

SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA

CIVIL DIVISION

SARAH DAHLGREN, :
 :
 Plaintiff, :
 v. : Case No. 2002 CA 007884 B
 : Judge Burgess
 AUDIOVOX COMMUNICATIONS : Calendar 3
 CORPORATION *et al.*, :
 :
 Defendants. :

M E M O R A N D U M

Before the Court are defendants' Motion to Dismiss Plaintiff's Second Amended Complaint, the opposition and the reply. Defendants move the Court pursuant to Superior Court Civil Rule 12 to dismiss the complaint asserting that 1) federal law preempts plaintiff's claims, 2) she has not stated a claim under the District of Columbia Consumer Protection Procedures Act, D.C. Code § 28-3901 et seq ("the CPPA"), and 3) she cannot state a claim on her own behalf for unjust enrichment. The Court will address defendants' arguments in turn, but first discusses the history of the case.

I. BACKGROUND

Plaintiff initially filed her complaint on September 6, 2002. The defendants removed the case to U.S. District Court, it was subsequently remanded to this court on June 13, 2005, and an amended complaint was filed on December 9, 2005. In February 2006, defendants filed two motions to dismiss. The case was stayed pending the outcome of motions to dismiss in six related Superior Court cases, and then stayed again pending the appeal of those cases to the District of Columbia Court of Appeals. Defendants' motions to dismiss were denied without prejudice to refiling once the stay was lifted. The Court of Appeals issued its opinion in Murray v. Motorola, Inc., 982 A.2d 764 (D.C. 2009), on October 29, 2009. On January 16, 2010, plaintiff filed the Corrected Second Amended Complaint, and on February 26, 2010, defendants filed the present motion to dismiss.

Plaintiff's claims arise from the marketing and sale of cellular phones in the District of Columbia by the defendants, seven cellular phone manufacturers¹ and a trade

¹ The manufacturer defendants are Motorola, Inc.; Audiovox Communications Corp.; Nokia, Inc.; Ericsson, Inc.; Kyocera Wireless Corp.; Qualcomm, Inc.; and Samsung Telecommunications America.

association, The Cellular Telecommunication & Internet Association ("CTIA"). The complaint contains two counts. Count One, brought on behalf of the general public of the District of Columbia pursuant to D.C Code § 28-3905(k)(1), alleges that defendants have engaged in unlawful trade practices in violation of the CPPA. Count Two, brought by plaintiff individually on her own behalf, alleges that defendants were unjustly enriched by the profits they received from her as a result of their unlawful trade practices.

The principle allegations in Count One are that the defendants violated the CPPA by misrepresenting and failing to disclose material information about their phones which had a tendency to deceive consumers.² The section governing unlawful trade practices, D.C. Code § 28-3904, provides, in pertinent part, that it "shall be a violation of this chapter, whether or not any consumer is in fact misled, deceived or damaged thereby, for any person to:

² In quoting D.C. Code § 28-3904, plaintiff lists subsections (a), (d) and (u) in addition to subsections (e) and (f). However, the Court cannot discern anywhere in the complaint allegations that defendants engaged in the type of conduct governed by subsections (a), (d) and (u). While there are allegations relating to the Federal Communications Commission's ("FCC") certification of defendants' cell phones, plaintiff acknowledges that the phones are certified pursuant to the process prescribed by the FCC, and her allegations pertain to alleged misleading statements about the process, which would fall under subsection (e).

. . .

(e) misrepresent as to a material fact which has a tendency to mislead;

(f) fail to state a material fact if such failure tends to mislead; . . .

D.C. Code § 28-3904(e)-(f).

Plaintiff's CPPA claims rest on allegations that defendants did not disclose that there is a debate regarding the risks and potential biological effects of cell phone use, that they made misleading representations about the process by which the FCC certifies cell phones to be marketed or sold in the U.S., and that they failed to disclose information regarding how to use cell phones and how to mitigate exposure to the radio frequency emissions from cell phones. Plaintiff explicitly states that the complaint's purpose is not to challenge the design, manufacture or testing of cell phones, or to question the federal standard for radiofrequency radiation. (SAC ¶ 4.)

Defendants move to dismiss on the grounds that plaintiff's CPPA claims are preempted by federal law, and that as to both her CPPA and unjust enrichment claims, she fails "to state a claim upon which relief can be granted" pursuant to Superior Court Civil Rule 12(b)(6).

II. LEGAL STANDARD

On a motion to dismiss, the Court takes all factual allegations in the complaint as true, but is not bound to accept as true legal conclusions couched as factual allegations. Grayson v. AT&T Corp., 980 A.2d 1137, 1144 (D.C. 2009) (citing Papasan v. Allain, 478 U.S. 265, 286, (1986)). While detailed factual allegations are not required, plaintiff must provide grounds for her entitlement to relief that are more than labels and conclusions or a "formulaic recitation of the elements" of her claim. Id. (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, (2007)). The allegations must be sufficient to "raise a right to relief above the speculative level" and, accepted as true, must "'state a claim to relief that is plausible on its face.'" Id. (quoting Ashcroft v. Iqbal, ___ U.S. ___, ___, 129 S.Ct. 1937, 1949 (2009)). Further, this court's rules "'manifest a preference for resolution of disputes on the merits, not on technicalities of pleading,'" and pleadings are construed "'as to do substantial justice.'" Clampitt v. Am. Univ., 957 A.2d 23, 29 (D.C. 2008) (quoting Carter-Obayuwana v. Howard Univ., 764 A.2d 779, 787 (D.C. 2001)).

III. PREEMPTION

Defendants move to dismiss plaintiff's CPPA claims on the ground that they are federally preempted by FCC regulations governing the emission of radiofrequency (RF) radiation from cell phones manufactured and sold within the United States. In 1996, the FCC established a 1.6 W/kg limit on the specific absorption rate (SAR) of RF radiation emitted from cellular phones. See 11 F.C.C.R. 15123 (1996). Defendants rely on Murray, supra, which held that under the doctrine of conflict preemption, federal law preempts "claims that are premised on allegations that defendants' FCC-certified cell phones are unreasonably 'dangerous' because of RF radiation." 982 A.2d at 789.

The Supremacy Clause of the United States Constitution provides that "the laws of the United States . . . shall be the supreme Law of the Land; . . . any thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. Pursuant to the Supremacy Clause, federal law may expressly or impliedly preempt state law under the doctrine of preemption. Murray, supra, 982 A.2d at 771. "The purpose of Congress is the ultimate touchstone in every preemption

case." Altria Group, Inc. v. Good, ___ U.S. ___, ___, 129 S.Ct. 538, 543 (2008).

Under the doctrine of conflict preemption, a type of implied preemption, federal law supplants state law either where compliance with both "is a physical impossibility" or where "state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Murray, supra, 982 A.2d at 771 (quotations and citation omitted). A court "should not find pre-emption too readily in the absence of clear evidence of a conflict." Geier v. Am. Honda Motor Co., 529 U.S. 861, 885 (2000); see English v. General Elec. Co., 496 U.S. 72, 79 (1990).

The FCC established the SAR limit pursuant to its mandate from Congress to "prescribe and make effective rules regarding the environmental effects of radio frequency emissions" that contain "adequate, appropriate and necessary levels of protection to the public." Murray, supra, 982 A.2d at 780 (quotations and citations omitted). Congress' objective was to advance the national interest in "'uniform, consistent requirements with adequate safeguards of the public health and safety'" so as to "'ensure an

appropriate balance in policy and [] speed deployment and the availability of competitive wireless communications services'" Id. at 776 n.15 (quoting H.R. Rep. 104-204, pt. 1, at 94).

Before adopting its standards, the FCC consulted extensively with government health and safety agencies and considered over 150 sets of comments. Id. at 775 (citing 12 F.C.C.R. 13494, 13506, ¶ 34 (1997)). The standards it adopted were based on a balancing "between the need to protect the public and workers from exposure to potentially harmful RF electromagnetic fields and the requirement that industry be allowed to provide telecommunications services to the public in the most efficient and practical manner possible." 12 F.C.C.R. at 13496, ¶ 2.

The court in Murray concluded that state regulations that would alter the balance struck by the FCC were federally preempted. The court was persuaded by the FCC's explanation that its RF radiation limit "reflected a balancing of policy considerations" and its argument that verdicts holding defendants liable for damages for injuries caused by FCC-compliant phones would "'necessarily upset'" the balance struck by the agency and contravene its policy

judgments “regarding how safely and efficiently to promote wireless communication.” Id. at 777 & n.17 (citing FCC Amicus Br.).

In reaching its holding, the court considered the FCC’s Congressional mandate “that Congress contemplated that the FCC would engage in just such a balancing,” as well as the FCC’s “‘unique understanding of the statutes [it] administer[s] and [its] attendant ability to make informed determinations about how state requirements may pose an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’” Id. at 776 n.15 & 776-77 (quoting Wyeth v. Levine, ___ U.S. ___, ___, 129 S. Ct. 1187, 1202 (2009)).

The court held that claims that “rest on allegations about the inadequacy of the FCC’s RF radiation standard or about the safety of [] FCC-certified cell phones” are preempted because they conflict with the FCC’s determination that phones that comply with its standards are safe to be sold and used in the United States. Id. at 777-78. The court found that state law, including damage awards, “that would treat FCC-certified cell phones as defective and unreasonably dangerous – . . . even though

the phones meet the FCC RF radiation standard – conflicts with federal law.” Id. at 780.

While the court found that plaintiffs’ personal injury claims were preempted, it reached a different conclusion regarding their claims under the CPPA. It found that those claims under the CPPA that were not premised on allegations of personal injury and did not “necessarily depend for their success upon proof that cell phones are unreasonably dangerous” were not preempted. Id. at 783. The court noted that the CPPA entitles a person to sue under D.C. Code § 28-3905(k)(1)) “‘whether or not [plaintiffs were] . . . damaged thereby.’” Id. (quoting D.C. Code § 28-3904). Further, liability for misrepresenting or failing to disclose material information about cell phones could be found without plaintiffs “having to prove that cell phones emit unreasonably dangerous levels of radiation.” Id.

Plaintiff alleges in Count One of the Second Amended Complaint that defendants engaged in unlawful trade practices in violation of the CPPA. Rather than list the specific allegations supporting Count One, plaintiff incorporates by reference the 126 preceding paragraphs and asserts that the defendants’ conduct described there “was a

false and deceptive trade practice within the meaning of the DC CPPA” in that they made misrepresentations regarding the potential risks associated with their phones, and failed to state material facts regarding the risks, which had the tendency to deceive. (SAC ¶¶ 127-30.)

