. 25, 2010) 11

28 *In re iPhone 4S Consumer Litig.,*
 No. C 12-1127 CW, 2013 WL 3829653 (N.D. Cal. July 23, 2013)..... 13

In re iPhone Application Litig.,
 No. 11-MD-002250-LHK, 2011 WL 4403963 (N.D. Cal. Sept. 20, 2011)..... 17

In re iPhone Application Litig.,
 No. 11-MD-02250-LHK, 2013 U.S. Dist. LEXIS 169220 (N.D. Cal. Nov. 25, 2013) 7

1 *In re Sony Gaming Networks & Customer Data Sec. Breach Litig.*,
 2 903 F. Supp. 2d 942 (S.D. Cal. 2012) 7, 9

3 *In re Sony Grand Wega KDF-E A10/A20 Series Rear Projection HDTV Television Litig.*,
 4 758 F. Supp. 2d 1077 (S.D. Cal. 2010) 10

5 *Indep. Cellular Tel., Inc. v. Daniels & Assocs.*,
 6 863 F. Supp. 1109 (N.D. Cal. 1994) 14

7 *Jewelry 47, Inc. v. Biegler*,
 8 No. 2:08-CV-00174-MCE-KJM, 2008 WL 4642903 (E.D. Cal. Oct. 16, 2008)..... 18

9 *Kearns v. Ford Motor Co.*,
 10 567 F.3d 1120 (9th Cir. 2009)..... 9, 10, 11

11 *Kokkonen v. Guardian Life Ins. Co. of Am.*,
 12 511 U.S. 375 (1994) 6

13 *Kowalsky v. Hewlett-Packard Co.*,
 14 771 F. Supp. 2d 1138 (N.D. Cal. 2010), vacated in part on other grounds by 771
 15 F.Supp.2d 1156 (N.D.Cal.2011) 16

16 *Kwikset Corp. v. Super. Ct.*,
 17 51 Cal. 4th 310 (2011) 12

18 *Laster v. T-Mobile USA, Inc.*,
 19 407 F. Supp. 2d 1181 (S.D. Cal. 2005) 12

20 *Lujan v. Defenders of Wildlife*,
 21 504 U.S. 555 (1992) 6

22 *Meyer v. Sprint Spectrum L.P.*,
 23 45 Cal. 4th 634 (2009) 7, 12

24 *name.space, Inc. v. Internet Corp. for Assigned Names &*
 25 *Numbers*, No. CV 12-8676 PA, 2013 WL 2151478 (C.D. Cal. Mar. 4, 2013)..... 19

26 *Oestreicher v. Alienware Corp.*,
 27 544 F. Supp. 2d 964 (N.D. Cal. 2008) 10

28 *People v. McKale*,
 25 Cal. 3d 626 (1979) 13

Piping Rock Partners, Inc. v. David Lerner Assocs., Inc.,
 946 F. Supp. 2d 957 (N.D. Cal. 2013) 17

Pirozzi v. Apple Inc.,
 913 F. Supp. 2d 840 (N.D. Cal. 2012) 8

1	<i>Quelimane Co. v. Stewart Title Guaranty Co.</i> ,	
2	19 Cal. 4th 26 (1998)	17
3	<i>Rubio v. Capital One Bank</i> ,	
4	613 F.3d 1195 (9th Cir. 2010).....	7
5	<i>Schauer v. Mandarin Gems of Cal., Inc.</i> ,	
6	125 Cal. App. 4th 949 (2005).....	15
7	<i>Trindade v. Reach Media Grp., LLC</i> ,	
8	No. 12-CV-4759-PSG, 2013 WL 3977034 (N.D. Cal. July 31, 2013)	18
9	<i>White v. Lee</i> ,	
10	227 F.3d 1214 (9th Cir. 2000).....	6
11	<i>Williamson v. Reinalt-Thomas Corp.</i> ,	
12	No. 5:11-CV-03548-LHK, 2012 WL 1438812 (N.D. Cal. Apr. 25, 2012).....	8
13	<i>Wilson v. Hewlett-Packard Co.</i> ,	
14	668 F.3d 1136 (9th Cir. 2012).....	11
15	<i>Wofford v. Apple Inc.</i> ,	
16	No. 11-CV-0034 ABJ NLA, 2011 WL 5445054 (S.D. Cal. Nov. 9, 2011).....	15, 16, 17
17	<i>Wolfe v. Strankman</i> ,	
18	392 F.3d 358 (9th Cir. 2004).....	6
19	<i>Wynn v. NBC</i> ,	
20	234 F. Supp. 2d 1067 (C.D. Cal. 2002).....	18
21	STATUTES	
22	Cal. Bus. & Prof. Code	
23	§ 17200.....	13
24	Cal. Civ. Code	
25	§ 1770(a)	16
26	OTHER AUTHORITIES	
27	Fed. R. Civ. P.	
28	9(b)	1, 9, 13
	12(b)(1)	5, 6
	12(b)(6)	4, 6, 19
	U.S. Const. art. III	passim

ISSUES TO BE DECIDED

1. Does Plaintiff’s Complaint demonstrate the injury and causation required to establish standing under Article III of the U.S. Constitution and/or California’s consumer protection statutes?
2. Has Plaintiff stated a claim based on allegedly fraudulent conduct when she cannot allege, as required by Rule 9(b), any misrepresentation or actionable omission by Apple or her justifiable reliance on any misrepresentation or omission?
3. Has Plaintiff stated a claim under California’s Consumers Legal Remedies Act (“CLRA”) when her claim does not involve the “sale or lease” of a “good” or “service” under the CLRA?
4. Has Plaintiff stated a claim under the Unfair Competition Law (“UCL”) when she cannot allege that Apple engaged in any “unlawful,” “unfair,” or deceptive business practice?
5. Has Plaintiff stated a claim for tortious interference with contract when she cannot allege that Apple had knowledge of any specific contract between Plaintiff and her wireless carrier and intentionally induced a breach of such contract, the actual breach of such contract, and any resulting damage?

MEMORANDUM OF POINTS AND AUTHORITIES**I. INTRODUCTION AND SUMMARY OF ARGUMENT**

Apple has offered its customers a free alternative to conventional text messaging since October 2011. Apple’s iMessage service allows Apple users to send text-based messages to one another through Apple’s secure, encrypted systems, rather than conventional, third-party SMS/MMS¹ architecture. Apple does not charge its users to send messages through Apple’s internal systems. Apple provides this benefit so users can exchange messages without incurring any text messaging charges from their wireless carriers. iMessaging requires Apple’s proprietary “Messages” application and iOS/OS operating software. As such, this free benefit can be provided only to Apple users; iMessaging does not work with other manufacturers’ devices.

