CONSUMER PROTECTION DIVISION, OFFICE OF THE ATTORNEY GENERAL

Proponent,

v.

CRICKET WIRELESS, LLC

and

AT&T, INC.

Respondents.

IN THE CONSUMER PROTECTION DIVISION OF THE OFFICE OF THE ATTORNEY GENERAL

CPD Case No.: 20-005-312593

Office of the Attorney General
Consumer Protection Division
FILED
JUL 21 2021
ADMINISTRATIVE HEARING PROCESS

* *

FINAL ORDER

1. Having found by a preponderance of the evidence that Respondents Cricket Wireless, LLC and AT&T, Inc. (hereinafter collectively "Respondents") have violated the Consumer Protection Act ("CPA"), Md. Code Ann., Com. Law §§ 13-101 through 13-501 (2013 Repl. Vol.), the Consumer Protection Division of the Office of the Attorney General (the "Agency")[1] hereby orders the Respondents to cease and desist from violating the Consumer Protection Act, and to take affirmative action pursuant to § 13-403(b)(1) of the Consumer Protection Act as described herein.

Findings of Fact and Conclusions of Law

2. The Agency hereby adopts and incorporates the factual findings and conclusions of law found by Administrative Law Judge Geraldine Klauber (the "ALJ") in the ALJ's Proposed Ruling on Motion for Summary Decision, a copy of which is attached hereto, except as modified by the Ruling on Exceptions, also attached hereto, as if they were fully set forth herein.

[1] The Consumer Protection Division acting in its capacity as a quasi-judicial agency is referred to herein as the "Agency," while the Consumer Protection Division acting as the Proponent in the instant matter is referred to as "Proponent."

3. Consistent with the Ruling on Exceptions, the Agency finds that the following additional Findings of Fact are undisputed:

> 35. For consumers who bought CDMA-only phones directly from Cricket via its website after the close of the merger, the Respondents placed a disclaimer on Cricket's website that could be found on the website's frequently asked questions page in response to the question "Where can I purchase phones and accessories?" as well as via a link titled "Important Device Purchase Information" under the CDMA-only phones offered for sale on the website. Dennis Testimony, Ex. A 59:8-17; Purchasing a Phone Related FAQs on MyCricket.com, Ex. B37 p. 1; McGee Affidavit, Ex. B ¶ 26 (citing mycricket.com/cell-phones website dated March 15, 2014, Ex. B38).
>
> 36. If consumers clicked on the link below the phones, the webpage automatically scrolled down to the bottom of the webpage, where a disclaimer appeared. After clicking on an individual phone, the disclaimer appeared again at the bottom of a page showing more details about the phone. *Id.*
>
> 37. The disclaimer on the Frequently Asked Questions page stated that "CDMA PHONES WILL NO LONGER WORK ON OUR WIRELESS NETWORK AFTER WE COMPLETE THIS UPGRADE." Proponent's PPFFCL Ex. 37.
>
> 38. Two of the three places disclosures were displayed on the website were in places consumers would have to seek out in order to find the frequently asked questions page in response to a question about where phones could be purchased, and at the very bottom of a page listing multiple products that

consumers might only see if they scrolled all the way to the bottom or clicked a hyperlink.

39. The only other disclosure was made on the product page and beneath the important information about the phone, such as price, description, features, accessories, and a link to download a user manual. The disclosure is preceded by technical jargon that is likely unclear and potentially distracting to consumers, stating "Cricket is upgrading its CDMA network to 4G GSM and expects to stop offering CDMA service as early as March 2015."

40. The website disclosures were not conspicuously placed to draw consumers' attention to the fact that CDMA-only phones would not work at all on Cricket's new network.

4. Consistent with the Ruling on Exceptions, the Agency makes the following revisions to the Conclusions of Law in the Proposed Decision:

A. The ALJ's unnumbered Conclusion of Law that "The CPD's claims regarding the Respondents' pre-merger violations of the Act are preempted by federal antitrust law, 15 U.S.C.A. § 1 (2009); 15 U.S.C.A. § 18a (Supp. 2020)" is hereby stricken. Instead, the Agency makes the following Conclusion of Law: "The CPD's claims regarding the Respondents' pre-merger violations of the Act are not preempted by federal antitrust law, including the Sherman Act, 15 U.S.C. § 1, and the Hart-Scott-Rodino Act, 15 U.S.C. § 18a."

B. The ALJ's unnumbered Conclusion of Law that "The CPD failed to state cognizable claims under the Act regarding the Respondents' pre-merger actions, Md. Code Ann., Com Law § 13-301(1), (2), and (3) (Supp. 2020); COMAR 02.01.02.18B;

COMAR 28.02.01.12D(5);" is hereby stricken. Instead, the Agency issues the following Conclusion of Law: "The Respondents violated § 13-301(1), (2) and (3) and § 13-303 of the Act in conjunction with their pre-merger representations to consumers and failure to disclose material facts to consumers in connection with Respondents' sale and offer for sale of cell phones. Md. Code Ann., Com. Law § 13-301(1), (2) and (3) and § 13-303."

C. The ALJ's unnumbered Conclusion of Law is modified as follows: "The Respondents violated section 13-301(1), (3) of the Act in conjunction with its in-store and online disclosure to consumers of cell phones after the merger regarding the shut-down of the CDMA network. Md. Code Ann., Com. Law § 13-301(1), (3) (Supp. 2020); COMAR 02.01.02.18B; COMAR 28.02.01.12D(5)."

5. Specifically, the Respondents engaged in multiple violations of the Consumer Protection Act each time that they offered or sold a CDMA-only phone after July 12, 2013, the date of the announcement of the planned merger between Respondent AT&T, Inc. and Leap Wireless International, LLC, then the parent company of Cricket Communications, Inc. (the "Merger"). Since the Merger, Respondent Cricket Wireless, LLC has been a wholly-owned subsidiary of Respondent AT&T, Inc.

6. Section 13-303 of the Consumer Protection Act prohibits deceptive trade practices in, among other things, the offer and sale of consumer goods and consumer services such as the mobile phones and mobile phone services offered by the Respondents.

7. Section 13-301(1) of the CPA defines as a deceptive trade practice any false or misleading statement or representation that has the capacity, tendency, or effect of deceiving or misleading consumers.