In the preceding portions of the complaint, plaintiff alleges that defendants have 1) failed to disclose that a safety debate exists as to the “risks and biological effects that might arise” from cell phone use (SAC ¶ 3); 2) made representations that phones “posed no threat to human health” despite evidence to the contrary (SAC ¶ 21); 3) failed to disclose information regarding the potential health risks of RFR to which cell phone users are exposed (Id.); 4) failed to disclose that phones are self-tested and self-certified (SAC ¶ 27-28); 5) failed to disclose that use of phones may pose a safety hazard to children (SAC ¶ 29); and 6) failed to disclose methods of mitigating risks including “using speakers and earphones, reducing the use of cell phones in areas where reception is weak, and limiting cell phone use by children” (SAC ¶ 103) as well as “using a headset or speakers, holding the cell phone away from the body when talking, avoiding holding the phone

against the ear, in a pocket, or on a belt . . . " (SAC ¶ 106).

Defendants argue that plaintiff's theory for liability under the CPPA "is premised on the allegation that there are 'potential risks associated with' using FCC-compliant wireless phones" and that such claims "directly conflict with the FCC's determination that wireless phones that comply with its standards are safe for use by the general public." (Defs.' Mem. 12-13.) They further argue that the only way the alleged misrepresented or omitted information can be construed as material is to the extent it informs the consumer about cell phone safety, and as such is preempted. Defendants assert that a jury verdict in plaintiff's favor, particularly one imposing the warning requirements she seeks, would upset the balance struck by the FCC.

The Court is of the opinion that defendants paint with too broad a brush in their interpretation that Murray preempts all claims "about safety." The fundamental concern of the court in Murray was whether or not plaintiff's claims would upset the balance struck by the FCC, and to answer that question the court looked to what a

jury would be asked to find in order to decide in plaintiff's favor. To the extent a jury was asked to find that cell phones are unreasonably dangerous, such a finding conflicted with the FCC's balancing and was preempted. But claims under the CPPA were not preempted to the extent a jury could find in plaintiffs' favor "without plaintiffs having to prove that cell phones emit unreasonably dangerous levels of radiation." 982 A.2d at 783.

One of the plaintiffs' claims in Murray was that defendants "falsely represented that '[r]esearch has shown that there is absolutely no risk of harm associated with the use of cell phones.'" Id. at 784. This is a claim that could be said to be "about safety." Yet the court plainly stated that it was not preempted. Moreover, the court noted that the complaint contained allegations that "the defendants did not disclose that the cell phone antenna should be extended when the device is in use" and did not disclose that a headset or other precautionary measure could be used to reduce radiation exposure. Id. at 784. The placement of the antenna and the potentially beneficial use of headsets are not about the proper functioning of cell phones; they are about, according to

plaintiff, the ways of mitigating potential dangers of cell phone use. Claims about defendants' omissions of information about these aspects of cell phone use are, in a sense, "about the safety" of cell phones. But the court in Murray found that to "the extent that [the claims in that case] are not read as claims that cell phones are unreasonably dangerous," but rather as claims that defendants omitted information in violation of the CPPA "that was material to plaintiffs' decisions about whether to purchase or how to use a cell phone, the claims are not conflict-preempted." Id. Defendants are thus incorrect that any claims under the CPPA that are "about safety" are preempted.

This Court further observes that the court in Murray concluded that the FCC "left it as a matter of manufacturer discretion what information to provide consumers about the use of their cells phones." Id. at 788. It cited the FCC's notice of rulemaking, in which the FCC explained that "instructional material should be provided to the user to caution against [unusual or inappropriate cell phone] usage," 11 F.C.C.R. at 15149, ¶ 69, and the FCC's OET Bulletin, in which it advised manufacturers that "operating

instructions and caution statements should be used to inform users to avoid operating" under "conditions [that] do not represent normal usage." 982 A.2d at n.39. Further, the court did not discern that uniformity in consumer disclosures is necessary "to achieve an efficient and effective nationwide cell-phone-communications network." Id. at 788.

Likewise here, the Court is of the opinion that a jury could find in the plaintiff's favor without having to find that FCC-certified cell phones are unsafe or emit unreasonably dangerous levels of RF radiation. To make out her claims under the CPPA, plaintiff must show that the alleged misrepresentations or omissions were of material information having a tendency to mislead. She need not show that any consumer was in fact misled. Material information is that which "has a natural tendency to influence, or [is] capable of influencing, the decision of the decisionmak[er] to [whom] it is addressed." Neder v. U.S., 527 U.S. 1, 16 (1999). In consumer fraud cases, courts have found information material "if the consumer's decision might have been different had the truth been disclosed," Briggs v. Am. Nat'l Prop. & Cas. Co., 209 P.3d

1181, 1186 (Colo. Ct. App. 2009), or “if a reasonable purchaser would attach importance to its existence or nonexistence in determining the choice of action in the transaction in question,” Ollerman v. O'Rourke Co., 288 N.W.2d 95, 107 (Wis. 1980).

Plaintiff asks a jury to decide that “a consumer’s decision might have been different” or “a reasonable purchaser would attach importance” to the existence of the cell phone safety debate, the fact that defendants self-test SAR levels as part of the FCC-certification process, or information regarding the use of cell phones and the methods of reducing RF exposure. A finding that such information has a tendency to mislead does not necessarily imply a finding that cell phones are unreasonably dangerous or that the FCC’s SAR standard is insufficient. A finding that a consumer would find it important to know about potential risks or uncertainty about long-term exposure is not a finding that cell phone use is unsafe.

Defendants nevertheless argue that plaintiff’s claims “challenge a federal balancing of competing policy considerations” and upset that balancing. They assert that to find in her favor, a jury would have to put more weight

on safety concerns than the FCC did, which they argue conflicts with the FCC's "compelling concern that industry be allowed to meet marketplace demand with lower cost and greater efficiency." (Defs.' Reply at 10.)

The FCC was concerned with the costs that a given SAR limit would impose on the industry and its ability to maintain a wireless network to meet market demand. The language quoted by defendants in their reply regarding "significant and unnecessary economic and technical burdens for which adequate justification has not been presented," comes from the FCC's discussion of whether to apply the SAR limit for general population exposure to occupational exposure as well, and clearly regards the economic and technical burdens of operating the wireless network at certain SAR levels. See 11 F.C.C.R. at 15139-40, ¶¶ 42-45.

The type of costs that plaintiff's claims could potentially impose on cell phone manufacturers, those related to consumer disclosures, are outside the scope of the costs contemplated by the FCC respecting SAR levels, and defendants have not shown that imposition of such costs on manufacturers affects the balancing the FCC struck. The costs associated with consumer disclosures are naturally

attendant to the marketing and sale of consumer products. Further, defendants' argument that different states may impose different warning or disclosure requirements that would add to their costs is also not persuasive. Complying with the consumer protection laws of the fifty states is an incident of marketing products within those states. The Court will not assume "that Congress meant to proscribe the States' historic regulation of deceptive advertising practices" where it has not clearly indicated an intent to do so. See Altria Group, supra, 129 S.Ct. at 545.

Defendants rely on Farina v. Nokia, 578 F. Supp. 2d 740 (E.D. Pa. 2008). The holding there does not help them. The District Court found that Farina's claims were preempted because

[i]n order to win a jury verdict on these claims, Farina necessarily has to ask a jury to accept his premise that the FCC's SAR maximum is inadequate to ensure the safe use of cell phones and, thus, headsets are required in order to make them safe. Thus, he seeks to impose legal duties that would conflict directly with federal regulatory mandates because the Defendants could be held liable even though they indisputably complied with the SAR maximum.

Id. at 770.

Unlike the allegations in Farina, that cell phones require headsets to be safe, the allegations here are that a consumer's purchasing decision might be influenced by the information that a headset, other accessory, or certain means of operation can reduce RF exposure below the already FCC-certified-safe level. The present case is distinguishable from Farina because the jury will not be asked to determine whether the FCC standard ensures safety; rather it will be asked to determine, given that the FCC standard ensures safety, whether the alleged misrepresentations or omissions occurred and whether they were material.

The Court further notes that unlike in Murray, the FCC has not filed an amicus brief in this case. There, the court was particularly persuaded by the FCC's argument that "verdicts that would hold defendants liable for damages for bodily injury caused by cell phones that met the FCC RF radiation limit 'would necessarily upset [the] balance [the agency struck] and . . . contravene the policy judgments of the FCC' regarding how safely and efficiently to promote wireless communication." 982 A.2d at 777 (citing FCC Amicus Br.). The same concerns are not implicated in this

case, in which a jury is not asked to find that the FCC SAR standard is insufficient or that FCC-certified phones are unsafe.

In sum, defendants have not shown that plaintiff's claims ask a jury to second guess the balance struck by the FCC or to question the SAR level it adopted. They have not shown a clear conflict between a jury verdict on plaintiff's claims and Congressional or FCC purposes in setting safety standards for cell phone SAR levels. Accordingly, plaintiff's claims are not preempted.

IV. PLEADING STANDARD

Each manufacturer defendant argues that the Court should dismiss the complaint because it does not provide fair notice of plaintiff's claims against it. To address this issue, the Court first considers the question of whether the complaint must meet the requirements of Super. Ct. Civ. R. 9(b), which provides:

In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

There exists no controlling authority on the question of whether complaints alleging misrepresentations or omissions under the CPPA, § 28-3904(a), must satisfy Rule 9(b). Each side cites a case that tends to support its position but the case cited does not provide an authoritative holding.

Plaintiff relies on Murray, supra, where the court decided that the complaint there satisfied the notice pleading standards under Super. Ct. Civ. R. 8(a)(2), as interpreted in Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007). See 982 A.2d at 783 n.32. But there is no evidence from the Murray opinion that the court was presented with the question of whether Rule 9(b) governed.³

Defendants have somewhat stronger authority from Washkoviak v. Student Loan Mktg. Ass'n, 849 A.2d 37, 39 (D.C. 2004). That case upheld the dismissal of three counts of a complaint, one of which alleged a material omission in violation of § 28-3904(f) of the CPPA. As to that count, the court remanded with direction to the trial

³ Plaintiff also cites language from the dissenting opinion in Adams v. A.B. & A., Inc., 613 A.2d 858, 866 (D.C. 1992), which is obviously not controlling. Fort Lincoln Civil Ass'n Inc. v. Fort Lincoln New Town Corp., 944 A.2d 1055, 1073 n.20 (D.C. 2008), also does not control the decision here since it did not face the issue presented.

court to “grant[] leave to amend . . . [so that plaintiffs], if they can do so consistently with Super. Ct. Civ. R. 11, . . . plead fraud or misrepresentation with particularity.” Id. at 39. Although this is a clear signal that the court was thinking of the particularity requirement of Rule 9(b), there is no evidence from the court’s opinion or from that of the lower court that either court actually was presented with the issue of whether Rule 9(b) applied.