Plaintiff Adrienne Moore used an Apple iPhone 4 for several years before she filed this lawsuit. She purchased her iPhone 4 in March 2011. Seven months later, Apple offered for download a free operating system software update called iOS 5. Included in iOS 5 was a *new* service — iMessaging. Plaintiff downloaded iOS 5 and began using Apple’s free iMessage service. About three years later, in April 2014, Plaintiff switched her telephone number to a non-Apple, non-iMessageable device and stopped using her iPhone. Soon after switching, Plaintiff claims she stopped receiving text messages sent to her telephone number — now associated with her new, non-Apple phone — by some current iMessage users. Plaintiff filed this lawsuit because she allegedly did not receive those messages.

Notably, Plaintiff did not tell Apple that she was no longer using her iPhone, or that she had switched her telephone number over to a non-Apple phone. (*See* Compl. ¶ 27, Ex. 2 at 2.) Nevertheless, Plaintiff now wants to pursue this action against Apple because Apple did not automatically “recognize” that Plaintiff’s telephone number was “no longer using an Apple device and hence is no longer using iMessage or Messages.” (*Id.* ¶ 14.) In fact, Apple *never* claimed that iMessage or its companion application, Messages, would automatically recognize a

¹ SMS (Short Message Service) and MMS (Multimedia Messaging Service) refer to text and multimedia (“messages containing image, video, and sound content”) messages “sent between the texter and the recipient through a cellular network.” (Compl. ¶¶ 7-8.)

1 user's transition to a new device.

2 Apple takes customer satisfaction extremely seriously, but the law does not provide a
3 remedy when, as here, technology simply does not function as Plaintiff subjectively believes it
4 should. Apple asks the Court to dismiss Plaintiff's case because:

- 5 • ***Plaintiff Lacks Standing:*** Plaintiff does not have standing under Article III of the
6 U.S. Constitution or California's consumer protection laws. She lacks the necessary
7 "injury-in-fact" because she does not, and cannot, point to a single misrepresentation
8 or omission regarding iMessage that *caused* her to buy, or overpay for, her iPhone 4.
9 In fact, Plaintiff bought her iPhone long before iMessage was released to the market.
10 Plaintiff's other injury theory also fails: Plaintiff cannot assert Apple deprived her of
11 the "full benefit" of a contractual guarantee she never received from her wireless
12 carrier — essentially she is asserting that her carrier warranted that she would receive
13 every text-based message sent to her, even if sent through Apple's closed-loop
14 proprietary text messaging system.
- 15 • ***Plaintiff Was Not Misled by Apple:*** Each of Plaintiff's consumer protection statute
16 claims is based on her assertion that Apple misled her into purchasing her iPhone 4.
17 But, Plaintiff does not identify a single misrepresentation upon which she allegedly
18 relied. Nor can she. As noted above, Plaintiff's own allegations make clear that she
19 purchased her iPhone 4 *before* the iOS 5 software update and iMessage were first
20 released for download. Apple could not have made any misstatements or omissions
21 regarding iMessaging before Plaintiff purchased her iPhone because iMessaging *did*
22 *not exist* in the marketplace when Plaintiff bought her iPhone.
- 23 • ***Plaintiff's Consumer Protection Claims Are Otherwise Deficient:*** Plaintiff's
24 allegations are inadequate under both the unlawful and unfair prongs of the UCL. The
25 unlawful prong of the UCL requires a predicate *unlawful* act. Plaintiff has alleged no
26 such unlawful act. Likewise, Plaintiff has alleged no conduct that could be deemed an
27 "unfair" act or practice under the UCL. Plaintiff's CLRA claim is defective because
28 Plaintiff must, but did not, allege a predicate "sale or lease" as defined in the CLRA.

1 Nor does she identify a single alleged misrepresentation that she relied upon when she
2 bought her iPhone. Finally, because iMessaging is part of a software system, Plaintiff
3 cannot make a CLRA claim. Software is neither a good nor a service under the CLRA
4 and cannot be the basis of a CLRA claim.

- 5 • ***Apple Did Not Interfere with Her Wireless Contract:*** Plaintiff contends that Apple
6 somehow interfered with Plaintiff's apparently guaranteed right to receive text
7 messages under her wireless contract. This claim is a "non-starter" because Plaintiff
8 has not identified the contract or the specific provision that provides for this purported
9 guaranteed right to receive texts. Nor does Plaintiff allege any intentional actions by
10 Apple to induce Plaintiff's wireless carrier to breach its contract with Plaintiff.

11 These deficiencies cannot be cured through amendment. Apple respectfully requests that
12 the Court dismiss Plaintiff's claims pursuant to Rules 12(b)(1) and 12(b)(6).

13 II. FACTUAL BACKGROUND

14 A. What Is iMessage?

15 iMessage is a free, proprietary service that allows users of Apple devices, like the iPhone
16 and iPad, to send text-based messages to other Apple users. (*See* Compl. ¶ 11.) iMessage and its
17 client application, "Messages," provide Apple users a free alternative to conventional SMS text
18 messages that are transmitted through a cellular network. (*Id.* ¶ 8.) While wireless carriers
19 normally charge a fee for sending an SMS text message, text messages sent through iMessage do
20 not incur an SMS charge. (*Id.* ¶ 12.) Apple first introduced iMessage as a part of its iOS 5
21 software update, which was released in October 2011. (*Id.* ¶ 11.) Users can elect to turn
22 iMessage on or off as they please. (*See id.* ¶ 19.)

23 According to Plaintiff, "once an iPhone or iPad user switches their wireless telephone
24 number to a non-Apple device," that user "is unable to receive text messages sent to her by users
25 of Apple devices that employ iMessage and Messages." (*Id.* ¶ 13.) Plaintiff claims that this
26 occurs because "the Apple Message[s] application does not recognize that the same telephone
27 number of the former Apple device user . . . is no longer using an Apple device and hence is no
28 longer using iMessage or Messages." (*Id.* ¶ 14.) However, Plaintiff admits that Apple instructs

1 users to “turn off iMessage if [they] plan to transfer [their] SIM card or phone number from an
2 iPhone to a device that doesn’t support iMessage.” (*Id.*, Ex. 2 at 2.) Apple affirmatively advises
3 its iMessage users that if users do not disable iMessage in advance of the transfer, “other iOS
4 devices might continue to try to send you messages using iMessage, instead of using SMS or
5 MMS, for up to 45 days.” (*Id.* ¶ 27, Ex. 2 at 2 (emphasis omitted).)

6 **B. Plaintiff’s Allegations**

7 Plaintiff owned an iPhone 4 “[f]or years pre-dating the filing of this action.” (*Id.* ¶ 5.)
8 After she purchased this iPhone 4, she installed a new version of Apple’s mobile operating
9 software, iOS 5, which enabled her to send iMessages and use the Messages application. (*Id.*
10 ¶¶ 5-6.) Plaintiff does not identify any advertisement or marketing materials that she saw, or was
11 exposed to, that caused her to purchase the iPhone 4. She does not identify any pre-purchase or
12 pre-installation representations that addressed what would happen to iMessaging if she moved to
13 a non-Apple device.