8. Section 13-301(2)(i) of the CPA defines as a deceptive trade practice any

representation that consumer goods or consumer services have, among other things, an approval, accessory, characteristic, use or benefit which they do not have.

9. Section 13-301(3) of the CPA defines as a deceptive trade practice the failure to state a material fact if the failure deceives or tends to deceive. A material fact, for purposes of CPA § 13-301(3), is one that a significant number of unsophisticated consumers would find important in deciding whether to make a purchase. *See, e.g., Golt v. Phillips*, 308, Md. 1, 10 (1986).

10. Each time that the Respondents offered or sold a CDMA-only Cricket phone after June 12, 2013, they made express and implied representations that the phones would work on the Cricket network for the life of the phones. These representations were false, as the Respondents planned to shut down the network on which those phones operated, after which the phones would not work with Cricket's service. The Respondents' misrepresentations not only had the capacity and tendency to deceive and mislead consumers, but did in fact, mislead and deceive consumers. Each of the Respondents' misrepresentations was a deceptive trade practice that violated CPA § 13-303, as defined by CPA § 13-301(1). The Respondents sold over 51,500 CDMA-only phones in Maryland after June 12, 2013. This number does not include the number of Maryland consumers to whom CDMA-only phones were offered with the express or implied misrepresentation, but who did not ultimately make purchases, each of which would also violate the CPA pursuant to CPA § 13-302, which prohibits deceptive advertising practices, such as those of the Respondents, whether or not any consumer in fact has been misled, deceived, or damaged as a result of that practice. Accordingly, the true number of the Respondents' violations of CPA § 13-301(1) is certainly larger than the number of consumers who purchased phones.

11. The Respondents' express and implied representations that the CDMA-only phones they sold would work on the Cricket network for the life of the phones were also representations that the phones had a characteristic, accessory, use, and benefit that the phones did not have, as the phones were incapable of working on the Respondents' network after the planned shutdown of that network. Thus, each of the Respondents' misrepresentations also constituted a deceptive trade practice as defined by CPA § 13-301(2)(i).

12. Prior to March 13, 2014, when the Federal Communications Commission approved the Merger, the Respondents failed to disclose to at least 50,000 Maryland consumers that the CDMA-only phones they purchased would no longer work after the planned shutdown of Cricket's CDMA network. The Respondents also failed to disclose this fact to over 1,500 additional Maryland consumers who purchased CDMA-only phones after the Merger was approved. The Respondents' only disclosures to post-merger consumers were unclear and inconspicuous disclosures about the planned shutdown that were not intended to, and did not, inform consumers who purchased phones in stores or online that the phones would stop working within a matter of months. The fact that the phones would not work once Cricket's CDMA network was shut down was information that was essential for consumers to know because the phones had little or no value if they could not access Cricket's cellular network. These facts were material to consumers, and the Respondents' failure to disclose these facts tended to deceive, and in fact did deceive consumers. Each time the Respondents failed to disclose material facts to consumers they engaged in deceptive trade practices as defined in CPA § 13-301(3). Though the Respondents omitted these facts in at least 51,500 sales they made to Maryland consumers, this number does not include the number of Maryland consumers to whom CDMA-only phones were offered without providing material information, but who did not ultimately make purchases, each

of which would also violate the CPA pursuant to CPA § 13-302. Accordingly, the true number of the Respondents' violations of CPA § 13-301(3) is certainly larger than the number of consumers who purchased phones.

Application

13. The provisions of this Final Order shall apply to Cricket Wireless, LLC and its officers, employees, agents, successors, assignees, merged or acquired entities, subsidiaries, and all other persons or entities acting in concert or participation with Cricket Wireless, LLC.

14. The provisions of this Final Order shall apply to AT&T, Inc. and its officers, employees, agents, successors, assignees, merged or acquired entities, subsidiaries, and all other persons or entities acting in concert or participation with AT&T, Inc.

15. The cease and desist provisions set forth below shall apply to all of the Respondents' activities relating to the offer and sale of Mobile Devices to Maryland consumers.

Definitions

16. "CDMA" shall mean a Code Division Multiple Access network.

17. "CDMA-only" means a Mobile Device that is only capable of working on a Code Division Multiple Access network.

18. "Clear(ly) and Conspicuous(ly)" means that a required disclosure is difficult to miss (*i.e.*, easily noticeable) and easily understandable by consumers, including in at least all of the following ways:

a. A visual disclosure, by its size, contrast, location, the length of time it appears, and other characteristics, must stand out prominently from any accompanying text or other visual elements so that it is readily noticed, read, and understood, must not be obscured in any manner, and in the case of a television, internet, or other

time-limited disclosure, shall remain on the screen for a duration sufficient for a consumer to read and understand the entire statement or disclosure. If the visual disclosure is triggered by an express representation, the disclosure must be made with at least equal prominence to the representation triggering the disclosure.

b. An audible disclosure, including in person, by telephone, or in streaming video, must be delivered in a volume, speed, and cadence such that it can be easily heard and understood by consumers. If the audible disclosure is triggered by an express representation, the disclosure must not be delivered in a lower volume, faster speed, or different cadence than the representation triggering the disclosure.

c. In any communication using an interactive medium, such as the internet or software, the disclosure must be unavoidable, meaning that a disclosure must be presented in such a manner that consumers will be exposed to the disclosure without having to take affirmative actions, such as scrolling down a page, clicking on a link to other pages, activating a pop-up window, or entering a search term to view the statement, and that consumers cannot purposefully or accidentally take an action that will prevent the disclosure from being displayed.

d. If the disclosure modifies, explains, or clarifies other information with which it is presented, then the statement must be presented in close proximity to the information it modifies, explains, or clarifies. For purposes of this sub-paragraph, close proximity means, for a visual disclosure, that is it made on the same print page, webpage, online service page, or other electronic page, and not separated by space, text, visual material, or in any other way, and is not accessed or displayed though hyperlinks, pop-ups, interstitials, or other means. For an audible

disclosure, close proximity means that is made immediately after the representation triggering the disclosure.

e. The disclosure must not be contradicted or mitigated by, or inconsistent with, anything else in the communication.

f. The disclosure must be made through the same means, whether audio, visual, or both, through which the representation triggering the disclosure is made.

g. The disclosure must use clear language and syntax that is easily understandable to consumers, must not use technical jargon, and must appear in each language in which a representation triggering the disclosure is made.

h. The disclosure shall not be presented with other text, information, sound, or graphics that distract consumers' attention from the disclosure.

i. A disclosure triggered by a representation shall be made at least each time the representation triggering the representation is made.

j. The disclosure must be made before a consumer makes a purchase or incurs a financial obligation. On a website, mobile application, or other medium where a consumer can complete a transaction online, the disclosure must be made before the consumer makes the decision to buy, *e.g.*, before clicking on an "order now" button or a link that says "add to shopping cart."

k. The disclosure must comply with these requirements in each medium through which it is received, including all smartphones, tablets and other electronic devices and in face-to-face communications.