The particularity requirement of Rule 9(b) applies to “all averments of fraud or mistake.” Some courts have pointed out that “averments” is not the same as “claims” and therefore that a complaint need not claim fraud in order to occasion the requirements of Rule 9(b). See, e.g., Rombach v. Chang, 355 F.3d 164, 170–71 (2d Cir. 2004); Borsellino v. Goldman Sachs Group, Inc., 477 F.3d 502, 507 (7th Cir. 1996). Accordingly, these courts reason, the issue is not whether there is a claim of fraud but rather whether the allegations in the complaint describe “fraudulent conduct” so that that the complaint “sounds in fraud.” If so, the particularity requirements of Rule 9(b) apply. Id.

As defendants point out, several courts have held that averments under state consumer protection acts sound in fraud or are akin to fraud and therefore are subject to Rule 9(b). See, e.g., Nahigian v. Juno Loudoun, LLC, 684 F. Supp. 2d 731, 741 (E.D. Va. 2010) (Virginia Consumer Protection Act); Haley v. Corcoran, 659 F. Supp. 2d 714, 724 & n.10 (D. Md. 2009); Naporano Iron & Metal Co. v. American Crane Corp., 79 F. Supp. 2d 494, 510 (D.N.J. 1999); Burton v. R.J. Reynolds Tobacco Co., 884 F. Supp. 1515, 1524 & n.8 (D. Kan. 1995). Indeed, two judges from the federal court in this jurisdiction have applied Rule 9(b) to the CPPA. See Carroll v. Freemont Inv. & Loan, 636 F. Supp. 2d 42, 52 n.2 (D.D.C. 2009); Witherspoon v. Phillip Morris, Inc., 964 F. Supp. 455, 463-64 (D.D.C. 1997).

Plaintiff, on the other hand, points to other cases in this jurisdiction holding that Rule 9(b) does not apply to complaints under the CPPA. These cases rest on the fact that complaints under the CPPA are not fraud claims and that the elements of fraud need not be satisfied to prevail. See Hoyte v. Yum! Brands, Inc., 489 F. Supp. 2d 24, 27 n.5 (D.D.C. 2007); Wells v. Allstate Inc. Co., Civ.

No. 00760-LFO, slip. op. at 3 (D.D.C. May 23, 2002); see also Margolis v. U-Haul Int'l. Inc., No. 2007 CA 005245, slip op. at 2 (D.C. Super. Ct. Dec. 17, 2009). And there are also cases from other jurisdictions holding that Rule 9(b) does not apply to claims under the state's deceptive trade practices statute. These cases also rest, at least in part, on the fact that the elements of the claim are not those of a fraud claim of the state within that jurisdiction. See, e.g., Nordberg v. Trilegiant Corp., 445 F. Supp. 2d 1082, 1097 (N.D. Cal. 2006); CPB Res., Inc. v. SGS Control Servs., 394 F. Supp. 2d 733, 739-40 (M.D.N.C. 2005); Fed. Paper Bd. Co. v. Amata, 693 F. Supp. 1376, 1390 (D. Conn. 1988).

While strong arguments can be made on both sides of this issue, this Court is persuaded that it should look to the elements of a claim under the CPPA to determine whether Rule 9(b) applies.

The elements of a fraud claim are (1) a false representation or willful omission of a material fact; (2) knowledge of the falsity; (3) an intention to induce reliance; and (4) action taken in reliance on the representation. Howard v. Riggs Nat'l Bank, supra, 432

A.2d at 706. To prove a violation of the relevant subsections of the CPPA, the plaintiff must prove a misrepresentation or omission of a material fact that has a “tendency” or “tends to” mislead. D.C. Code § 28-3904(e)-(f). She need not prove reliance, since she need not prove that the misrepresentation misled or deceived the consumer. § 28-3904. Nor need she prove an intent to deceive. Fort Lincoln Civic Ass’n, Inc. v. Fort Lincoln New Town Corp., 944 A.2d 1055, 1073 & n.20 (D.C. 2008) (intent to deceive and scienter not elements of § 28-3904(e) and (f)).

Given the elements of the CPPA, the Court is persuaded that Rule 9(b)’s requirements do not apply in this case. In Pelman v. McDonald’s Corp., 396 F.3d 508 (2d Cir. 2005), the court considered whether Rule 9(b) applied to a complaint brought under New York General Business Law § 349. The court ruled:

Unlike a private action brought under § 350, a private action brought under § 349 does not require proof of actual reliance Additionally, because § 349 extends well beyond common-law fraud to cover a broad range of deceptive practices . . . and because a private action under § 349 does not require proof of the same essential elements (such as reliance) as common-law

fraud, an action under § 349 is not subject to the pleading-with-particularity requirements of Rule 9(b), Fed. R. Civ. P., but need only meet the bare-bones notice-pleading requirements of Rule 8(a), Fed. R. Civ. P

Id. at 511. This reasoning applies equally here, and the Court will follow it.

Each defendant argues that it is not on adequate notice because plaintiff has used “group pleading” in her claim and has not identified the time, place and circumstances of the representations and omissions. Since Rule 9(b) does not apply, there exists no support for the proposition that the plaintiff needs to plead time, place and circumstances. Defendants have cited cases in which group pleading was not sufficient.⁴ Each case turns on the allegations in the complaint. Here, it is clear that plaintiff is, for the most part, alleging that each defendant itself committed the same wrong in not providing material information to the consumer about the safety debate or about potential risks, or in minimizing information that might be adverse to defendants’ claims of safety. The court’s comment in Crowe

⁴ See, e.g., Martinez v. City of Orlando, No. 6:09-CV-802-ORL-22GJK, 2009 WL 3048486, at *8 (M.D. Fla. Sept. 21, 2009); Infanti v. Scharpf, No. 06 CV 6552 (ILG), 2008 WL 2397607, at *2 (E.D.N.Y. June 10, 2008); Lane v. Capital Acquisitions & Mgmt. Co., No. 04-60602 CIV, 2006 WL 4590705, at *5 (S.D. Fla. Apr. 14, 2006).

v. Coleman, 113 F.3d 1536, 1539 (11th Cir. 1997), is pertinent: "When multiple defendants are named in a complaint, the allegations can be and usually are to be read in such a way that each defendant is having the allegation made about him individually."

Notice pleading under Super. Ct. Civ. R. 8(a), like notice pleading under Fed. R. Civ. Proc. 8(a),

relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims. "The provisions for discovery are so flexible and the provisions for pretrial procedure and summary judgment so effective, that attempted surprise in federal practice is aborted very easily, synthetic issues detected, and the gravamen of the dispute brought frankly into the open for the inspection of the court."

Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512-13 (2002)

(quoting 5 C. Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1202, at 76 (2d ed. 1990))

(internal citations omitted). Using discovery, defendants will be able to determine precisely the allegations made against each one of them.

V. CHOICE OF LAW

Defendants move to dismiss on the ground that, because plaintiff has not alleged that she bought any cell phone in the District of Columbia, the CPPA does not apply to her. Defendants rely on Gomez v. Independence Mgmt. of Del., Inc., 967 A.2d 1276, 1287 (D.C. 2009), for the proposition that “unless [plaintiff] can allege that she purchased her phone within the District of Columbia, she cannot state a claim under the CPPA.” (Defs.’ Mem. at 28.) Gomez held that the CPPA did not apply to a claim brought by a tenant association in connection with a landlord’s failure to offer its property for sale to its tenants. Id. at 1285-87. It does not stand for the proposition defendants assert.

In their reply memorandum, defendants cite Nelson v. Nationwide Mortgage Corp., 659 F. Supp. 611, 616-17 (D.D.C. 1987), which refused to apply the CPPA to a loan transaction between a District of Columbia resident and Virginia corporations. In that case, the transactions and meetings took place in Virginia, but the mortgaged house was in the District and the money loaned was to be used in the District. The court held:

It is undisputed that both Nationwide and Family Federal are Virginia corporations, and that the relevant transactions occurred in Virginia. Consequently, the District of Columbia statute would have to be given broad extraterritorial effect if it were to apply here. Nothing in the statute or interpretative case law indicates such a legislative intent, and absent such affirmative evidence the Court will not presume that the statute was intended to apply to every commercial transaction involving a District of Columbia resident, wherever and with whomever that transaction occurs.

Id. at 616-17.

Plaintiff points out that another judge on the same court on similar facts reached the opposite conclusion, explicitly disagreeing with the conclusion reached in Nelson. Williams v. Central Money Co., 974 F. Supp. 22, 27 (D.D.C. 1997). In Williams v. First Gov't Mortgage & Investors Corp., 176 F.3d 497 (D.C. Cir. 1999), the court, employing this jurisdiction's "governmental interests" analysis,⁵ affirmed that ruling. It explained that the mortgage company subjected itself to District consumer protection laws when it issued a loan to a D.C. resident with D.C. property as collateral, and that the District's interest in protecting its residents from predatory lending

⁵ See Dist. of Columbia v. Coleman, 667 A.2d 811, 816 (D.C. 1995).

practices was at least as strong as Maryland's interest in ensuring that its lenders behaved fairly. Id. at 499. In view of these cases, the holding in Nelson is of questionable value. See Shaw v. Marriott Int'l, Inc., 474 F. Supp. 2d 141, 149 n.10 (D.D.C. 2007).

Defendants also rely on Shaw v. Marriott Int'l, Inc., 570 F. Supp. 2d 78, 87 (D.D.C. 2008), and Cooper v. Farmers New Century Ins. Co., 593 F. Supp. 2d 14, 23-24 (D.D.C. 2008). Neither of these cases supports defendants' position. While the alleged illegal trade practices did take place outside the District, the critical difference between those cases and this one is that the plaintiffs in those cases were not residents of the District. 570 F. Supp. 2d at 87; 593 F. Supp. 2d at 23-24 & n.11.