14 On April 16, 2014, Plaintiff “decided to replace her Apple iPhone 4 device with a [non-
15 Apple device].” (*Id.* ¶ 5.) She did not tell Apple of her switch to the non-Apple phone. Plaintiff
16 claims that, after switching to her non-Apple phone, iMessage and the Messages application
17 “acted so as not to deliver incoming text messages sent to her by Apple device users to her same
18 cellular telephone number, [which] was now associated with a non-Apple device.” (*Id.*)

19 Plaintiff claims that, as soon as she figured out she was not receiving messages from her
20 old iMessaging contacts, she contacted her wireless carrier. Her carrier instructed her to turn off
21 iMessage on her iPhone 4 (the procedure that Apple recommended before switching to a non-
22 Apple device). (*Id.* ¶ 19.) Plaintiff did so and allegedly began receiving text messages from
23 some iPhone users, but not others. (*Id.*) Apple offered several other solutions to Plaintiff, but she
24 claims that they were unacceptable. (*Id.*)

25 Plaintiff filed her Complaint against Apple on May 15, 2014 — less than thirty days after
26 switching to her non-Apple phone.

27 **III. LEGAL STANDARD**

28 A motion to dismiss based on Article III standing is properly raised under Rule 12(b)(1).

1 *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). The burden of proof on a Rule 12(b)(1)
2 motion to dismiss is on the party asserting jurisdiction. See *Kokkonen v. Guardian Life Ins. Co.*
3 *of Am.*, 511 U.S. 375, 377 (1994); see also *In re Actimmune Mktg. Litig.*, No. C 08-02376 MHP,
4 2010 U.S. Dist. LEXIS 90480, at *14 (N.D. Cal. Aug. 31, 2010), *aff'd*, 464 F. App'x 651 (9th
5 Cir. 2011). "Rule 12(b)(1) jurisdictional attacks can be either facial or factual." *White*, 227 F.3d
6 at 1242. Where the challenge to jurisdiction is facial, the Court applies a standard similar to that
7 applied to a Rule 12(b)(6) motion. *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004).

8 Under Federal Rule of Civil Procedure 12(b)(6), a complaint must be dismissed for failure
9 to state a claim if the plaintiff either fails to state a cognizable legal theory or has not alleged
10 sufficient facts to support a cognizable legal theory. See Fed. R. Civ. P. 12(b)(6); *Bell Atl.*
11 *Corp. v. Twombly*, 550 U.S. 544, 562-63 (2007). A pleading that offers "labels and conclusions"
12 or "a formulaic recitation of the elements of a cause of action will not do." *Ashcroft v. Iqbal*,
13 556 U.S. 662, 678 (2009) (quotations and citation omitted). The complaint must allege facts
14 which, when taken as true, raise more than a speculative right to relief. *Twombly*, 550 U.S. at
15 555.

16 **IV. PLAINTIFF SUFFERED NO INJURY-IN-FACT SO SHE CANNOT BRING** 17 **THESE CLAIMS**

18 Plaintiff received iMessage as a free benefit when she was an Apple customer. She now
19 seeks to transform that benefit into a cognizable injury. However, the alleged injuries Plaintiff
20 claims to have suffered do not give her standing to assert her claims.

21 To meet the standing requirements of Article III, a plaintiff bears the burden of alleging
22 facts sufficient to show that (1) "[she] has suffered an 'injury in fact' that is (a) concrete and
23 particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly
24 traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely
25 speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc.*
26 *v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000).

27 In addition to the "irreducible constitutional minimum of standing" required under Article
28 III, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), Plaintiff must satisfy the *specific*

1 standing requirements under California’s consumer protection statutes. To assert a UCL claim, a
2 private plaintiff needs to have “suffered injury in fact and . . . lost money or property as a result of
3 the unfair competition.” *Rubio v. Capital One Bank*, 613 F.3d 1195, 1203 (9th Cir. 2010); *see*
4 *also Birdsong v. Apple Inc.*, 590 F.3d 955, 960 (9th Cir. 2009) (“Plaintiffs must show . . . that
5 they suffered a ***distinct and palpable injury*** as a result of the alleged unlawful or unfair
6 conduct.”) (emphasis added). Similarly, to establish standing under the CLRA, a plaintiff “must
7 have ‘suffer[ed] any damage as a result of the . . . practice declared to be unlawful.’ ” *Aron v. U-*
8 *Haul Co. of Cal.*, 143 Cal. App. 4th 796, 802 (2006). That is, the plaintiff must “allege a
9 ‘***tangible*** increased cost or burden to the consumer.’ ” *In re Sony Gaming Networks & Customer*
10 *Data Sec. Breach Litig.*, 903 F. Supp. 2d 942, 965 (S.D. Cal. 2012) (emphasis added) (quoting
11 *Meyer v. Sprint Spectrum L.P.*, 45 Cal. 4th 634, 643 (2009)). Further, when a plaintiff’s UCL and
12 CLRA claims are based on a misrepresentation theory, the “plaintiff must have actually relied on
13 the misrepresentation, and suffered economic injury as a result of that reliance, in order to have
14 standing to sue.” *In re iPhone Application Litig.*, No. 11-MD-02250-LHK, 2013 U.S. Dist.
15 LEXIS 169220, at *26-28 (N.D. Cal. Nov. 25, 2013); *Durell v. Sharp Healthcare*, 183 Cal. App.
16 4th 1350, 1355, 1367 (2010).

17 **A. iMessaging Played No Part in Plaintiff’s Decision to Purchase Her**
18 **iPhone**

19 Plaintiff cannot satisfy the “injury-in-fact” requirement of Article III or the specific
20 standing requirements of California’s consumer protection laws. First, Plaintiff’s bare assertion
21 that she “made a purchase she would not have made at all, or not on the terms that she did, as a
22 result of being unaware of the undisclosed” issues regarding iMessage (Compl. ¶ 50.) is both
23 legally insufficient and factually impossible. “Conclusory allegations of decreased value,
24 unsupported by facts, cannot support standing.” *Gonzalez v. Drew Indus., Inc.*, No. CV 06-08233
25 DDP (JWJx), 2010 WL 3894791, at *3 (C.D. Cal. Sept. 30, 2010). As detailed below, Plaintiff
26 does not identify any specific misrepresentation or misleading statement by Apple regarding
27 iMessage that she saw, heard, or relied on, or that was in any way material to her purchase of her
28 iPhone 4. Plaintiff cannot claim that Apple’s supposed misrepresentation or omission caused her

1 to buy, or to over-pay for, her iPhone 4 when there are no alleged *facts* showing that the
2 misrepresented/omitted information would have been material to her purchase. Courts have
3 dismissed claims for lack of standing where plaintiff did not allege which alleged misstatements
4 were material to her purchase and, therefore, “has not suffered an injury-in-fact that is caused by
5 the complained of conduct.” *See, e.g., Pirozzi v. Apple Inc.*, 913 F. Supp. 2d 840, 847 (N.D. Cal.
6 2012); *see also Williamson v. Reinalt-Thomas Corp.*, No. 5:11-CV-03548-LHK, 2012 WL
7 1438812, at *8 (N.D. Cal. Apr. 25, 2012) (“These hypothetical allegations, however do not
8 establish that Plaintiff has properly pled that he actually relied on Defendants’ alleged omission
9 of the tire disposal fee. That Plaintiff *could have* purchased his tires from a competitor or *could*
10 *have* recycled the tires himself does not establish he *actually relied* on the alleged omission when
11 deciding where to purchase his tires.” (emphasis in original)).