19. "GSM" shall mean the Global System for Mobile communications.

20. "GSM Device" means a Mobile Device capable of working on a Global System for Mobile communications network.

21. "Feature Phone" means a mobile phone, typically with a push-button interface and a relatively small screen, that has voice and text messaging functionality, but only basic multimedia and internet capabilities, as distinguished from "smartphones," which have larger and touchscreen displays, advanced operating systems, and which function more like personal computers.

22. "Materially Affect" means to (1) reduce the functionality or capabilities of a device, or (2) otherwise alter the functionality or capabilities of a device in a way that is likely to affect a consumer's purchase or use of the device.

23. "Mobile Device" means a portable electronic device that connects to a cellular network to provide voice, text, and/or internet services, including, without limitation, Feature Phones, smartphones, and tablets.

Cease and Desist Provisions

24. The Respondents shall immediately cease and desist from engaging in any unfair or deceptive trade practices in violation of the Maryland Consumer Protection Act in connection with the offer and sale of Mobile Devices.

25. The Respondents shall not make any representation that has the capacity, tendency or effect of misleading or deceiving consumers in connection with the offer and sale of Mobile Devices.

26. The Respondents shall not fail to state any material fact, the omission of which would deceive or tend to deceive consumers, in connection with the offer and sale of Mobile Devices.

27. The Respondents shall not expressly or impliedly represent that the Mobile Devices they offer and sell have a sponsorship, approval, accessory, characteristic, ingredient, use, benefit, or quantity which they do not have.

28. The Respondents shall not offer or sell Mobile Devices to Maryland consumers if the Respondents know, have reason know, or should know that a proposed or impending change to the Respondents' services, by the Respondents or by third parties, will Materially Affect the Mobile Devices, unless the Respondents Clearly and Conspicuously disclose the planned or impending change and how it would affect the Mobile Devices. Such disclosures must be made, at a minimum, in all advertisements and promotional materials for the Mobile Devices, including product packaging, and at point of sale in retail locations that Respondents control or for which they have the authority to set policy. A proposed change must be disclosed pursuant to this paragraph at least when:

a. the proposed change has been publicly announced or is otherwise publicly available information;

b. the Respondent or a third party has taken steps to implement the proposed change; or

c. if a proposed change is subject to regulatory or other third-party approval, an application for approval has been made.

29. If due to changed circumstances, any of the specific prohibitions or affirmative obligations that are imposed by this Final Order become unnecessary, any party may petition the Agency to amend this Final Order.

Restitution

30. Consumers were harmed by the Respondents' unfair and deceptive trade practices

in connection with their offer and sale of Mobile Devices. Each consumer who purchased the Respondents' CMDA-only phones after the announcement of the Merger was not informed by the Respondents, or not adequately informed, that the Respondents planned to shut down the network on which those phones worked, after which the phones would have little functionality and be practically worthless. Consumers who were not aware of this plan were harmed. The Respondents profited from this harm by selling phones that consumers would not have otherwise purchased and must disgorge all amounts that they receive from the violations.

31. The Respondents shall pay restitution to the Proponent equal to the sum of all monies paid by each consumer in Maryland who purchased a CDMA-only phone from the Respondents or from Leap Wireless International, Inc. or Cricket Communications, Inc. for use on the Cricket network, either directly or through an authorized retailer (*e.g.*, independent Cricket dealers or national retailers) after July 12, 2013 and who was not made aware of the planned shutdown of Cricket's CDMA network (the "Restitution Amount"). The Restitution Amount shall be reduced by the amount of:

a. any refund that the Respondents can document has already been paid to each such consumer for the CDMA-only phone;

b. any credit provided by the Respondents that the Respondents can document was used by each such consumer toward the purchase of a replacement GSM Phone;

c. any amount the Respondents can document each such consumer was paid by the Respondents or their agents for the repurchase of the CDMA-only phone; and

d. by the full amount each such consumer paid for a CDMA-only Feature Phone

to the extent Respondents can demonstrate that the consumer received a substantially equivalent replacement GSM Phone free of charge.

32. A Consumer is entitled to receive restitution ordered under this Final Order if:

a. the consumer purchased a CDMA-only phone for use on the Cricket network from the Respondents or from Leap Wireless International, Inc. or Cricket Communications, Inc., either directly or through an authorized retailer (*e.g.*, independent Cricket dealers or national retailers) after June 12, 2013, provided however, that if the consumer purchased the phone directly from the Respondents via telephone after May 18, 2014, they are not eligible;

b. the consumer was not made aware of the planned shutdown of Cricket's CDMA network at the time of purchase; and

c. the consumer returns a paper or electronic claim form, which shall be in a form similar to Exhibit A, within one (1) year of actual receipt of the form, indicating that he or she was not made aware of the planned shutdown of Cricket's CDMA network at the time he or she purchased the CDMA-only mobile phone.

33. If the Respondents are unable to document the amount consumers paid for their CDMA-only phones, the restitution amount for each such consumer shall be the manufacturer's suggested retail price (MSRP) for the phone, unless the consumer indicates on the claim form that he or she paid a lesser amount than the MSRP.