Plaintiff has alleged that the defendants "promot[ed], market[ed], and distribut[ed]" cell phones in the District, as well as throughout the country. (SAC ¶¶ 9-15.) The Court plausibly can infer from this and other allegations in the complaint that the plaintiff, herself a resident of the District, or other members of the general public residing in the District on whose behalf plaintiff sues, received in the District some if not all of the

communications which included misrepresentation or omitted allegedly material information. The Court further can infer from her residence and that of members of the general public on whose behalf she sues that the use of cell phones would be principally in the District.

Defendants have cited no case that stands for the proposition that the CPPA is not intended to reach the plaintiff given these allegations, whether or not she bought cell phones in the District. If this were a case in which plaintiff or District consumers both received the misrepresentations and relied on them in the District, those facts, together with residence in the District, would leave little doubt that the District's law should apply. See Restatement (Second) Conflict of Laws, § 148(a); Washkoviak v. Student Loan Marketing Ass'n, 900 A.2d 168, 182 n.18 (D.C. 2006) (§ 148 is a useful guide, though not to be applied mechanically) (citing Hercules & Co. v. Shama Restaurant Corp., 566 A.2d 31, 43 (D.C. 1989)). As pointed out above, p. 26, reliance need not be proved under the CPPA. Accordingly, the place where the misrepresentation was received, and the residence in the District of the plaintiff and those on whose behalf she sues – “the general

public" – are the most important factors. These, along with the fact, inferable from residence itself, that the cell phones were used in the District, lead the court to conclude that the District's law applies. See Washkoviak, supra, 900 A.2d at 181-82 (qualitative analysis, not counting contacts, is task of court in deciding which jurisdiction has the more significant relationship). The District's interest in protecting its consumers from misrepresentations is at least as strong as the place where the defendants, who market nationwide, are incorporated or have their principal place of business, or the place where plaintiff bought her cell phone. See also Restatement (Second) Conflict of Laws § 148 (2) and cmts. (e)-(j) (1971).⁶

VI. CTIA

Plaintiff's complaint contains several claims that CTIA violated the CPPA. Plaintiff lumps CTIA with all defendants in her general allegation that it and the

⁶ To the extent that the defendants raised at oral argument the contention that plaintiff has not shown standing to bring her action under the CPPA as amended in 2000, the Court will not consider it since it was not raised in the motion, the memorandum or the reply. See Maher v. Int'l Paper Co., 600 F. Supp. 2d 940, 948 (W.D. Mich. 2009); Probst v. Cent. Ohio Youth Ctr., 511 F. Supp. 2d 862, 871 (S.D. Ohio 2007).

manufacturer defendants promoted cell phones without disclosing the existence of the debate about safety risks associated with cell phone use. (SAC ¶¶ 2,3.) The complaint then details the instances over two decades in which, plaintiff alleges, CTIA violated the CPPA by misrepresentations or omissions. (SAC. ¶¶ 21, 38, 41, 43, 44, 54-56, 59, 60, 70-73, 160.)

Although D.C. Code § 28-3904 makes it unlawful for “any person” to violate its provisions, the court in Howard v. Riggs Nat’l Bank, 432 A.2d 701 (D.C. 1981), held that only a “merchant,” as defined in § 28-3901(a), is subject to liability. Id. at 709-10. A “merchant” is

a person who does or would sell, lease (to), or transfer, either directly or indirectly, consumer goods or services, or a person who does or would supply the goods or services which are or would be the subject matter a trade practice[.]

§ 28-3901(a)(3).

The complaint describes CTIA as a “non-profit industry association.” In Save Immaculata/Dunblane, Inc. v. Immaculata Preparatory School Inc., 514 A.2d 1152, 1159 (D.C. 1986), the court held that a nonprofit educational institution was not a “merchant” and therefore could not be

held liable under the CPPA. In Schiff v. AARP, 697 A.2d 1193, 1197 (D.C. 1997), the court held that the holding in Save Immaculata/Dunblane, Inc. was not limited to educational nonprofits but applied to all nonprofits. See Snowder v. Dist. of Columbia, 949 A.2d 590, 599-600 (D.C. 2008).

In reaction to this line of cases, the City Council of the District of Columbia enacted the Nonprofit Organizations Oversight Improvement Act of 2007, D.C. Act No. 17-53, 54 D.C. Reg. 4085 (May 4, 2007), which went into effect on June 12, 2007. That act amended the definition of "merchant" so that it now reads "a person, whether organized or operating for profit or for a nonprofit purpose" D.C. Code § 28-3901(a)(4) (Supp. 2009). Although this change would make CTIA a "merchant" if it otherwise met the definition of the term, the issue is whether the June 12, 2007 amendment is retroactive.

Defendants accurately point out that

[s]tatutes are not to be given retroactive effect or construed to change the status of claims fixed in accordance with earlier provisions unless the legislative purpose so to do plainly appears.

Dist. of Columbia v. Gallagher, 734 A.2d 1087, 1093 (D.C. 1999). “[A] retrospective operation will not be given to a statute . . . unless such be the unequivocal and inflexible import of the terms.” Mayo v. D.C. Dep’t of Employment Servs., 738 A.2d 807, 811 (D.C. 1999) (internal quotations and citation omitted). In Childs v. Purll, 882 A.2d 227, 228 (D.C. 2005), the court applied these principles in holding that an amendment to the CPPA extending its reach to deceptive practices in real estate sale and lease transactions would not be applied retroactively.

Although plaintiff is correct in arguing that the June 2007 amendment to the CPPA was intended to reverse the holdings excluding nonprofits from the definition of “merchant,” she points to nothing in the CPPA itself or its legislative history plainly evidencing a legislative purpose to make the amendment retroactive. Her citation to State ex rel. Turner v. Limbrecht, 246 N.W.2d 330, 332 (Iowa 1976), is unhelpful to her. That decision gave retroactive effect to provisions that the Iowa court regarded as procedural, not substantive, and thus subject to an exception to the general rule that statutes are to be given prospective effect only. Id. at 333. District of

Columbia law also allows a court to give retroactive effect to a law that is procedural and does not create new or take away vested rights. Edwards v. Lateef, 558 A.2d 1144, 1146-47 (D.C 1989). The amendment to the CPPA providing a new cause of action against nonprofits is not procedural and therefore does not fit within the principle on which the plaintiff relies. Accordingly, the Court holds that CTIA is not subject to liability for any acts or omissions occurring before June 12, 2007.⁷

Plaintiff has alleged that CTIA made a misrepresentation in September 2009 (SAC ¶ 107) and has alleged generally that it and the other defendants "have" omitted material facts, and "have" made misrepresentations. The complaint thus contains allegations that can be read to claim that CTIA violated the CPPA by misrepresentations and omissions occurring since June 12, 2007. The Court therefore must decide whether CTIA may be found liable for that conduct.

As just observed, the June 12, 2007 amendment made clear that a nonprofit can be a "merchant" so long as it

⁷ At oral argument, counsel for the plaintiff argued that the law before the court decided Save Immaculata/Dublane, Inc. was that nonprofits were "merchants." This argument is meritless. Courts "'decide cases according to existing law.'" Thorpe v. Housing Auth. of City of Durham, 393 U.S. 268, 282 (1969) (quoting United States v. Schooner Peggy, 5 U.S. 103, 110 (1801)).

otherwise satisfies the definition of that term. To qualify as a "merchant," CTIA must "sell . . . either directly or indirectly" cell phones, which are "consumer goods."

Plaintiff does not allege that CTIA sells cell phones directly but does say that it does so "indirectly" by operating as the marketing arm of the cell phone manufacturers. She alleges that CTIA's members are the manufacturer defendants, that at least one of those defendants has a representative on CTIA's board of directors, and that CTIA

has served as the voice of the industry, coordinating and disseminating to consumers the industry's wireless phone safety and health information.

(SAC ¶ 16.) She alleges that CTIA "defines and publishes test plans, authorizes and manages test labs, and defines and implements device certification programs for Manufactur[er] Defendants." Id.

The CTIA operates an equipment testing and certification program regarding SAR levels and the protocols set by the FCC. The CTIA has prepared, directed, conducted, reviewed and funded scientific testing and research on behalf of the manufacturers, which results were

ultimately distributed to consumers. The CTIA's efforts serve the marketing interests of the industry by attempting to influence consumers' purchasing decisions and promote the overall health of the wireless industry. The CTIA's actions . . . have affected the sale of [cell phones] by the Manufacturing Defendants, and have influenced consumers' purchases of [cell phones]. The CTIA's representations to the marketplace regarding [cell phones] materially impacted the point of sale, induced the transaction, and, as such, binds the CTIA as an indirect merchant to Manufacturing Defendants' transactions.

(SAC ¶¶ 16, 17.) The complaint contains several specific allegations about CTIA's statements to the public media, to Congress, and to others on the subject of the safety of cell phones.

In Howard, supra, the court held that the term "'merchant' is not limited to the actual seller of the goods or services complained of" but includes those "connected with the 'supply' side of a consumer transaction.'" 432 A.2d at 709 (quoting Council of the Dist. of Columbia, Comm. on Pub. Services and Consumer Affairs, Report on Bill 1-253, at 13 (Mar. 24, 1976) ("Committee Report")). The court reached this conclusion,

as indicated by its quotation, after studying the legislative history of the CPPA. Plaintiff is correct that CTIA is "connected with" the "supply side" of the transaction in that, according to the complaint, it acts as the research arm of the manufacturer defendants who do sell cell phones, coordinates and disseminates their statements to the public, the Congress and the FCC about cell phone safety, and directly makes representations in the media about the subject that "materially impact the point of sale." (SAC ¶¶ 16-17.) If "connected with the 'supply' side" could be read so broadly as to include this kind of activity, CTIA would be a "merchant."

The Court is of the opinion, however, that "connected with" cannot be read that broadly. The court in Howard faced the issue of whether any "person" could be held liable for a deceptive trade practice, as the language of § 5 of the CPPA, read literally, provided. The court concluded from the legislative history that "merchant[]," not "person," was the operative term. 432 A.2d at 708. Then, seeking a meaning for "merchant," the court referred to § 6 of the CPPA, which, in prescribing the complaint procedure at the administrative level, referred to the

"respondent" as a merchant or merchants who took part in or carried out a trade practice, and "'other persons who may be deemed legally responsible for the trade practice.'" Id. at n.9 (quoting § 2(a)(5) of the CPPA, defining "respondent"). When the plaintiff/appellant in Howard argued that this language could include a disinterested party like Riggs Bank who recommended to the plaintiff the offending "merchant," the court pointed to the Committee Report, which explained that the "respondent" in an administrative proceeding was "'the merchant, or another merchant further along the supply chain who is deemed legally responsible under relevant substantive law.'" Id. (quoting Committee Report at 14). The court then said that "[t]his definition is summarized in the Committee Report

(3) "merchant" is a person on the "supply side" of a consumer transaction.