12 Further, Plaintiff’s bare conclusory allegations could not be accurate. Plaintiff cannot
13 have relied on any misrepresentation or omission concerning iMessage because iMessage did not
14 exist in the marketplace at the time Plaintiff purchased her iPhone. As alleged in the Complaint,
15 Apple first released iOS 5, iMessage, and Messages on October 12, 2011. (Compl. ¶ 6.) Plaintiff
16 purchased her iPhone 4 before iOS 5 was released. (*See id.* ¶¶ 5-6.) In fact, Apple’s business
17 records show that Plaintiff purchased her iPhone 4 in March 2011, *some seven months before*
18 *iMessage was released*. (Decl. of Jeffrey Kohlman ¶ 2.) Plaintiff cannot allege that she relied on
19 any misrepresentation or omission regarding iMessage because the technology was not available
20 at the time she made her purchase.

21 **B. Plaintiff Did Not Lose the “Full Benefit” of Her Wireless Contract as a**
22 **Result of the Alleged Conduct**

23 Second, Plaintiff claims she was “unable to receive the full benefit of her contractual
24 bargain with her wireless carrier,” but this theory of injury-in-fact, “lost money or property,” or
25 “tangible” injury also fails. (Compl. ¶ 50.) Plaintiff does not identify a guarantee or any other
26 contractual provision in which her wireless carrier obligated itself to ensure that she receive all
27 text messages transmitted by Apple iMessaging users to her non-iMessageable device. Nor does
28

1 Plaintiff claim that she was misled into entering into and paying for her wireless contract because
2 of Apple's alleged misrepresentations or omissions regarding iMessage.

3 **V. PLAINTIFF CANNOT ALLEGE VIABLE CLAIMS UNDER**
4 **CALIFORNIA'S CONSUMER PROTECTION STATUTES**

5 **A. Plaintiff Does Not Satisfy Rule 9(b)'s Heightened Pleading**
6 **Requirements.**

7 **1. UCL and CLRA Claims Sounding in Fraud Are Subject to**
8 **Rule 9(b)**

9 If a plaintiff relies on allegedly fraudulent conduct as the basis for claims under the CLRA
10 and UCL, those claims are "said to be 'grounded in fraud' or to 'sound in fraud,' and the pleading
11 . . . as a whole must satisfy the particularity requirement of Rule 9(b)." *Kearns v. Ford Motor*
12 *Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009) (internal citations omitted). That is precisely the case
13 here.

14 The gravamen of Plaintiff's consumer protection claims is that "Apple knew but never
15 disclosed that its iMessage service and Message[s] application would prevent device owners from
16 receiving text messages sent to them from other Apple users" and that Apple "touted" the
17 superior attributes and enhanced benefits of iMessage and Messages "while omitting any mention
18 of this serious consequence." (Compl. ¶ 16.) Because Plaintiff alleges fraudulent conduct in
19 support of her UCL and CLRA claims, Plaintiff must meet the heightened pleading standard
20 under Federal Rule of Civil Procedure 9(b). *Hovsepian v. Apple, Inc.*, No. 08-5788 JF (PVT),
21 2009 WL 5069144, at *2 (N.D. Cal. Dec. 17, 2009) ("Because [plaintiff's] CLRA and UCL
22 claims are predicated on allegedly fraudulent omissions by Apple, those claims are subject to the
23 pleading requirements of Rule 9(b)."); *Herrington v. Johnson & Johnson Consumer Cos. Inc.*,
24 No. C 09-1597 CW, 2010 WL 3448531, at *6 (N.D. Cal. Sept. 1, 2010) (holding that Rule 9(b)
25 applied to plaintiffs' CLRA and UCL claims where "[t]he gravamen of their claims is that
26 Defendants made affirmative misrepresentations or failed to disclose material facts about their
27 children's bath products.").

28 Rule 9(b) requires Plaintiff to "state[] the time, place and specific content of the false
representations as well as the identities of the parties to the misrepresentation." *In re Sony*

1 *Gaming Networks & Customer Data Sec. Breach Litig.*, 903 F. Supp. 2d at 953 (internal
 2 quotation marks and citation omitted); *Ebeid ex rel. U.S. v. Lungwitz*, 616 F.3d 993, 998 (9th Cir.
 3 2010) (plaintiff must allege “the who, what, when, where, and how of the misconduct charged”).
 4 Plaintiff must also plead facts explaining why the statement was false when it was made. *Id.*

5 **2. Plaintiff Does Not Allege Any Actionable Misrepresentations**

6 Plaintiff does not allege that she saw or heard *any* representations regarding iOS 5,
 7 iMessage, or the Messages software. While she claims that Apple “touted the superior attributes
 8 and enhanced benefits of its iMessage[] and Message[s] service and application while omitting
 9 any mention of this serious consequence,” she does not allege when, where, or how this alleged
 10 “touting” occurred; who made the alleged representations; when or how she was exposed to them;
 11 or which ones she relied on and considered material to her purchase. *See Kearns*, 567 F.3d at
 12 1126 (upholding dismissal of complaint because plaintiff did not allege the specific
 13 misrepresentations, who made them, when he was exposed to them, or which ones he relied on
 14 and found material). At best, Plaintiff has identified non-actionable statements of pure opinion
 15 that cannot support claims under the UCL or CLRA. *In re Sony Grand Wega KDF-E A10/A20*
 16 *Series Rear Projection HDTV Television Litig.*, 758 F. Supp. 2d 1077, 1089 (S.D. Cal. 2010)
 17 (concluding that statements regarding the “high” or “superior” quality of a product constitute non-
 18 actionable puffery and cannot support a claim under the UCL or CLRA); *Oestreicher v.*
 19 *Alienware Corp.*, 544 F. Supp. 2d 964, 973 (N.D. Cal. 2008) (statements regarding a product
 20 being “faster, more powerful, and more innovative” with “higher performance” are “non-
 21 actionable puffery”); *Annunziato v. eMachines, Inc.*, 402 F. Supp. 2d 1133, 1140 (C.D. Cal. 2005)
 22 (“quality,” “reliability,” “performance,” and the “latest technology” are not actionable);
 23 *Consumer Advocates v. Echostar Satellite Corp.*, 113 Cal. App. 4th 1351, 1361 (2003) (satellite
 24 system will provide “crystal clear digital” video or “CD quality” audio held to constitute puffery).