34. Within thirty (30) days after the date of this Final Order, the Respondents shall provide the Proponent with a list of all consumers in Maryland who (a) purchased a CDMA-only phone for use on the Cricket network, either directly from the Respondents, Leap Wireless

International, Inc., or Cricket Communications, Inc. or through one of those parties' authorized retailers (*e.g.*, independent Cricket dealers or national retailers) after June 12, 2013; or (b) activated a CDMA-only phone on the Cricket network after June 12, 2013 (the "Customer List"). For each consumer on the Customer List, the Respondents shall provide the following information:

(a) the consumer's first name;
(b) the consumer's last name;
(c) the consumer's last known street address;
(d) the consumer's last known city, and postal code;
(e) the consumer's last known telephone number;
(f) the consumer's last known email address;
(g) the brand and model of CDMA-only mobile phone(s) purchased or activated;
(h) the date the CDMA-only phone(s) was/were first activated on the Cricket network;
(i) the price the consumer paid for the CDMA-only mobile phone(s);
(j) the MSRP for the CDMA-only mobile phone(s) at the time of sale;
(k) the amount of any refund that the Respondents can document has already been paid to the consumer for the CDMA-only phone(s);
(l) the amount of any credits that the Respondents can document were provided to each such consumer toward the purchase of a replacement GSM Phone;
(m) the amount the Respondents can document each such consumer was paid for the repurchase of the CDMA-only phone(s); and
(n) if applicable, whether the Respondents can document that the consumer received a substantially equivalent replacement GSM Phone free of charge.

The Respondents shall provide the Consumer List required under this paragraph in both electronic and paper formats, with each item listed above contained in a separate field. The electronic document shall be in an Excel or ASCI, tab-delimited format, or another format to which the Division agrees. The Respondents shall preserve all data and documents that they possess that contain information that may be used to compile the foregoing Consumer List. The Respondents shall, at the same time they provide the Customer List, provide electronic copies of documents demonstrating any amounts or information listed in subparagraphs (j) through (n), above.

35. Within thirty (30) days of the date of this Final Order, the Respondents shall make an initial payment to the Agency in the amount of **$500,000.00** to be placed by the Agency into an account to pay restitution to consumers and to pay for the costs of a claims process (the "Restitution Account"). Without accounting for the costs of the claims process, this amount represents disgorgement of just under $10.00 for each of the at least 51,500 CDMA-only phones the Respondents sold to Maryland consumers without providing any notice, or without providing adequate notice, that the phones would stop working once the CDMA network was shut down.

36. The Restitution Account shall be maintained by the Agency. The Proponent shall make disbursements from the Restitution Account to pay restitution to eligible consumers and to pay the costs of the claims process.

37. The Proponent shall perform a claims process that will be conducted by a person or persons appointed by the Agency (hereinafter the "Claims Administrator"). The Claims Administrator may be an employee of the Agency or an independent claims processor.

38. The claims process shall consist of identifying and locating each consumer who is eligible to receive restitution pursuant to this Final Order, gathering all information necessary to determine the amounts of restitution due to each consumer who is eligible to receive restitution, and the Claims Administrator mailing restitution payments to all such eligible consumers and any other mailings necessary to the claims process.

39. The Claims Administrator shall perform the tasks necessary to ensure a thorough and efficient determination of consumers' claims pursuant to the terms of this Final Order.

40. The Claims Administrator shall perform the above duties under the supervision and control of the Proponent.

41. The Respondents shall give the Claims Administrator complete access to all records, data, and personnel necessary for the Claims Administrator to complete his or her duties.

42. The Respondents shall be jointly and severally liable for the costs of conducting the claims process, including the payment provided for under paragraph 35 of this Final Order. The Claims Administrator shall notify the parties of all costs incurred in connection with the claims process.

43. If, at any stage of the claims process, it is determined that the Restitution Account will require additional payments to satisfy all consumer restitution due under this Final Order or to pay the costs of the claims process, the Respondents shall deposit additional money in the amount specified by the Proponent within thirty (30) days of being notified by the Proponent of the additional amount.

44. If there are insufficient funds collected to provide full restitution to each victim, benefits shall be distributed to consumers on a *pro rata* basis.

45. All monies received pursuant to this Final Order received shall be credited first toward restitution and the costs of the claims process and shall only be credited toward the civil penalty after all restitution claims are satisfied.

Civil Penalties

46. The Respondents are subject to civil penalties for each of their violations of the Consumer Protection Act pursuant to CPA § 13-410(a). The factors to be considered by the Agency pursuant to Md. Code Ann., Com. Law § 13-410(d) in setting the amount of a civil penalty are:

(i) The severity of the violation for which the penalty is assessed;

(ii) The good faith of the violator;
(iii) Any history of prior violations;
(iv) Whether the amount of the penalty will achieve the desired deterrent purpose; and
(v) Whether the issuance of a cease and desist order, including restitution, is insufficient for the protection of consumers.

These factors, considered below, support the imposition of a substantial penalty.

47. The Respondents' violations were severe. Both before and after the Merger was approved, the Respondents were aware that the CDMA-only mobile phones that they offered and sold to consumers would be practically worthless once the planned shutdown of Cricket's CDMA network was approved by the FCC. The phones would be both inoperable on Cricket's network and, because the phones were locked to Cricket's network, they also could not be used on any other network unless Cricket unlocked them, which was not a certainty. Despite this, the Respondents did not disclose the potential shutdown of the network to consumers at all prior to the approval of the Merger. Even after the approval of the Merger, when the Respondents did provide some disclosures, the Respondents clearly did not intend for consumers to see the disclosures. Instead, the inadequate and ineffective disclosures were hidden in fine print or otherwise placed in areas where consumers were unlikely to see the disclosures, prefaced with information that distracted consumers, and placed in locations consumers were unlikely to look.

48. The Respondents' omissions clearly harmed consumers. The Respondents' failure to disclose the planned shutdown of Cricket's CDMA network meant that consumers bought CDMA-only mobile phones—potentially at great cost—without knowing that the Respondents planned to make the phones obsolete, and that the consumers would have to buy replacements in a matter of months. This caused financial harm to consumers while providing a financial benefit to the Respondents—they were able to more easily sell off an inventory of phones that would be otherwise unmerchantable.