Id. (quoting Committee Report at 13). After reciting this history, the court concluded that "merchant" meant any person "connected with the 'supply' side of a consumer transaction.'" Id.

This Court is of the opinion that "connected with the supply side" means a person who is the seller or provider of services⁸, one who controls the sale or provision of services to the consumer, or one who is "further along the supply chain." Thus, for example, the pharmacy companies in Williams v. The Purdue Pharma Co., 297 F. Supp. 2d 171 (D.D.C. 2003), who both sold drugs to the doctors who supplied them to patients and marketed those drugs to patients were "further along the supply" chain that led to the sale of drugs to patients. Id. at 175; see also Jones v. Sportelli, 399 A.2d 1047, 1050 (N.J. Super. Ct. Law Div. 1979) (intrauterine device manufacturer liable under New Jersey law for "indirect attempt to sell" to consumer); Kociemba v. G.D. Searle & Co., 680 F. Supp. 1293, 1305 (D. Minn. 1988) (semble). A franchisor who exercises control over a franchisee's dealings with customers is an indirect seller as well. Maryland v. Cottman Transmission Systems, Inc., 587 A.2d 1190, 1197-98 (Md. Ct. Spec. App. 1991).

The makers of the cell phones sold to plaintiff and other District of Columbia consumers were the cell phone

⁸ As illustrated in Adam A. Wechsler & Sons v. Klank, 561 A.2d 1003 (D.C. 1989), a person participating in a sale need not actually have title to the property to qualify as one clearly connected to the sale. In that case, an auctioneer that conducted the sale qualified as a merchant whether it held title to the property or sold it on commission. Id. at 1004.

manufacturers, who are further up the supply chain from those who actually sold the cell phones. They are clearly merchants because they are indirect sellers. But CTIA is not a merchant because it is not "further along the supply chain" from the point of sale. It is not alleged to have manufactured or sold any cell phones. Nor is it alleged to have exercised any control over the sale of cell phones. True, it is "connected with" – perhaps even tightly connected with – the supply chain in the way plaintiff has alleged. But the Court would be unduly stretching the reach of the CPPA, as illuminated by its legislative history and Howard, if it construed the CPPA to reach CTIA.

Defendants citation to D.C. Code § 28-3905(k)(5) further supports their position insofar as nonprofits are concerned. Section 28-3905 sets forth the procedures for the adjudication of complaints brought in the administrative process, and, as seen above, illuminates legislative intent. Section 28-3905 was amended to add subsection (k)(5) in the June 2007 amendment as a companion to the change in the definition of "merchant" to make clear that nonprofits are not necessarily excluded from liability under the CPPA. The subsection now reads:

An action brought by a person under this subsection against a nonprofit organization shall not be based on membership in such organization, membership services, training or credentialing activities, sale of publications of the nonprofit organization, medical or legal malpractice, or any other transaction, interaction, or dispute not arising from the purchase or sale of consumer goods or services in the ordinary course of business.

Section 28-3905(k)(5) (Supp. 2009). Defendants point to letters to the District of Columbia City Council from then-mayor Anthony Williams and testimony from Bennett Rushkoff, Chief of the Consumer Protection Section of the Office of the Attorney General, stating that the need to make nonprofits "merchant[s]" arose from their selling products and services to consumers as for-profit enterprises do.⁹

Defendants cite two cases that support their position. In Newman v. Motorola, Inc., 125 F. Supp. 2d 717 (D. Md. 717), the court considered whether CTIA was a "merchant"

⁹ See Letter from Anthony A. Williams, Mayor, Dist. Of Columbia, to Linda W. Cropp, Chairman, Council of the Dist. of Columbia (May 4, 2006) ("Many nonprofit organizations, such as hospitals, schools, and counseling agencies, provide consumers with services for a fee."); Testimony of Bennett Rushkoff, at 7 ("By eliminating the judicially-created exemption from nonprofits, we can provide consumers who purchase from nonprofit businesses with the same legal protections as consumers who purchase from for-profit businesses.") Both of these sources are attached to plaintiff's opposition as Exhibit D.

under the Maryland Consumer Protection Act, Md. Code Ann., Com. Law II §§ 13-101, et seq. Maryland's law, like the District's in respects relevant to the present issue, defines a "merchant" as "a person who directly or indirectly either offers or makes available to consumers any consumer goods, consumer services, consumer realty or consumer credit." Md. Code Ann., Com. Law II § 13-101(g). The court held that CTIA was not a merchant. 125 F. Supp. 2d at 724. Hogan v. Md. State Dental Ass'n, 843 A.2d 902 (Md. Ct. Spec. App. 2004), was an action alleging that the Maryland Dental Association deceived consumers by concealing the fact that dental fillings contained toxic mercury. Plaintiffs made allegations similar to those in this case: that the association violated the Maryland act by failing to warn the public of danger and suppressing information about it. Following Newman, supra, the court held that the association was not a "merchant" because "it did not sell or offer to sell." Id. at 563. Plaintiff's allegation that the association "took 'an active role in controlling' how member dentists practiced their profession" was insufficient to show that it was a "merchant" because it was not "tantamount to an offer to

sell or sale.” Id. at 906. Plaintiff’s attempt to distinguish or limit these holdings is unpersuasive.

Unlike the defendants, plaintiff cites no case under a consumer protection statute supporting her position that a trade association can be held liable. All the cases she cites involve negligence claims against associations and the issue before the courts was whether to hold that the association had a duty to the plaintiff.¹⁰ In the present case, the Court is not called on to make a decision under the common law as to whether, considering factors such as foreseeability, a duty should be imposed on CTIA not to make material misrepresentations or omissions. It is the statute that imposes a duty, and the Court is required to construe its words and structure in light of its legislative history to determine legislative purpose or intent.

The Court is aware that the CPPA should be “construed and applied liberally to promote its purpose.” D.C. Code § 28-3901(c). The purpose most relevant to this case is to

¹⁰ See, e.g., Jappell v. American Ass'n of Blood Banks, 162 F. Supp. 2d 476 (E.D. Va. 2001); Cofield v. Lead Indus. Ass'n, Inc., No. Civ. A. MJG-99-3277, 2000 WL 34292681 (D. Md. Aug. 17 2000); Evenson v. Osmose Wood Preserving, 760 F. Supp. 1345, 1349 (S.D. Ind. 1990).

“assure that a just mechanism exists to remedy all improper trade practices and deter the continuing use of such practices.” D.C. Code § 28-3901(b)(1). The statute defines a “trade practice” as

[a]ny act which does or would create, alter, repair, furnish, make available, provide information about, or, directly or indirectly, solicit or offer for or effectuate, a sale, lease or transfer, of consumer goods or services.

D.C. Code § 28-3901(a)(7). As illustrated by Howard v. Riggs Bank, supra, not any act that “provide[s] information” about a sale or service is within the scope of the purposes of the statute. There, the bank’s employee provided information to the customer about a contractor she could hire. Nevertheless, the court gave a “narrow construction” to the term “merchant” because not to do so would be inconsistent with the intent of the City Council. Id. at 710 & n.11. This Court has attempted to do likewise in the present case.

VII. SAFETY DEBATE

One of defendants’ alleged violations of the CPPA is conduct in relation to what plaintiff claims is and has

been an "important safety debate raging within the industry[] (many details of which have been known or are currently known only to industry insiders)." (SAC ¶ 5.) Plaintiff claims that defendants have "failed to disclose to consumers that . . . industry experts and scientific study results differ as to the risks and 'biological effects' that might arise from [cell phone] use." (SAC ¶ 3.) She alleges that, despite knowledge of "the debate regarding the biological effects caused by the low-level RFR emitted by Defendants' [cell phones]," defendants failed to take the "simple step" of disclosure to the consumer about the "existence and implications of this debate." (SAC ¶ 40.) She says that "[d]efendants continue to deny that a debate exists over the potential risks and harms posed by [cell phones]" and "refus[e] to acknowledge and disclose the debate over the potential risks and harms posed by [cell phones]." (SAC ¶¶ 91, 108.)

As previously discussed, D.C. Code § 28-3904(e) makes it a violation for a merchant to "misrepresent as to a material fact which has a tendency to mislead." Section 28-3904(f) makes it a violation to "fail to state a material fact if such failure tends to mislead." Plaintiff

claims that defendants' failure to disclose the fact of the safety debate, and its denial of the fact of the safety debate, were material omissions and misrepresentations that violated these provisions.¹¹

Defendants move to dismiss these claims on the ground that "according to [plaintiff's] own allegations, the general public was already well aware of the alleged 'safety debate' long before the October 19, 2000 effective date of the Amended CPPA." (Defs.' Mem. at 15.) They argue that since the safety debate was already well known, the alleged omissions and misrepresentations "cannot have been material." (Defs.' Reply at 15.)

In making this argument, defendants rely on the allegations in the complaint itself. In addition, they rely on documents to which the complaint refers, as they are allowed to do. Pisciotta v. Shearson Lehman Bros., 629 A.2d 520, 525 n.10 (D.C. 1993). The Court may use these documents in determining defendants' Rule 12 (b)(6) motion without converting it to one for summary judgment.

¹¹ Plaintiff also argues that a misrepresentation that no scientific debate exists is a violation of § 28-3904(u), which makes it a violation to "represent that the subject of a transaction has been supplied in accordance with a previous representation." The Court does not see the applicability of this provision to the conduct alleged, but it need not reach that issue for purposes of deciding the issue presented.

Chamberlain v. American Honda Finance Corp., 931 A.2d 1018, 1025 (D.C. 2007); Washkoviak v. Student Loan Marketing Ass'n, 900 A.2d 168, 178 (D.C. 2006) ("The trial court's consideration of appellants' promissory notes, which Sallie Mae attached to its motion to dismiss, was insufficient to convert Sallie Mae's 12 (b)(6) motion into a motion for summary judgment, because appellants themselves referred to the promissory notes in their original complaint."); Oparaugo v. Watts, 884 A.2d 63, 76 n.10 (D.C. 2005) (court may consider documents that "were referenced in the complaint and are central to appellant's claim").