25 **3. Plaintiff Does Not Allege Any Actionable Omission**

26 Plaintiff has not alleged any actionable omission in support of her CLRA or UCL claims.
 27 To be actionable, an omission must be “contrary to a representation actually made by the
 28 defendant, or an omission of a fact the defendant was obliged to disclose.” *Baltazar v. Apple*,

1 *Inc.*, No. CV-10-3231-JF, 2011 WL 588209, at *4 (N.D. Cal. Feb. 10, 2011) (quoting *Daugherty*
2 *v. Am. Honda Motor Co. Inc.*, 144 Cal. App. 4th 824, 835 (2006)); *Wilson v. Hewlett-Packard*
3 *Co.*, 668 F.3d 1136, 1141 (9th Cir. 2012) (“California courts have generally rejected a broad
4 obligation to disclose . . .”). Rule 9(b) applies with equal force to alleged omissions. *Kearns*,
5 567 F.3d at 1127 (because “nondisclosure is a claim for misrepresentation in a cause of action for
6 fraud, it . . . must be pleaded with particularity under Rule 9(b)”). Plaintiff has pled no omissions
7 that satisfy these requirements.

8 **a. No Representation in Need of Correction**

9 As discussed above, Plaintiff does not allege any specific misrepresentations by Apple
10 and, thus, cannot point to any representation in need of correction. To the extent she seeks to rely
11 on Apple’s purported, unspecified statements “touting” the “superior attributes and enhanced
12 benefits” of iMessage and Messages, those statements are general, non-actionable representations
13 that Plaintiff herself never claims are untrue, let alone in need of correction.

14 Even if Plaintiff could identify a representation by Apple she believed was in need of
15 correction, she does not point to any representation that *she* saw, heard, or reviewed. The law
16 requires Plaintiff to at least make this minimal showing. *In re Facebook PPC Adver. Litig.*, No.
17 5:09-3043-JF, 2010 WL 3341062, *10 (N.D. Cal. Aug. 25, 2010) (“Plaintiffs still should be able
18 to identify with particularity at least the specific policies and representations that they reviewed.”)
19 (citation omitted). Her inability to do so is fatal.

20 **b. No Obligation to Disclose**

21 Plaintiff can point to no other basis for requiring Apple to disclose facts regarding
22 iMessage or Messages. “California courts have generally rejected a broad obligation to disclose.”
23 *Wilson*, 668 F.3d at 1141. As the Ninth Circuit has held, an obligation to disclose arises only
24 when the alleged “defect” relates to a “safety issue.” *Id.* Plaintiff makes absolutely no
25 allegations about any safety issues she faced.

1 **4. Plaintiff Does Not Allege Reliance**

2 **a. Plaintiff Cannot Have Relied on an Unidentified,**
3 **Theoretical Misrepresentation That Could Have Only**
4 **Been Made after She Purchased Her iPhone**

5 Plaintiff must plead *actual* reliance on an allegedly deceptive or misleading statement as
6 part of her UCL claim. *Kwikset Corp. v. Super. Ct.*, 51 Cal. 4th 310, 326 (2011). The CLRA
7 similarly requires that a violation “cause[] or result[] in some sort of damage.” *Meyer v. Spring*
8 *Spectrum, L.P.*, 45 Cal. 4th 634, 641 (2009). Because she does not identify a misrepresentation,
9 Plaintiff cannot meet her pleading burden.

10 Plaintiff does not allege a specific misrepresentation so, of course, she cannot allege that
11 she saw, heard, or was somehow exposed to any specific misrepresentation. This deficiency is
12 fatal to Plaintiff’s CLRA and UCL claims. *See Durell*, 183 Cal. App. 4th at 1363 (“The SAC
13 does not allege Durell relied on either Sharp’s Web site representations or on the language in the
14 Agreement for Services Indeed, the SAC does not allege Durell ever visited Sharp’s Web
15 site or even that he ever read the Agreement for Services.”); *Laster v. T-Mobile USA, Inc.*, 407 F.
16 Supp. 2d 1181, 1194 (S.D. Cal. 2005) (dismissing UCL claim where “none of the named
17 Plaintiffs allege that they saw, read, or in any way relied on the advertisements”).

18 As discussed above, the timing set forth in Plaintiff’s allegations make her
19 misrepresentation claim simply impossible. Because iMessaging did not exist in the market when
20 Plaintiff purchased her iPhone, she could not have relied on any representations about
21 iMessaging. By definition, post-sale representations cannot induce a sale because the sale has
22 already been made. *See Hensley-Maclean v. Safeway, Inc.*, No. CV 11-01230 RS, 2014 WL
23 1364906, at *6 (N.D. Cal. Apr. 7, 2014) (dismissing CLRA claim because plaintiff only alleged
24 misrepresentations after the time of sale, and stating that “the CLRA only applies to
25 representation and omissions that occur during pre-sale transactions”); *Baba v. Hewlett-Packard*
26 *Co.*, No. C 09-05946 RS, 2011 WL 2486353, at *5 (N.D. Cal. June 16, 2011) (noting that
27 “plaintiffs have not sufficiently alleged that they relied on any of HP’s statements or omissions in
28 purchasing the computers” where plaintiffs alleged that the defendant made misleading
statements only after the sale transaction. “This behavior is irrelevant to the question of whether

1 HP made false statements to plaintiffs before or during their respective transactions which
2 induced them to purchase the computers.”).

3 **b. Conclusory Allegations of Reliance Are Insufficient**

4 Plaintiff makes the conclusory allegation that she “and the putative class members would
5 not have downloaded” the Messages application, “or would not have purchased an iPhone or
6 other Apple device in the first instance” had they “been informed by Apple that iMessage would
7 work in such a fashion so as to prevent them from receiving text messages, once they switched
8 their Apple devices to non-Apple devices.” (Compl. ¶ 16.) This bare assertion is not enough.
9 “[M]ere assertions of reliance” have been repeatedly dismissed for failure to satisfy Rule 9(b).
10 *Baltazar*, 2011 WL 588209, at *3 (dismissing CLRA and misrepresentation claims because “the
11 mere assertion of ‘reliance’ is insufficient” and requiring plaintiffs to “allege the specifics of
12 [their] reliance on the misrepresentation to show a bona fide claim of actual reliance”) (citation
13 omitted); *In re iPhone 4S Consumer Litig.*, No. C 12-1127 CW, 2013 WL 3829653, *12-13 (N.D.
14 Cal. July 23, 2013) (dismissing UCL and CLRA claims because plaintiffs did not “allege with
15 specificity which commercials or other misleading advertisements they each relied upon in
16 purchasing their devices.”); *Herrington*, 2010 WL 3448531, at *7, *11 (dismissing UCL, CLRA,
17 and misrepresentation claims where plaintiffs pleaded neither “the circumstances in which they
18 were exposed to these [allegedly false or misleading] statements” nor “upon which of these
19 misrepresentations they relied in making their purchase”). The same result is warranted here.