49. The trade-in credits provided by the Respondents after the Merger do not negate the severity of the violations. While the Respondents did provide credits to some consumers toward the purchase of replacement GSM Phones, many of the credits were mandated by the FCC as a condition of approving the Respondents' business plans. The credits were neither intended nor sufficient to compensate consumers for the loss of use of their CDMA-only phones. Instead, the credits were offered as an incentive for consumers to migrate their service plans to the AT&T network. The Respondents only began offering credits and other incentives several months after they notified consumers that the CDMA network would be shut down and began advising consumers to purchase replacement phones. This meant that many consumers purchased replacement phones without receiving any credits. When credits were eventually offered, they were initially for relatively small amounts, which increased as time went on, and only after many consumers had already purchased replacement phones. Even the larger credits offered by the Respondents were potentially insufficient to cover the cost of a substantially equivalent replacement, which meant that consumers either had to downgrade their phones or expend additional amounts above the credits to obtain an equivalent replacement. The credits and other incentives did not offset the financial harm suffered by consumers.

50. The Respondents acted in bad faith. After the approval of the Merger, when it was a certainty that the CDMA-only phones sold by the Respondents would stop working on the Respondents' network, the Respondents failed to notify consumers of this extremely important information. Though the Respondents placed some disclosures on and near the phone boxes in stores, it is clear from the fine print used in the disclosures, the inconspicuous placement of the disclosures in the corner of phone boxes and buried in fine print on price cards, and in the use of distracting elements, such as preceding the disclosure with an unrelated statement in another

language, that the Respondents did not intend their disclosures to be seen or understood by consumers. The disclosures were unclear and inconspicuous. The nature of the disclosures suggests a cynical attempt at technical compliance meant to insulate the Respondents from liability while they foisted worthless merchandise on unsuspecting consumers.

51. While not as egregious as their post-merger violations, the Respondents acted in bad faith prior to the FCC's approval of the Merger as well. Between the announcement of the Merger and its approval, consumers were given no warning at all of the planned shutdown of Cricket's CDMA network. At least 50,000 Marylanders bought CDMA-only phones during this time frame without being informed that the phones would stop working after the Merger. The Respondents' claim that no disclosures were made because they believed that to do so would have violated federal antitrust laws prohibiting premature merger are dubious. The Respondents did, in fact, announce the planned network change before it was approved. Cricket posted a letter to its customers on its website informing them of the Merger and doing the very thing they now claim prevented them from making disclosures about the CDMA-only phones: disclosing the planned upgrade to AT&T's GSM network. Specifically, the letter noted that "this transaction will enable us to provide our customers with...access to AT&T's award-winning 4G LTE mobile network," and instead of noting the effect of that change on phones, falsely stated that the agreement "will not result in any change or disruption to your Cricket service." The Respondents disclosed the positive aspects of the planned network change while concealing the potential risk it posed to the functionality of the phones they offered and sold, and worse, misrepresented that the Merger would have no negative effects. The Respondents did not act in good faith either before or after the approval of the Merger.

52. The Respondents have not previously been found by the Agency to have committed violations similar to those alleged by the Proponent in this matter; however, the violations committed by the Respondents are numerous, long lasting, and statewide. The Respondents sold at least 50,000 CDMA-only mobile phones to Maryland consumers between the date the Merger was announced and the date it was approved, during which time it made no disclosures. The Respondents sold over 1,500 CDMA-only mobile phones after the Merger was approved without adequately disclosing the impending network shutdown. It is clear that each of the over 51,500 such sales violated the Consumer Protection Act. It is also certain that an untold number of consumers were exposed to the Respondents' misleading offers and advertisements for CDMA-only phones without making purchases. Each time a consumer was exposed to these misleading advertisements was also a violation of the Consumer Protection Act. The number of violations is likely far greater than the at least 51,500 times the Respondents sold CDMA-only phones.

53. Injunctive provisions and an order to pay restitution alone are not sufficient to protect consumers from future violations. Though the facts of this matter were not greatly disputed, the Respondents maintain that they have not violated the law. This is particularly disturbing in light of the clearly inadequate disclosures made after the Merger was approved. No reasonable person could conclude that the disclosures were clear or conspicuous, or that the maker of the disclosure had any intent for consumers to actually read or understand them. Further, a requirement that the Respondents pay restitution to consumers who unknowingly purchased CDMA-only phones with limited lifespans doesn't even have the effect of putting the Respondents in the financial situation they would have been in if they had complied with the law. In addition to profiting from phone sales they would not otherwise have made, the

Respondents benefitted each month a consumer paid their monthly service fee, unaware that they would have to buy a new phone to continue using the service in the future. Thus, the restitution amount does not disgorge the amount that the Respondents may not have obtained consumers' monthly service payments without the use of their deceptive practices. A significant penalty is necessary to deter the Respondents and those similarly situated from engaging in this or a similar type of illegal conduct in the future.

54. At the time of the violations, section 13-410(a) of the Consumer Protection Act provided that a merchant who engaged in a violation of the Act is subject to a fine of not more than $1,000 for each violation.[2]

55. In recognition of the number of violations committed by the Respondents and the factors set forth in Md. Code Ann., Com. Law, § 13-410(d), the Agency has determined that the Respondents shall, no later than thirty (30) days from the date of this Final Order, pay civil penalties totaling $3,250,000.00, representing a penalty of $500.00 per violation for the at least 1,500 violations the Respondents committed after the approval of the Merger, and of $50.00 per violation for each of the at least 50,000 violations committed prior to the approval of the Merger.

Costs

56. Within thirty (30) days from the date of this Final Order, the Respondents shall pay the Agency $24,973.54 for the Proponent's costs incurred investigating and prosecuting this matter.

[2] The maximum penalty for violations of the Consumer Protection Act was increased to $10,000 per violation for a first violation and $25,000 for a subsequent violation in October 2018 (*see* CPA § 13-410(a) and (b)). Each of the violations at issue here occurred before that time.

Joint and Several Liability of Respondents

57. The Respondents are jointly and severally responsible for all payments due hereunder.

Resolution of Disputes

58. The Chief of the Agency or his designee shall resolve any disputes regarding this Final Order and enter any supplemental orders needed to effectuate its purpose.

Notice to Respondents

59. Pursuant to Md. Code Ann., Com. Law § 13-403(d), the Respondents are hereby notified that if the Agency determines that the Respondents have failed to comply with this Final Order within thirty (30) days following service of this Final Order, the Proponent may proceed with enforcement of the Final Order pursuant to Title 13 of the Commercial Law Article.