Although defendants are allowed to proceed in this fashion, the Court still must determine the motion to dismiss in accord with familiar standards. "[L]ike the trial court, we must construe the complaint in the light most favorable to the plaintiff, while taking the facts alleged in the complaint as true." Casco Marina Dev., L.L.C. v. D.C. Redevelopment Land Agency, 834 A.2d 77, 81 (D.C. 2003) (citing Cauman v. George Washington Univ., 630 A.2d 1104, 1105 (D.C. 1993)). "Any uncertainties or ambiguities involving the sufficiency of the complaint must be resolved in favor of the pleader, and generally, the

complaint must not be dismissed because the court doubts that plaintiff will prevail." Atkins v. Industrial Telecommunications Ass'n, Inc., 660 A.2d 885, 887 (D.C. 1995)(citing McBryde v. Amoco Oil Co., 404 A.2d 200, 203 (D.C. 1979)).

The Court will summarize the pertinent allegations of this very long complaint, referring also to the documents to which the complaint refers.

The complaint describes "numerous studies and experiments that demonstrated the health risks and biological effects of RFR dating back to the late 1920's." (SAC ¶ 31.) Research and studies "over the ensuing decades [revealed] adverse biological effects result[ing] from exposure to varying levels of RFR" and "[b]y the early 1960's, it was believed in the scientific and medical communities that RFR is absorbed into human tissue and is capable of producing biological effects." (SAC ¶ 32.)

From the 1960s to the present "dozens of peer-reviewed research papers were published . . . rais[ing] serious and credible questions regarding whether the RFR, to which [cell phone] users were and are exposed, posed a risk to health," but defendants suppressed or minimized this

science. (SAC ¶¶ 34, 35.) In the 1990's, "consumers began inquiring into the connection between cell phone use and brain tumors," and "the cell phone industry," falsely, countered with statements that "thousands of studies had proven cell phones safe." (SAC ¶ 36.) In the 1990's, "credible concerns continued to surface regarding the safety of [cell phones]," and defendants "with great public fanfare" funded a study to prove their safety. (SAC ¶ 37.) A Dr. George Carlo was appointed by CTIA to direct a group (named the Science Advisory Group but later known as Wireless Technology Research, L.L.C. – WTR) to conduct the study. (SAC ¶¶ 37-38, 47.) The study failed to corroborate the industry's safety claim and "in fact, presented new evidence of potential health concerns." (SAC ¶ 38.) The industry terminated the research, "publicly disparage[ed] Dr. Carlo," and "suppress[ed] and minimize[ed] the results of his studies." (Id.)

Defendants did not disclose to the public the existence of the debate over the biological effects caused by low-level emissions of RFR from cell phones. The U.S. Food and Drug Administration ("FDA") urged them to do so, but they failed or refused to comply, and, in fact, in 1993 CTIA

held a press conference and issued a report stating in bold: "Rest Assured. Cellular cell phones are safe!" (SAC ¶ 41.) This press conference prompted the FDA to send a letter to CTIA "which clearly questioned and challenged the false and misleading statements made by the Defendants to the public regarding the 'safety' of [cell phones]." (SAC ¶ 42.) The concluding sentence of the letter stated: "I think it is very important that the public understand where we stand in evaluating the possibility that cellular phones might pose a health risk." (Id.)

More studies came out. One study showed "that cell phone radiation causes damage to DNA in human blood cells." (SAC ¶ 44.) The study was sent to the defendants, but they did not disclose it to the public, and "attempted to prevent publication of the paper." (Id.) Defendants then funded other research to test that study, which confirmed its findings. Defendants did not release the results. (SAC ¶ 44.) There was another study in 1994, three in 1996, and three in 1998, all showing in one way or another a risk to health from radiation like that emitted from cell phones. The defendants either made none of them public or

did not amend its public position that cell phones were "biologically inactive and safe." (SAC ¶¶ 46, 48-50.)

Meanwhile, Dr. Carlo, an "industry insider," "declared . . . that his research established a correlation between cancer and [cell phone use]." (SAC ¶ 53.) His research "indicated that [cell phone] radiation could triple the number of chromosomal abnormalities in human blood." (Id.) In February 1999, he presented his findings at CTIA's trade show. In response to that presentation, one company whose 120 stores sold cell phones put into place procedures under which all customer received "a single-page health and safety bulletin that explains the possible dangers of using cell phones." (SAC ¶ 54.) The defendants complained about Dr. Carlo's procedures and tried to discredit his work and his abilities. (SAC ¶ 55.)

ABC planned a television program "about cell phone health risks." CTIA sent a letter to ABC listing its concerns, attacking Dr. Carlo's credibility, and questioning his motives. (SAC ¶ 58.) It asked ABC to delay the program. When it refused, CTIA president Thomas Wheeler went on the program and "declared that 'there is nothing that has come up in the research that suggests that

there is a linkage between the use of a wireless phone and health effects" (SAC ¶ 59.) He also said, misleadingly, that responsible scientists "'say there is not a public-health effect.'" (Id.)

That program included interviews with Dr. Carlo and other scientists who raised issues about the safety of cell phones, as well as with scientists, and Wheeler, who supported the conclusion that science did not show that cell phones were unsafe. The reporter for the program stated in the introductory phase of the program that

[w]hen cell phones first came out, it was widely assumed there couldn't be a risk because the power or radiation they produce was so low. But now that assumption is very much being called into question by several new scientific studies, which, while still preliminary, are regard[ed] by some scientists as quite troubling.

(Defs.' Ex. 8 at 2.)

In November 1999, Dr. Carlo released a book in which he "describ[ed] in detail his time at WTR, the research and methodology used by him, and the impediments and hurdles placed by the [cell phone] industry to that research." (SAC ¶ 57.) CTIA "continued the media campaign against [him]." (SAC ¶ 58)

More studies about risks of adverse health effects occurred in 2000 and 2001. (SAC ¶¶ 61, 62.) Lawsuits were filed raising concerns about the biological effects of RFR. (SAC ¶ 63). As a result, some of the manufacturing defendants began to provide purchasers with a copy of the FDA's 2000 "Update on Mobile Phones" (dated October 2000), inserting the update as part of the packaging for cell phones. (Id.) The update, quoted in part in the complaint, states that cell phones emit low levels of RF, that levels of such emissions can produce biological damage, but "'it is not known whether, to what extent, or through what mechanism, lower levels of RF might cause adverse health effects'" and "the available science does not allow us to conclude that mobile phones are absolutely safe" (SAC ¶ 64.) "'The existing scientific evidence is conflicting'" about whether handheld cell phones might be harmful and "'many of the studies that have been done to date have suffered from flaws in their research methods.'" (Id.)

In the summer of 2000, "CNN's Larry King Live aired a story on cell phones and their health risks." (SAC ¶ 66.)

Defendant Motorola issued a misleading statement to the program saying that scientific studies over the years "have not wavered from the longstanding conclusions that the lower-power radio signals from wireless phones pose no known health risk.'" (Id.)

The Larry King program included an interview with a physician and his attorney, who had sued Motorola and a telecommunications company claiming use of a cell phone caused the physician to get brain cancer. The program had a panel, the composition of which King described as follows:

Let's meet our panel. Later, we'll meet the director of the FDA. They are, in Seattle, Dr. Sam Milham. Dr. Milham is a chronic disease epidemiologist. He believes that cell phones do cause brain cancer. In Milwaukee is Dr. John Moulder, cancer and radiation researcher, medical college of Wisconsin, says they do not pose a cancer risk. In New York, Linda Erdreich. Dr. Erdreich is a managing scientist[] at Exponent, an independent consulting firm specializing in health risk assessments, and does not believe cell phones pose a risk. In Miami is David Reynard. He brought the cell phone cancer question to spotlight on this program seven years ago when he sued a cell phone company in connection with brain cancer that killed his wife And as kind of our arbiter here in New York is Dr. Ian Smith, medical columnist for Time.

(Defs.' Ex. 10 at 5-6.)

On or about May 7, 2001, the United States General Accounting Office ("GAO") issued a report titled "'Research and Regulatory Effects on Mobile Phone Health Issues.'" (SAC ¶ 67.) The report reviewed information from the FDA and other regulatory bodies (including the FCC and the WHO) and found the research did not show an adverse health effect but that the findings were not conclusive. The report mentioned questions raised about CTIA-funded research, and said:

"A relatively large body of research exists on the health effects of radiofrequency energy in general, but most of this research has focused on short-term exposure of the entire body, not on the longer-term exposure of the head that is characteristic of mobile phone use

* * *

"[W]hen researchers performed a battery of tests to assess the effects of exposure to mobile phone radiofrequency energy on the genetic material of blood cells, one type of test, known as a micronucleus assay, detected changes in the genetic material, a common precursor to cancer.

* * *

Some of these studies have reported effects, including changes in brain activity, reaction times, and sleep patterns.

SAC (¶¶ 67, 69.)

The defendants have attached to their memorandum the full GAO report, which was submitted to the Ranking Member of the Senate Committee on Governmental Affairs and the Ranking Minority Member of the Subcommittee on Telecommunications and Internet, Committee on Energy and Commerce, of the House of Representatives. The report further said in relevant part:

The media has given widespread attention to the debate over whether mobile phones can cause adverse health effects; thus, the federal government's role in providing the public with clear information on this issue is particularly important

(Defs.' Ex. 3 at 5.) The report pointed out that "[t]he mobile phone health issue came to national attention in 1993 after a lawsuit was brought against some mobile phone companies by a Florida man claiming that his wife's use of a mobile phone caused her brain cancer. The industry has prevailed in this and other suits that have been brought. Recently, a number of new law suits have been filed." (Id. at 8 n.5.) It also stated that "[d]uring the past year, as

new research studies were published, the print and broadcast media have presented a variety of assessments about the potential health effects of mobile phones (Id. at 26.)