20 **B. Plaintiff Does Not Otherwise State a Claim under California’s Unfair
21 Competition Law**

22 The UCL provides that “unfair competition includes any unlawful, unfair or fraudulent
23 business act or practice and unfair, deceptive, untrue or misleading advertising” Cal. Bus. &
24 Prof. Code § 17200. “Although the unfair competition law’s scope is sweeping, it is not
25 unlimited.” *Cel-Tech Commc’ns, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal. 4th 163, 182 (1999).

26 **1. Plaintiff Does Not Allege a Predicate “Unlawful” Act**

27 An “unlawful” practice or act under the UCL is “anything that can properly be called a
28 business practice and that at the same time is forbidden by law.” *People v. McKale*, 25 Cal. 3d

1 626, 634 (1979) (citation omitted). The UCL thus “borrows” violations of other laws and treats
2 them as unlawful practices that are independently actionable under the statute. *Farmers Ins.*
3 *Exch. v. Superior Court*, 2 Cal. 4th 377, 383 (1992). Courts routinely dismiss UCL claims where
4 the plaintiff has not established a predicate violation of underlying law. *See, e.g., Indep. Cellular*
5 *Tel., Inc. v. Daniels & Assocs.*, 863 F. Supp. 1109, 1118 (N.D. Cal. 1994).

6 Plaintiff bases her claim under the “unlawful” prong of the UCL on a CLRA violation and
7 on her tortious interference with contract claim. (Compl. ¶ 48.) As discussed above and below,
8 Plaintiff has not stated a viable predicate claim under the CLRA or for tortious interference with
9 contract, and therefore cannot plead an “unlawful” act under the UCL. *Daugherty v. Am. Honda*
10 *Motor Co.*, 144 Cal. App. 4th 824 (2006) (dismissing UCL claim for lack of a violation of statute
11 or other law); *Hodges v. Apple Inc.*, No. 13-CV-01128-WHO, 2013 WL 4393545, at *6 (N.D.
12 Cal. Aug. 12, 2013) (“Because Hodges fails to plead with particularity how Apple violated any
13 statute, he also fails to adequately plead a violation under the UCL’s ‘unlawful’ prong.”).
14 Plaintiff cannot maintain a claim under the UCL’s “unlawful” prong.

15 2. Plaintiff Has Not Pled Any “Unfair” Acts under the UCL

16 Plaintiff claims that Apple’s purported conduct is “unfair” within the meaning of the UCL
17 because it “disincentivize[s]” users from switching to a non-Apple device and, therefore,
18 threatens to harm competition in its incipiency.” (Compl. ¶ 49.) Although the UCL does not
19 define the term “unfair,” California courts have developed at least two possible tests for
20 “unfairness” within the meaning of the statute.² *See Herskowitz v. Apple Inc.*, 940 F. Supp. 2d
21 1131, 1145 (N.D. Cal. 2013). Plaintiff’s allegations satisfy neither.

22 Under the first test, Plaintiff must allege that Apple’s purported conduct violated a public
23 policy that is “tethered” to specific constitutional, regulatory, or statutory provisions. *Id.* at 1145.
24 Courts require this “tethering” because “[c]ourts may not simply impose their own notions of the
25 day as to what is fair or unfair.” *Cel-Tech*, 20 Cal. 4th at 182, 185. Plaintiff does not purport to

26 ² As this Court noted in *Herskowitz*, the Ninth Circuit has rejected a third, multipronged
27 test contained in the Federal Trade Commission Act as inapplicable in the consumer context.
28 *Herskowitz*, 940 F. Supp. 2d at 1146 n.6.

1 base her claim under the unfair prong on a public policy. Even if she did, Plaintiff has not
2 identified any policy tethered to any specific legal provision.

3 The second test “examines whether the challenged business practice is ‘immoral,
4 unethical, oppressive, unscrupulous or substantially injurious to consumers and requires the court
5 to weigh the utility of the defendant’s conduct against the gravity of the harm to the alleged
6 victim.” *Herskowitz*, 940 F. Supp. 2d at 1145-46; *Drum v. San Fernando Valley Bar Ass’n*, 182
7 Cal. App. 4th 247, 257 (2010) (citation and internal quotation marks omitted). Plaintiff admits
8 that iMessage provides a *benefit* to consumers by allowing users to transmit text messages
9 without incurring SMS charges. (Compl. ¶ 12.) Balanced against this indisputable benefit,
10 Plaintiff has not identified any conduct by Apple that is “immoral, unethical, oppressive,
11 unscrupulous or substantially injurious to consumers.” Nor does Plaintiff explain how any
12 amorphous “threat” to “competition in its incipiency” can be a cognizable harm under the UCL.
13 To the extent Plaintiff’s claims of substantial injury are based on alleged misrepresentations or
14 omissions, as discussed above, Plaintiff has not pled any that are actionable, that she relied on,
15 and that caused her injury. Especially in light of the significant benefit that iMessaging offers,
16 Plaintiff’s “unfairness” claim cannot survive.

17 **C. Plaintiff Cannot State a Claim under California’s Consumers Legal**
18 **Remedies Act**

19 **1. Because iOS 5, Messages, and iMessage Were Free, There Was**
20 **Necessarily No “Sale or Lease”**

21 Plaintiff does not allege that she purchased iOS 5, Messages, or iMessage. In fact, they
22 were available for free. A free download is not a “sale or lease” within the meaning of the
23 CLRA. See *Schauer v. Mandarin Gems of Cal., Inc.*, 125 Cal. App. 4th 949, 960 (2005) (plaintiff
24 did not engage in a transaction covered by the CLRA where she received an engagement ring as a
25 gift from her fiancé); cf. *Berry*, 147 Cal. App. 4th at 229 n.2 (questioning whether obtaining an
26 American Express card is a “purchase or lease” for purposes of the CLRA).

27 In *Wofford v. Apple Inc.*, No. 11-CV-0034 ABJ NLA, 2011 WL 5445054, at *2 (S.D. Cal.
28 Nov. 9, 2011) plaintiffs claimed that defendant violated the CLRA by fraudulently inducing them
into downloading and installing iOS 4 on their iPhones. *Id.* The court dismissed plaintiffs’

1 CLRA claim finding that, among other things, “the *free* download of iOS 4 on Plaintiffs’ []
2 iPhone does not meet the CLRA’s ‘sale or lease’ requirement.” *Id.* The court continued that
3 “[p]laintiffs’ original purchase of the iPhone is a separate transaction from their free upgrade of
4 the iPhone’s operating system, which occurred about a year later. The iPhone’s software upgrade
5 was not intended to result in a ‘sale or lease’ because it was provided free of charge.” *Id.* Here,
6 as in *Wofford*, Plaintiff has no CLRA claim because she cannot plead facts establishing that her
7 download of free iOS 5 software, which included iMessage, constituted a “sale or lease.”