Appeal Rights

60. A party aggrieved by this Final Order is entitled to judicial review of the decision as provided by § 10-222 of the State Government Article of the Annotated Code of Maryland. Generally, a petition for judicial review must be filed within thirty (30) days after the date of the order from which relief is sought. The time for filing a petition is regulated by Rule 7-203 of the

Maryland Rules and the rules regulating judicial review of administrative agency decisions as set forth in Rules 7-201 to 7-210 of the Maryland Rules.

CONSUMER PROTECTION DIVISION
OFFICE OF THE ATTORNEY GENERAL

Date: July 21, 2021

By:

Steven M. Sakamoto-Wengel
Consumer Protection Counsel for
Regulation, Legislation and Policy and
Chief's Designee

Copies to:
Patrick Henry McCormally
Consumer Protection Division
Office of the Attorney General
200 St. Paul Street, 16th Floor
Baltimore, MD 21202
pmccormally@oag.state.md.us

Milton Marquis, Esq.
Hugh J. Marbury, Esq.
1200 19th St., N.W.
Washington, D.C. 20036
hmarbury@cozen.com
mmarquis@cozen.com

Cricket Wireless, LLC
575 Morosgo Drive, N.E.
Atlanta, GA 30324

AT&T, Inc.
208 S Akard St.
Dallas, TX 75202

Exhibit A – Claims Form

Date

Re: Cricket Wireless

Dear Consumer:

As the result of an action brought by the Consumer Protection Division of the Office of the Maryland Attorney General against Cricket Wireless, LLC and its owner, AT&T, Inc., you may be entitled to a refund of the amount you paid Cricket Wireless for a cell phone that stopped working on Cricket's network after AT&T, Inc. took over Cricket's operations.

Certain mobile phones sold by Cricket Wireless between July 12, 2013 and March 12, 2015 were not capable of working on the new cellular network that Cricket began using in Maryland in 2015. We are writing to you because Cricket's records indicate that you had one of these phones. Depending on your experience, you may be entitled to a refund, however, in order to determine your eligibility, you must fill out and return the attached claim form to the following address no later than xx/xx/xxx to:

XXXXXXXXXXXXXX
Claims Administrator
[Address of Claims Administrator]
[Address of Claims Administrator]
[Address of Claims Administrator]

After you return your claim form, if you are eligible for a refund, you will be contacted by the Consumer Protection Division. Please note, you will be required to provide the Consumer Protection Division with your Social Security Number before the State can issue a refund check. If you have any questions regarding your claim you may contact XXXXXXXXXX, Claims Administrator, by calling (XXX) XXX-XXXX.

Sincerely,

Attorney General

CRICKET WIRELESS, LLC / AT&T, INC. CLAIM FORM (A)
(Where Customer Device Purchase Information Available)

Rec. No.
Name
Street Address
City, State Zip Code

In order to determine your eligibility for a refund, you must complete this claim form and return it to the following address:

XXXXXXXXXXXXXX
Claims Administrator
[Address of Claims Administrator]
[Address of Claims Administrator]
[Address of Claims Administrator]

If your address above is incorrect, please provide any corrections in the space below:

____

____

____

Our records indicate you purchased the following phone from Cricket around [DATE].
[MAKE AND MODEL OF PHONE]
Is this correct?
__Yes.
__No.
__I don't recall.

How much did you pay for the phone? (Your claim will not be denied just because you do not know how much you paid.) Only list the price you paid for the phone, do not include any amounts you paid for accessories or for monthly service.
$_______________
___ I don't recall exactly what I paid.

Did you purchase the phone by calling Cricket and paying over the phone?
__Yes.
__No.

When you purchased the phone, were you aware of the plan to shut down Cricket's CDMA network in 2015, after which the phone would no longer work on Cricket's network?
__Yes, I was aware.
__No, I was not aware.

If you are eligible for a refund, do you want a refund?
__Yes, I want a refund if I am eligible.
__No, I do not want a refund even if I am eligible for one.

______________________________ ______________________________
Signature Date

____
Print Name

THIS CLAIM FORM MUST BE RETURNED IN AN ENVELOPE WITH A POSTMARK OF NO LATER THAN XX/XX/XXXX

CRICKET WIRELESS, LLC / AT&T, INC. CLAIM FORM (B)
(Where Only Customer Activation Information Available)

Rec. No.
Name
Street Address
City, State Zip Code

In order to determine your eligibility for a refund, you must complete this claim form and return it to the following address:

XXXXXXXXXXXXXX
Claims Administrator
[Address of Claims Administrator]
[Address of Claims Administrator]
[Address of Claims Administrator]

If your address above is incorrect, please provide any corrections in the space below:

____

____

____

Our records indicate you activated the following phone on Cricket's network around [DATE].
[MAKE AND MODEL OF PHONE]
Is this correct?
__Yes.
__No.
__I don't recall.

Where did you buy this phone?
__From a Cricket Store
__From Cricket's Website
__From another retail store (WalMart, RadioShack, Best Buy, etc.) either in store or online.
__Over the phone from Cricket
__I bought it used.
__I didn't buy the phone from Cricket/I already had this phone and brought it to Cricket.

How much did you pay for the phone? (Your claim will not be denied just because you do not know how much you paid.) Only list the price you paid for the phone, do not include any amounts you paid for accessories or for monthly service.
$________________

___ I don't recall.

When you purchased the phone, were you aware of the plan to shut down Cricket's CDMA network in 2015, after which the phone would no longer work on Cricket's network?
__Yes, I was aware.
__No, I was not aware.

If you are eligible for a refund, do you want a refund?
__Yes, I want a refund if I am eligible.
__No, I do not want a refund even if I am eligible for one.