The foregoing is a sufficient summary of the relevant information on which defendants rely in making their argument that the plaintiff cannot succeed in proving materiality.¹²

The defendants ask the Court to hold as a matter of law that defendants' failure to inform the public about the debate is not a material omission. (Defs.' Mem. at 15.) They argue that, as disclosed by the plaintiff's complaint and the exhibits on which she relies, the public was well aware of the debate over cell phone safety from a variety of sources: Dr. Carlo's book; the national television programs on ABC and CNN; the several lawsuits; the FDA's consumer update, which informed the public about the safety debate and which some of the manufacturers placed in the packages in which cell phones were sold; and the GAO report

¹² Defendants also refer to a program on a local television station that also, they say, helps to prove that the public was aware of the debate. This program aired in 2002. As the defendants argue that the public was "already aware of the alleged 'safety debate' long before the October 19, 2000 effective date of the Amended [CPPA]," the Court will not consider this program or any information about the public's awareness of the debate after October 2000.

itself, which was distributed to Congressional committees. They point to the GAO's own conclusion that the print and broadcast media had given widespread attention to the health issues involved in cell phone use.¹³

Defendants are correct in their legal premise. If a person who is the alleged victim of an omission already knows the information omitted, there cannot be, as a matter of law, a material omission. Alicke v. MCI Communs. Corp., 111 F.3d 909, 912 (D.C. Cir. 1997) (failure to tell phone card user that time rounded-up to the minute was not material because consumer must have been aware of that fact). In the present case, plaintiff's allegation does not rest on an omission made in connection with a representation to her. It is based on one made in connection with a representation to "consumers" in the District of Columbia. (SAC ¶ 3.) So if the Court can conclude from the allegations and the exhibits that plaintiff does not state a viable claim that defendants' omission was material in view of widespread knowledge among

¹³ Defendants do not rely on information shared within the industry itself or known by scientists and other experts only. Thus, plaintiff's point that this knowledge could not be in the public domain is not pertinent.

consumers about the safety debate, plaintiff's claim must be dismissed.

Plaintiff does not argue that the facts on which defendants premise their argument are not true; she could hardly do so since they are facts that she alleges in her own complaint, or facts found in documents on which she relies. Plaintiff argues instead that the evaluation of those facts – whether they add up to the knowledge that consumers would need to make the omissions immaterial – should be left to the jury. Ordinarily, as she points out, questions of materiality are left to the fact-finder. American General Life Ins. Co. v. Schoenthal Family, LLC, 555 F.3d 1331, 1340 (11th Cir. 2009). But “[a]s is true of virtually any factual question, if the materiality question in a given case admits of only one reasonable answer (because the evidence on the point is either undisputed or sufficiently lopsided), then the court must intervene and address what is ordinarily a factual question as a question of law.” Gibson v. City of Cranston, 37 F.3d 731, 736 (1st Cir. 1994).

Keeping in mind that the plaintiff has the burden of proving materiality by clear and convincing evidence,

Osborne v. Capital City Mortgage Corp., 727 A.2d 322, 326 (D.C. 2009), the Court is persuaded that there is only one reasonable answer to the question presented. Plaintiff's complaint rests on allegations that District of Columbia consumers were misled by defendants' misrepresentations in the national media - misrepresentations, among other places, on the ABC and CNN shows, when the subject was cell phone health risks. (SAC ¶¶ 58-60, 65.) There can be no doubt that those programs exposed - indeed, included - the debate about cell phone safety. If District of Columbia consumers heard these programs, as plaintiff says, implicitly, they did, those same consumers heard about the cell phone safety debate. They heard from responsible scientists on both sides of the issue, from consumers, from the industry, and from government officials.

If, as plaintiff alleges, the FDA in 2000 "informe[d] the consuming public" about the "concern" over use of cell phones, District of Columbia consumers of cell phones also learned about the "conflicting" scientific evidence about whether cell phones might be harmful. (SAC ¶ 64.)

In sum, if, as the GAO report says, the print and broadcast media had given widespread attention to the

debate over safety, the manufacturers had included with their products the FDA update discussing concerns over it, a book had been published about cell phone safety, and lawsuits had been filed, a jury would be compelled to find that a reasonably well-informed consumer in the District of Columbia would have learned about the debate. Thus, it could not find that omitting information about the cell phone safety debate would be a material omission.

The Court finds support for its conclusion in In re Toshiba America HD DVD Marketing and Sales Practices Litigation, 2009 U.S. Dist. LEXIS 82833 (D.N.J. 2009). The plaintiffs there claimed that they had been deceived into buying a DVD player from Toshiba when Toshiba omitted telling them that it planned to discontinue making DVD players in the face of competition from Blu-Ray Disc, made by Sony Corporation. The court found, from the complaint and the documents it referenced, that the format war between Toshiba and Sony was "well publicized and was characterized as a battle which would result in only the 'winning' format continuing in the marketplace." Id. at *36. It granted the motion to dismiss on the ground that

the “the notion that Toshiba could ‘conceal’ something that was so well covered in the media defies logic.” Id.

Plaintiff argues that the more persuasive case is Nafar v. Hollywood Tanning Systems, Inc., 2007 WL 1101440 (D.N.J. 2007). The plaintiff there brought a consumer fraud action against a tanning salon for selling her a membership without disclosing the risk of cancer from exposure to ultraviolet rays. The defendant asked the court to hold as a matter of law, “based on the facts alleged by Plaintiff and by taking judicial notice of articles cited by Defendant,” that the risk of cancer was “common knowledge to the average consumer.” Id. at *6. The court ruled that the issue of whether the information was common knowledge, which went to the materiality of the omission, was a question of fact and denied the motion. Id. at *8.

This Court agrees that the question of materiality is one of fact but, as indicated above, there are circumstances in which the Court will determine that no reasonable fact-finder could reach a given conclusion. What distinguishes Nafar from this case, among other things, is that there the defendant was asking the court to

take judicial notice of facts not alleged in the complaint or in documents to which the complaint referred. In this case, the information the Court relies on comes from the plaintiff's complaint and the documents on which she relies. The court made this point in Toshiba:

[In Nafar,] [t]he idea that the dangers of UV-based tanning were common knowledge . . . was contrary to the pleadings . . . In contrast, the [complaint in this case] and the articles referenced therein are replete with allegations and documentation . . . that the format war . . . was well publicized

2009 U.S. Dist. LEXIS at *36.

Plaintiff also argues that there is a dispute over whether defendants may have "undone" any public perceptions by their campaign to convince the public that cell phones are safe, by suppressing and discrediting research, and by blocking safety-related products to downplay safety as a factor for consumers to consider. (Defs.' Mem. at 38.) She also alleges that certain details about safety that are relevant to the debate are known only to the defendants.

The Court does not view these allegations, if they could be proved, as relevant to the issue of whether the defendants materially omitted telling District of Columbia consumers about the safety debate. It is the omission of

the fact that this debate exists, according to the plaintiff, that might have a tendency to mislead consumers. Whether defendants made other misrepresentations or omissions or conducted themselves in other deceptive ways might be the subject of other allegations of violations, but that conduct does not pertain to the issue under discussion here. For example, if suppression of information is a violation of the CPPA, that might be alleged and proved. If defendants have detailed information about safety that should have been disclosed, that might be alleged and proved. The issue under consideration is whether defendant violated the CPPA by failing to disclose the existence of the safety debate, not whether there are other violations.¹⁴

VIII. TESTING AND CERTIFICATION

Defendants next argue that plaintiff cannot state a claim based on defendants' failure to disclose that (1) the "[m]anufactur[er] [d]efendants measure and collect the Specific Absorption Rate," – the data provided to the FCC,

¹⁴ Given the Court's decision on this aspect of defendants' motion, the Court need not reach defendants' argument that there is no duty to disclose all sides of the safety debate.

and (2) “[t]he SAR measurements [are] not the product of rigid testing and review, but rather through a self-certification process.” (Defs.’ Mem. at 21.) The Court disagrees.

As made clear by plaintiff’s opposition, plaintiff is contending that these failures to disclose violate § 28-3904(f). (Pls.’ Opp. at 39.) She makes clear that she is not “contest[ing] the process the FCC has established for cell phone manufacturers to demonstrate their SAR compliance[,]” or that the “self-certification process is deficient.” (Id.) Rather, she says that “[d]efendants mislead consumers into believing that the FCC is itself testing every phone for SAR compliance, when in fact it does not.” (Id.) Thus, defendants argument that plaintiff’s claim under § 28-3904(a) must fail is not on point. Plaintiff’s challenge is treated as one under § 28-3904(f) and will be allowed to go forward on that ground.

IX. CLASS ACTION

Defendants argue that the plaintiff may not “maintain damages claims on behalf of the ‘general public’” without having her claims certified as a class action under Super.

Ct. Civ. R. 23(a). (Defs.' Mem. at 30.) They argue that an award of damages in the absence of a class action binding all members of the class who did not opt out of the action would violate the Due Process Clause of the United States Constitution. U.S. Const. amend. XIV, § 1.

Defendants' core argument is that, absent class action procedures authorized by Super. Ct. Civ. R. 23, they would be denied Due Process if plaintiff recovered a damages award and they were left unprotected from a future action by another party who also asked for a damages award.

The Court finds it premature to address the issue defendants raise. Defendants seek dismissal under Super. Ct. Civ. R. 12(b)(6), which allows a defendant as a defense to file a motion to dismiss for "failure to state a claim upon which relief can be granted." Plaintiff on behalf of the "general public" seeks money damages under D.C. Code § 28-3905(k)(1)¹⁵ along with punitive damages, disgorgement of profits, and injunctive relief. These demands for relief, however, are not part of plaintiff's "claim." See Bontkowski v. Smith, 305 F.3d 757, 762 (7th Cir. 2002);

¹⁵ D.C. Code § 28-3905(k)(1) provides in relevant part that "[a] person . . . acting . . . for . . . the general public . . . may bring an action . . . and may recover or obtain . . . (A) treble damages, or \$1,500, per violation, whichever is greater, payable to the consumer"

Laird v. Integrated Resources, Inc., 897 F.2d 826, 841-42 & n.69 (5th Cir. 1990); Schoonover v. Schoonover, 172 F.2d 526, 530 (10th Cir. 1949); See also 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1255 (2d ed. 1990). Accordingly, a Rule 12(b)(6) motion may not be used as a vehicle for dismissing a plaintiffs' prayer for relief. See Jumpfly, Inc. v. Torling, slip op., 2010 WL 1978732, at *1 n.1 (N.D. Ill. 2010) ("Prayers for relief . . . cannot be dismissed pursuant to Rule 12(b)(6)."); Cousin v. Small, No. 00-0069, 2000 U.S. Dist. LEXIS 11796, at *13 (E.D. La. 2000) ("specific prayers for relief . . . are not subject to dismissal under Rule 12(b)(6)"); Upjohn Co. v. Mova Pharm. Corp., 899 F. Supp. 46, 47-48 (D.P.R. 1995).

X. PRE-2000 CPPA

Defendants argue that, to the extent that the complaint seeks relief for alleged violations of the CPPA before its amendment went into effect on October 19, 2000, the complaint fails to state a claim because it fails to allege injury or reliance.

The pre-amendment version of the introductory phrase of § 28-3904 stated: "It shall be a violation of this chapter, whether or not any consumer is in fact misled, deceived, or damaged thereby for any person to" D.C. Code § 28-3904(a) (1996 Repl.). The City Council did not change this language in the 2000 amendments.