8 **2. Plaintiff Does Not Allege a Misrepresentation “At or Before** 9 **Time of Sale”**

10 To state a viable CLRA claim, Plaintiff must allege that Apple made a misrepresentation
11 at or before the time she purchased her iPhone 4. *See Kowalsky v. Hewlett-Packard Co.*, 771 F.
12 Supp. 2d 1138, 1152 (N.D. Cal. 2010), *vacated in part on other grounds by* 771 F.Supp.2d 1156
13 (N.D.Cal.2011) (“[A] misrepresentation made by HP after Plaintiff purchased his printer would
14 not support liability under the CLRA[.]”); *Baba v. Hewlett-Packard Co.*, No. C 09-05946 RS,
15 2011 WL 317650, at *2 (N.D. Cal. Jan. 28, 2011) (the viability of a CLRA claim “depends solely
16 on [plaintiff’s] contention that [defendant] made false statements . . . prior to his purchase.”).

17 As discussed above, Plaintiff’s allegations establish that Apple could not have made a
18 misrepresentation or actionable omission at or before the time Plaintiff purchased her iPhone 4.
19 (See Compl. ¶¶ 5-6.) Plaintiff’s inability to assert an actionable misrepresentation or omission
20 that she relied upon in connection with her purchase of her iPhone 4 defeats her CLRA claim.

21 **3. The CLRA Does Not Apply to Software**

22 The CLRA prohibits “unfair methods of competition and unfair or deceptive acts or
23 practices undertaken by any person in a transaction intended to result or which results in the sale
24 or lease of goods or services to any consumer[.]” Cal. Civ. Code § 1770(a). Courts have the
25 power to determine, at the earliest stages of the litigation, whether, as a matter of law, a CLRA
26 claim fails to state a cause of action. *See Freeman v. Wal-Mart Stores, Inc.*, 111 Cal. App. 4th
27 660, 668-69 (2003) (affirming demurrer with respect to CLRA claim).

28 Plaintiff’s CLRA claim is deficient as a matter of law. Software and software applications

1 are not “goods” or “services” covered by the CLRA. *Ferrington v. McAfee, Inc.*, No. 10-CV-
 2 01455-LHK 2010 WL 3910169, at *14 (N.D. Cal. Oct. 5, 2010) (holding that “California law
 3 does not support Plaintiffs’ contention that software is a tangible good or a service for purposes of
 4 the CLRA, and therefore the CLRA does not apply to the transactions at issue in this case”); *In*
 5 *re iPhone Application Litig.*, No. 11-MD-002250-LHK, 2011 WL 4403963, at *10 (N.D. Cal.
 6 Sept. 20, 2011) (concluding that software is neither a good nor a service within the meaning of
 7 the CLRA, and noting that “to the extent Plaintiffs’ allegations are based solely on software,
 8 Plaintiffs do not have a claim under the CLRA”).³ Plaintiff repeatedly admits that iMessage
 9 worked through its client software “*application*,” Messages, and was a feature of Apple’s iOS 5
 10 *software*. (See, e.g., Compl. ¶¶ 1 (iMessage and Messages “were part of Apple’s software
 11 operating system”), 11 (“Apple’s software on Apple iPhone and iPad wireless devices would
 12 employ iMessage and Messages”).) In *Wofford*, 2011 WL 5445054, at *2, the court dismissed the
 13 plaintiffs’ CLRA claim based on the same iOS operating system at the core of Plaintiff’s claims
 14 here because Apple’s operating system is software not covered by the CLRA. Plaintiff’s CLRA
 15 claim must be dismissed.

16 VI. PLAINTIFF’S TORTIOUS INTERFERENCE WITH CONTRACT CLAIM 17 SHOULD BE DISMISSED

18 Under California law, a claim for tortious interference with contract requires “(1) a valid
 19 contract between plaintiff and a third party; (2) defendant’s knowledge of this contract;
 20 (3) defendant’s intentional acts designed to induce a breach or disruption of the contractual
 21 relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting
 22 damage.” *Piping Rock Partners, Inc. v. David Lerner Assocs., Inc.*, 946 F. Supp. 2d 957, 979
 23 (N.D. Cal. 2013) (citing *Quelimane Co. v. Stewart Title Guaranty Co.*, 19 Cal. 4th 26, 55 (1998)).
 24 “The mere allegation that [defendant] purposefully and intentionally interfered with a contract,
 25 without any factual support ... does not satisfy the requirements for stating a claim for tortious

26 ³ Courts interpreting the CLRA “have not expanded it beyond its express terms” and have
 27 narrowly construed the phrase “goods or services.” See *Berry v. Am. Exp. Publ’g, Inc.*, 147 Cal.
 28 App. 4th 224, 229, 232 (2007).

1 interference with contractual relations.” *Wynn v. NBC*, 234 F. Supp. 2d 1067, 1122 (C.D. Cal.
2 2002).

3 Plaintiff cannot assert a claim for intentional interference with contract. Although
4 Plaintiff generally alleges that she had a contract with her wireless carrier, she does not allege any
5 facts sufficient to identify the specific terms of any particular agreement(s) that were breached by
6 Apple’s alleged interference. *Image Online Design, Inc. v. Internet Corp. for Assigned Names &*
7 *Numbers*, No. CV 12-08968 DDP (JCX), 2013 WL 489899, at *9 (C.D. Cal. Feb. 7, 2013)
8 (dismissing interference claim where plaintiff “has not alleged any facts identifying the particular
9 contracts, the actual disruption of these contracts, or any actual damage to IOD....[Plaintiff]
10 cannot simply allege that [defendant] has interfered with its business model”).

11 Nor does Plaintiff allege any facts demonstrating Apple’s knowledge regarding the
12 specific terms of Plaintiff’s particular contract with her wireless carrier. To prevail on a tortious
13 interference claim, a plaintiff must do more than allege that defendant had “generalized
14 knowledge that plaintiff was a party to contracts” with a third party. *Trindade v. Reach Media*
15 *Grp., LLC*, No. 12-CV-4759-PSG, 2013 WL 3977034, at *15-16 (N.D. Cal. July 31, 2013);
16 *Jewelry 47, Inc. v. Biegler*, No. 2:08-CV-00174-MCE-KJM, 2008 WL 4642903, at *3-4 (E.D.
17 Cal. Oct. 16, 2008) (dismissing interference claim where plaintiff merely alleged that defendant
18 “[knew] full well and had reason to know that [P]laintiff entered into an agreement with
19 [Defendant],” and finding that plaintiff’s “allegation is merely a conclusory recitation of a
20 required element of this cause of action.”) Plaintiff’s complaint contains none of the required
21 specifics regarding Apple’s knowledge of specific contracts and the details of such contracts.
22 *Trindade*, 2013 WL 3977034, at *15-16.