______________________________ ______________________
Signature Date

____
Print Name

THIS CLAIM FORM MUST BE RETURNED IN AN ENVELOPE WITH A POSTMARK OF NO LATER THAN XX/XX/XXXX

CONSUMER PROTECTION DIVISION,	*	**BEFORE GERALDINE A. KLAUBER,**
OFFICE OF THE ATTORNEY	*	**AN ADMINISTRATIVE LAW JUDGE**
GENERAL,	*	**OF THE MARYLAND OFFICE OF**
PROPONENT,	*	**ADMINISTRATIVE HEARINGS**
v.	*	**OAH CASE No.: OAG-CPD-04-20-13579**
CRICKET WIRELESS, LLC	*	
AND	*	
AT&T, INC.,	*	
RESPONDENTS	*	

* * * * * * * * * * * * *

PROPOSED RULING ON MOTION FOR SUMMARY DECISION

Procedural Background

On June 9, 2020, the Consumer Protection Division (CPD) of the Maryland Office of the Attorney General (Proponent) filed a Statement of Charges (SOC) against Cricket Wireless, LLC and AT&T, Inc. (collectively, Respondents) alleging deceptive trade practices as prohibited by the Maryland Consumer Protection Act (the Act), Md. Code Ann., Com. Law §§ 13-101 through 13-501 (2013 & Supp. 2020),[1] relating to the sale of cellphones. The CPD is seeking an order enjoining the Respondents from violating the Act, as well as seeking restitution, civil penalties, economic damages, and costs. The CPD delegated the matter to the Office of Administrative Hearings (OAH) to conduct a hearing and issue proposed findings of fact and conclusions of law, with the CPD making the final findings of fact and conclusions of law, determining the appropriate relief, and entering a final order in this matter.

[1] The 2013 Replacement Volume of the Commercial Law Article is updated yearly and includes the 2020 Supplement to the Commercial Law Article. The issues in this case occurred during 2013-2014. If a provision in the Commercial Law Article is currently in the 2020 Supplement, I have cited to the 2020 Supplement, but I have added an explanatory note if there is a substantive difference.

Along with the SOC, on June 9, 2020, the CPD filed a Motion for Summary Decision, Memorandum of Law in Support of Proponent's Motion for Summary Decision, as well as Proposed Findings of Fact and Conclusions of Law. On July 29, 2020, the Respondents filed an Answer to the Statement of Charges, an Opposition to the Proponent's Motion for Summary Decision, a Motion for Summary Decision, and a Memorandum of Law in Support of Respondents' Motion for Summary Decision. On September 1, 2020, the CPD filed an Opposition to Respondents' Motion for Summary Decision and a Reply to Respondents' Opposition to Proponent's Motion for Summary Decision. On September 4, 2020, the Respondents filed a Reply to Proponent's Opposition to Respondents' Motion for Summary Decision, as well as Proposed Findings of Fact and Conclusions of Law.

On September 9, 2020, I conducted a hearing on the parties' motions via Google Meet. Patrick H. McCormally, Assistant Attorney General, represented the CPD. Hugh J. Marbury, Esquire, and Milton Marquis, Esquire, represented the Respondents.[2]

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the CPD, and the Rules of Procedure of the OAH govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2020); Code of Maryland Regulations (COMAR) 02.01.02; COMAR 28.02.01.

ISSUE

Should either the Respondents' Motion or the CPD's Motion be granted?

SUMMARY OF THE EVIDENCE

The CPD's Motion for Summary Decision included two exhibits, and the CPD's Proposed Findings of Fact and Conclusions of Law were accompanied by Exhibits A, B, and B1 through B49. The exhibits contained affidavits and sworn statements that were offered in

---

[2] Additional attorneys appeared on behalf of the Respondents but did not participate in the hearing.

support of the CPD's Motion for Summary Decision. The Respondents also referenced some of the CPD's exhibits in support of their Motion for Summary Decision. The Respondents attached copies of supporting authorities to their Motion for Summary Decision that were marked as exhibits. All of the exhibits provided by the parties are listed in an Appendix to this Proposed Ruling.

UNDISPUTED FACTS

1. Respondent Cricket Wireless, LLC (Cricket) is a Delaware limited liability company with its principal place of business in Atlanta, Georgia. (CPD Ex. A.)

2. Cricket is a wholly owned subsidiary of AT&T. (*Id.*)

3. Cricket offers and sells cell phones and cell phone service to customers throughout the U.S., including Maryland, under the "Cricket" or "Cricket Wireless" brand name. (*Id.*; CPD Ex. B1, at 2.)

4. Prior to its acquisition by AT&T, the Cricket brand of service was operated by Cricket Communications, Inc., a wholly owned subsidiary of Leap Wireless International, Inc. (Leap). (CPD Ex. B2, ¶ 2.)

5. AT&T is a Delaware corporation with its principal place of business in Dallas, Texas. (CPD Ex. A.)

6. Cricket has offered and sold cell phone and cell phone services in Maryland since 2009. Cricket offers no-contract, month-to-month ("prepaid") service, where consumers pay a flat fee every month for their service. (CPD Ex. B2, ¶ 2.)

7. At all times relevant, cell phones, except Apple iPhones, were generally only capable of being used **either** on a Code Division Multiple Access (CDMA) network or a Global System for Mobiles (GSM) network. (CPD Ex. B9.)

8. Prior to its acquisition by AT&T, Cricket provided cell phone services to consumers in Maryland on a CDMA network. The phones only function on a CDMA network. (CDMA-only phones) (CPD Ex. B2, ¶ 9.)

9. AT&T provides cell phone service on a GSM and Long-Term Evolution (LTE) network. (CPD Ex. A.)

10. Consumers could purchase cell phones for use on Cricket's network directly from Cricket or indirectly from authorized dealers who purchased Cricket-branded phones directly from Cricket and resold the phones to consumers. Consumers had to set-up and pay for their cell phone service directly with Cricket. (*Id.*)

11. At all times relevant, Cricket installed software on the phones sold by Cricket and its authorized dealers that rendered the phones technically incapable of operating on another carrier's CDMA network. (*Id.*)

12. On July 12, 2013, AT&T announced its plan to acquire Cricket by purchasing its parent company, Leap. AT&T's acquisition of Cricket was subject to review and approval by the Federal Communications Commission (FCC) and the United States Department of Justice (DOJ). (CPD Ex. B1, at 1; CPD Ex. B16.)

13. At the time the purchase agreement was announced, AT&T planned to continue operating Cricket as a prepaid service provider on AT&T's GSM network. (CPD Ex. B6, ¶ 4.)