The pre-amendment version of § 28-3905(k)(1) stated:

Any consumer who suffers any damage as a result of the use or employment by any person of a trade practice in violation of a law of the District of Columbia within the jurisdiction of the Department [of Consumer and Regulatory Affairs] may bring an action in the Superior Court of the District of Columbia to recover or obtain [relief, as specified].

The 2000 amendments changed this language so that it now reads:

A person, whether acting for the interests of itself, its members, or the general public, may bring an action under this chapter in the Superior Court of the District of Columbia seeking relief from the use by any person of a trade practice in violation of a law of the District of Columbia and may recover or obtain [relief, as specified].

Whatever construction or effect may be given to the amended statute, it is plain from the language of the pre-2000

statute that the "consumer" must "suffer[] damage as a result of" the violation of the CPPA.

Plaintiff, conceding that under the pre-amendment law she may not sue on behalf of the general public, argues that she may bring the action on her own behalf. She argues that her injury is the purchase price of the cell phone (or phones) she bought "pursuant to inadequate and incorrect material misrepresentations." (Opp. at 51-52.) Her second amended complaint alleges that "[d]efendants have benefited by their receipt of profits from [p]laintiff resulting from the unlawful conduct alleged herein." (SAC ¶ 133.)

Defendants argue among other things that plaintiff must show reliance in order to satisfy the statutory requirement that she show "damage as a result of the" deceptive trade practice. They rely on Williams, supra, 297 F. Supp. 2d 171, for that proposition. Williams did hold that one reason the plaintiffs there failed to satisfy the statute was that they failed to "plead that [they] were in any way deceived – or even saw – any of t[he] [false and misleading] advertising." Id. at 177. In other words, they failed to allege reliance.

By pleading that the defendants received profits from her "resulting from [their unlawful conduct]," plaintiff could be understood to plead reliance. This allegation, however, appears in Count II of the Second Amended Complaint, in which plaintiff makes a claim under the common law for restitution. Moreover, her memorandum appears to eschew a reliance theory, and at one point in the oral argument she seemed to make that clear. In answer to the Court's question as to whether she claimed reliance, her attorney said, "Reliance is not an element." At another point in the argument, however, she stated: "Here, what we are saying is had I known, I would have purchased no phone or would have purchased a different phone." That formulation is a claim of reliance, the damage being the purchase price (had she not bought at all) or the difference between the price she paid and the price she would have paid "had she known."

The Court agrees with the defendants that under the pre-2000 version of the CPPA the plaintiff must prove reliance. In other words, she must prove that she herself was deceived by defendants' misrepresentations and omissions. The language of the statute is best understood

that way in relation to a case such as this, where the plaintiff is alleging as damages the purchase price she paid for the product.

This is not to say that in every deceptive trade practices case under the CPPA a plaintiff need show reliance. See, e.g., D.C. Code § 28-3904(r) (proscribing unconscionable terms in contracts). Even in cases of alleged misrepresentations, reliance by the plaintiff in the traditional sense need not be shown. This is illustrated by Osbourne v. Capital City Mortgage Corp., 667 A.2d 1321 (D.C. 1995). There the court held that the plaintiffs could prove injury by showing the expenses and other damages they incurred as a result of the lien and foreclosure action resulting from a misrepresented pay-off amount on plaintiffs' mortgage loan. Id. at 1327. The phrase "damage as a result of" is intended to cover all sorts of trade practices.

It is going too far, however, to interpret the CPPA to allow standing in a case such as this in which the plaintiff alleges damages in her own purchase of a consumer good but does not allege that she acted or refrained from acting because she herself was deceived. Plaintiff has not

articulated a theory of causation in the absence of reliance that would allow the Court to conclude that she meets the requirements of the CPPA.¹⁶

At the same time, the Court does not agree with defendants that plaintiff needs to show that she was injured in the sense that the cell phone did not work. Williams, on which defendants rely, can be distinguished from this case. There the deceptive advertising said that users of a pain killer would get "'smooth and sustained relief'" and that the medication posed little risk of addiction. Plaintiffs did not allege that they got no pain relief or were addicted, and did not allege that they even saw the advertisements. Rather, as just noted, supra n.16, they urged that they paid a higher price for the drug because other consumers were deceived. Here, on the other hand, as articulated at oral argument, plaintiff may wish to plead her own reliance. If a consumer alleges that she

¹⁶ It may be that plaintiff, if she does not plead reliance, may be asserting a so-called market theory of damages in which, though she is not herself misled, other consumers are, and defendants thereby are able to get a higher price for their product than they would be able to get if consumers knew about the risks plaintiff alleges accompany the use of cell phones. The court in Williams, supra, rejected this theory as a basis for standing under the CPPA, concluding that the CPPA did not change the standing requirements that our Court of Appeals had taken from the "case or controversy" requirements under the United States Constitution. Id. at 177-78. See Friends of Tilden Park, Inc. v. Dist. of Columbia, 806 A.2d 1201, 1206 (D.C. 2002). The Court will not address this theory as plaintiff has not articulated it.

decided to buy a product without knowing about risks the merchant should have disclosed, alleges that she would not have bought the product had she known about the risks, and wants her money back as her damages, the Court is of the opinion that the consumer alleges "damage as a result of" a deceptive trade practice.

While plaintiff seemed to state in oral argument that she can allege this kind of reliance, the complaint is too ambiguous to allow the Court to read it as having made this claim. The Court will therefore dismiss plaintiff's individual claim. The plaintiff may move to amend, as she suggested at oral argument she could do.

XI. UNJUST ENRICHMENT

Plaintiff brings a common law claim for unjust enrichment, alleging that defendants have been unjustly enriched "by receipt of profits from [p]laintiff resulting from the unlawful conduct alleged herein."

Unjust enrichment occurs when: (1) the plaintiff conferred a benefit on the defendant; (2) the defendant retains the benefit; and (3) under the circumstances, the defendant's retention of the benefit is unjust.

News World Communs., Inc. v. Thompsen, 878 A.2d 1218, 1222 (D.C. 2005). Defendants set forth several grounds for dismissal of this claim.

First, they argue that this claim can proceed only against the defendants whose cell phones plaintiff bought. Plaintiff concedes this. (Pl.'s Opp. at 52 n.37.) The Court will dismiss the unjust enrichment claim against all defendants except Motorola and Audiovox.

Next, defendants argue that plaintiff cannot succeed because she cannot prove an underlying violation of the CPPA. Since the Court will not dismiss all of her claims under the CPPA, this argument fails.

Defendants argue further that plaintiff has "failed to specify what benefit she conferred on defendants or how their conduct was unjust." Plaintiff has alleged that she bought cell phones from the defendants, from which purchase they profited. Thus she has sufficiently alleged a benefit conferred on defendants. Further, she has alleged several violations of the CPPA. Under notice pleading standards, plaintiff need not be more specific than this.

Defendants make one argument that deserves a more extended discussion. They argue that as an "indirect

purchaser," plaintiff may not state a claim for unjust enrichment. Plaintiff admits that she is an indirect purchaser. (Pl.'s Opp. at 54.) In other words, she did not buy directly from the defendants and thus is not in privity with them or does not have a direct relationship with them. Defendants argue that a direct relationship is required to find that the plaintiff conferred a benefit on the defendants.

Defendants cite no controlling District of Columbia authority supporting the proposition that an indirect purchaser may not state a claim for unjust enrichment. They principally rely on In re Vitamins Antitrust Litigation, 2001 U.S. Dist. LEXIS 9585 (D.D.C. 2001). The court in that case held that, under Tennessee law, a direct relationship was required to state a claim for unjust enrichment. Id. at *44-45. The court's understanding of Tennessee law was premised on its conclusion that the law of unjust enrichment in Tennessee depended on a showing of money had and received, as in actions in assumpsit. Id.

In re Vitamins does not interpret District of Columbia law and for that reason it does not provide direct support for defendants' position. The Court notes that there is a

difference among courts as to whether privity, or a direct relationship, is required. New York law, for example, differs from Tennessee law as interpreted in In re Vitamins. While finding the relationship between the parties too attenuated under the circumstances before it, the court in Sperry v. Crompton Corp., 863 N.E.2d 1012 (N.Y. 2007), noted that "a plaintiff need not be in privity with the defendant to state a claim for unjust enrichment." Id. at 1018.

The law of unjust enrichment developed as a response to situations in which a true contract could not be proved but it was inequitable to allow one party, who had received money or something of value from another, to retain what the party had received. See Hillyard v. Smither & Mayton, Inc., 76 A.2d 166, 167 (D.C. 1950). But the historical origins of the doctrine should not necessarily determine its application now. There can be situations in which the money is not conferred directly on a person but that person, in good conscience, cannot be allowed to retain it. This is illustrated among other places in Bank of America Corp. v. Gibbons, 918 A.2d 565 (Md. Ct. Spec. App. 2006), where the plaintiff bank sought to recover funds held by

the defendant Mrs. Gibbons, who had come by them innocently through a defalcation of the bank by her husband. The Court of Special Appeals held that there need not have been direct dealings between the bank and Mrs. Gibbons for the bank to state a claim of unjust enrichment. Id. at 571-72.

It is obvious that Bank of America presents a different set of facts than the present case. There it was relatively easy to trace the funds going from the plaintiff bank to the wife of the defalcating husband. Here, the plaintiff alleges that she indirectly paid money to the defendants through her purchase of cell phones and there may be tracing and other problems in her proof. But Gibbons does stand for the proposition that a direct relationship need not be found in order to conclude that the plaintiff conferred a benefit on the defendant.

Maryland law is more useful as authority on common law questions in this jurisdiction than is Tennessee law, when controlling authority does not exist. See Napoleon v. Heard, 455 A.2d 901, 903 (D.C. 1983) (noting that as the source of the District's common law, Maryland law is "an especially persuasive authority when the District's common law is silent"). The Court therefore will deny the motion

to dismiss and await the production of evidence so that it can evaluate the circumstances that might or might not warrant a finding that the plaintiff conferred a benefit on the defendants, that they retained it, and that it would be unjust to allow them to continue to retain it.

XII. CONCLUSION

For the foregoing reasons, the Court will grant in part and deny in part defendants' Motion to Dismiss Plaintiff's Second Amended Complaint. An order will issue consistent with this memorandum.

SIGNED IN CHAMBERS

July 8, 2010



A. Franklin Burgess, Jr.
Judge

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