23 Even if Plaintiff could identify the particular contractual term(s) she claims are at issue,
24 Plaintiff does not allege any “specific breach” by her wireless carrier, as she is required to do.
25 *Image Online Design*, 2013 WL 489899, at *9. Plaintiff does not, and cannot, allege that her
26 carrier contractually guaranteed that Plaintiff would receive every text message a third party
27 attempted to send to her, including any message transmitted as an iMessage to a non-
28 iMessageable phone. (*See* Compl. ¶ 36.) Absent a contractual provision that was breached,

1 Plaintiff's tortious interference claim fails.

2 Finally, Plaintiff does not allege any intentional actions undertaken by Apple that were
3 intended to induce Plaintiff's wireless carrier to breach its agreement with Plaintiff. *name.space,*
4 *Inc. v. Internet Corp. for Assigned Names & Numbers*, No. CV 12-8676 PA (PLAx), 2013 WL
5 2151478, at *8 (C.D. Cal. Mar. 4, 2013) (dismissing tortious interference cause of action for
6 failure to state a claim because "the Complaint does not allege any intentional actions undertaken
7 by [defendant] designed to induce breach of Plaintiff's contracts with its clients or any
8 evidentiary facts, as opposed to conclusory allegations, of actual breach or disruption and
9 resulting damage."). Indeed, such an assertion would be implausible — Apple, as a mobile
10 device manufacturer, relies on the service provided by the wireless carriers to its customers.
11 Apple has no interest in inducing a breach of the carrier-customer contractual relationship that
12 provides an important functionality for its mobile phones.

13 VII. CONCLUSION

14 For the foregoing reasons, Apple respectfully requests that the Court dismiss Plaintiff's
15 claims pursuant to Rule 12(b)(1) and Rule 12(b)(6) with prejudice.

16 Dated: July 24, 2014

17 DAVID M. WALSH
18 TIFFANY CHEUNG
19 KAI S. BARTOLOMEO
20 MORRISON & FOERSTER LLP

21 By: /s/ David M. Walsh

22 DAVID M. WALSH

23 Attorneys for Defendant
24 APPLE INC.

1 DAVID M. WALSH (CA SBN 120761)
 DWalsh@mofo.com
 2 KAI S. BARTOLOMEO (CA SBN 264033)
 KBartolomeo@mofo.com
 3 MORRISON & FOERSTER LLP
 707 Wilshire Boulevard
 4 Los Angeles, California 90017-3543
 Telephone: 213.892.5200
 5 Facsimile: 213.892.5454

6 TIFFANY CHEUNG (CA SBN 211497)
 TCheung@mofo.com
 7 MORRISON & FOERSTER LLP
 425 Market Street
 8 San Francisco, California 94105-2482
 Telephone: 415.268.7000
 9 Facsimile: 415.268.7522

10 Attorneys for Defendant
 APPLE INC.

11
 12 UNITED STATES DISTRICT COURT
 13 NORTHERN DISTRICT OF CALIFORNIA
 14 SAN JOSE DIVISION
 15

16 ADRIENNE MOORE, On Behalf of Herself and
 All Others Similarly Situated,

17 Plaintiff,

18 v.

19 APPLE INC.,

20 Defendant.
 21
 22
 23
 24
 25
 26
 27
 28

Case No. 5:14-cv-02269 LHK

CLASS ACTION

**DECLARATION OF JEFFREY
 KOHLMAN IN SUPPORT OF
 APPLE'S MOTION TO DISMISS**

Date: November 13, 2014
 Time: 1:30 p.m.
 Place: Courtroom 8 - 4th Floor
 Judge: Hon. Lucy H. Koh

Complaint Filed: May 15, 2014
 Trial Date: None Set

1 I, Jeffrey Kohlman, hereby declare as follows:

2 1. I am employed by Apple Inc. (“Apple”) as an AppleCare Support Engineer. I
3 submit this Declaration in Support of Apple’s Motion to Dismiss the Complaint. I have personal
4 knowledge of the facts set forth in this Declaration and, if called as a witness, could and would
5 competently testify to them.

6 2. Apple maintains business records with information related to purchases of Apple’s
7 iPhones. I access and review those records in the normal course of my duties for Apple. I
8 reviewed Apple’s internal records regarding Adrienne Moore’s purchases of iPhones. Those
9 records show that Ms. Moore purchased an iPhone 4 in March 2011.

10
11 I declare under penalty of perjury under the laws of the United States of America that the
12 foregoing is true and correct.

13 Executed this 24th day of July, 2014, at Cupertino, California.

14
15 /s/ Jeffrey Kohlman
16 Jeffrey Kohlman

17
18 **ECF ATTESTATION**

19 I, David M. Walsh, am the ECF User whose ID and Password are being used to file this
20 **DECLARATION OF JEFFREY KOHLMAN IN SUPPORT OF DEFENDANT APPLE**
21 **INC.’S MOTION TO DISMISS.** In compliance with Civil Local Rule 5.1, I hereby attest that
Jeffrey Kohlman concurred in this filing.

22 Dated: July 24, 2014

By: /s/ David M. Walsh
David M. Walsh

23
24
25
26
27
28

1 DAVID M. WALSH (CA SBN 120761)
DWalsh@mofo.com
2 KAI S. BARTOLOMEO (CA SBN 264033)
KBartolomeo@mofo.com
3 MORRISON & FOERSTER LLP
707 Wilshire Boulevard
4 Los Angeles, California 90017-3543
Telephone: 213.892.5200
5 Facsimile: 213.892.5454

6 TIFFANY CHEUNG (CA SBN 211497)
TCheung@mofo.com
7 MORRISON & FOERSTER LLP
425 Market Street
8 San Francisco, California 94105-2482
Telephone: 415.268.7000
9 Facsimile: 415.268.7522

10 Attorneys for Defendant
APPLE INC.

11
12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14 SAN JOSE DIVISION

15
16 ADRIENNE MOORE, On Behalf of Herself and
All Others Similarly Situated,

17 Plaintiff,

18 v.

19 APPLE INC.,

20 Defendant.

Case No. 5:14-cv-02269 LHK

CLASS ACTION

**[PROPOSED] ORDER
GRANTING APPLE INC.'S
MOTION TO DISMISS
PLAINTIFF'S COMPLAINT**

Date: November 13, 2014
Time: 1:30 p.m.
Place: Courtroom 8 - 4th Floor
Judge: Hon. Lucy H. Koh

Complaint Filed: May 15, 2014
Trial Date: None Set

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

[PROPOSED] ORDER

Before the Court is Defendant Apple Inc.’s Motion to Dismiss Plaintiff Adrienne Moore’s Complaint. The Court, having considered the arguments of counsel and the pleadings and papers filed in connection with the Motion, and good cause appearing, hereby **GRANTS** Apple’s Motion and dismisses Plaintiff’s Complaint [with leave to amend] [without leave to amend].

IT IS SO ORDERED.

Dated:

The Honorable Lucy H. Koh
United States District Judge