14. As a result of the change in networks, Cricket customers would have access to AT&T's larger network, but Cricket customers' CDMA-only phones would have to be replaced with ones that worked on AT&T's GSM network. (CPD Ex. B20.)

15. As of July 12, 2013, Cricket was aware that AT&T planned to switch Cricket's service from Leap's CDMA network to AT&T's GSM network, and that consumers who

purchased Cricket CDMA-only phones would not be able to use those phones on AT&T's GSM network if the merger was approved. (*Id.* at 7-8.)

16. Between the date AT&T announced its purchase of Leap and the date the merger was approved and closed, Cricket did not inform consumers that the Cricket CDMA-only phones would not work on AT&T's GSM network. (CPD Ex. A; CPD Ex. C; CPD Ex. E.)

17. Between the announcement of the merger and the date it was approved, Cricket sold at least 50,000 CDMA-only phones in Maryland. (CPD Ex. B24.)

18. On March 13, 2014, the FCC approved AT&T's proposed acquisition of Cricket in a Memorandum Opinion and Order (Merger Order). After the merger, Leap was a wholly owned subsidiary of AT&T. (CPD Ex. B21.)

19. On May 18, 2014, AT&T launched what it referred to as the "New Cricket," offering GSM cell phones and GSM service on the AT&T network. (CPD Ex. A; CPD Ex. B8.)

20. Cricket and its agents continued to sell CDMA-only phones with CDMA service plans for approximately two months after it became a subsidiary of AT&T. (CPD Ex. A; CPD Ex. B, at 10.)

21. Independent dealers and national retailers continued to sell Cricket CDMA-only phones through October 2014, and Cricket continued to activate service for consumers who bought or owned CDMA-only phones through March 2015. (CPD Ex. B8, at 10; CPD Ex. B31; CPD Ex. B42). Overall, 1,668 Cricket CDMA-only phones were sold in Maryland after the close of the merger. (CPD Ex. B, ¶ 16.)

22. For Maryland consumers Cricket continued to operate its old CDMA network along with the GSM network up until April 15, 2015. (CPD Ex. B27.) The CDMA network was shut down in three waves. The first wave occurred on April 15, 2015, and included Maryland customers, except for one authorized dealer in Hagerstown, which was included in the third wave

on September 15, 2015. Between the launch of the New Cricket and the shutdown of the CDMA network, the Respondents attempted to convince Cricket customers to migrate to AT&T's GSM network. (CPD Ex. A.)

23. The CDMA-only phones sold by the Respondents were locked to the Respondents' network and were incapable of working on another cell phone carrier's network, unless the Respondents unlocked the phones.

24. The FCC's approval of the merger was conditioned on post-merger steps addressing the network migrations and set forth in the Merger Order. (CPD Ex. B21.)

25. The Merger Order required Respondents to offer rate plans to certain customers that mirrored their prior Cricket CDMA plans, offer "significant" device trade-in credits, offer free SIM cards for certain models of CDMA iPhones, and offer free feature phones for customers who traded in Cricket CDMA feature phones. (*Id.*)

26. The FCC concluded that with the remedial steps imposed on the Respondents as a condition of the FCC approval and as set forth in the Merger Order, "the public interest benefits of the merger would outweigh the likelihood of significant public interest harms, such that overall, the merger would be in the public interest." (*Id.*)

27. Following the close of the merger, the FCC monitored the Respondents' compliance with the Merger Order through quarterly detailed reports in which the Respondents documented the status of the implementation of the remedial conditions and the migration of the Cricket customers to the new network. (*Id.*)

28. After the approval of the merger, the CDMA-only phones sold by the Respondents included a sticker on the lower left side of the phone box that included the following fine print disclosure:[3]

> Información en español includa.
> Cricket is upgrading its CDMA network to 4G GSM and expects to stop offering CDMA wireless service as early as March 2015. **This CDMA phone will no longer work on our wireless network after we complete this upgrade.**
>
> ---
>
> See Cricket's updated Terms and Conditions of Service, which includes your agreement to dispute resolution through binding individual arbitration instead of jury trials or class actions at www.cricketwireless.com,

(CPD Ex. B33, at 4.)

29. The stickers placed on the phone boxes measured approximately two inches by three-quarters an inch in height. (CPD Ex. B10, at 3; CPD Ex. B33 at 4.)

30. The print of the disclosure was surrounded by a black border and was contrasted against a light backdrop. (CPD Ex. B33, at 4.)

31. After the approval of the merger, the Respondents provided their dealers with new in-store price cards for CDMA-only phones, which display the price and features of the phones offered in the stores. (CPD Ex. B34.)

32. The new price cards contained fine print disclosures printed in bold and upper case. The disclosures were placed at the bottom of the price card and in the smallest font on the card. The disclosure was similar in content to the disclosure on the phone box stickers. (*Id.*)

33. The in-store price cards informed consumers in bold and upper-case text that: **"THIS CDMA PHONE WILL NO LONGER WORK ON OUR NETWORK AFTER WE COMPLETE THIS UPGRADE."** (CPD Ex. B35.)

---

[3] The words of the disclosure are as provided on the sticker, but the font size is not the actual font size as it appeared on the stickers.

34. The fine-print disclosure on the store price cards was the smallest font on the price card and was placed at the very bottom of the card below the price phone features. (*Id.* at 1-2.)

DISCUSSION

I. The Parties' Positions

The facts of this case relate to the merger of AT&T and Cricket in 2014. The CPD charges that pre-merger and post-merger, the Respondents committed deceptive trade practices prohibited by section 13-303 of the Act, and as defined by sections 13-301(1), (2) and (3) of the Act. Com. Law § 13-301(1), (2), (3) (Supp. 2020).[4] Specifically, the CPD contends that the Respondents' failure to inform consumers that the Cricket CDMA-only phones would not work after Cricket's merger with AT&T was an omission of a material fact that deceived or misled consumers in violation of section 13-301(3) of the Act.

The CPD also contends that the Respondents made false or misleading statements that the phones sold by the Respondents that were locked to Cricket's network would continue to work on Cricket's network after the merger. The CPD contends that Respondents' express and implied representations in this regard fell under the purview of section 13-301(1) of the Act.

Finally, the CPD contends that the Respondents' implied representation that Cricket's CDMA-only phones would work on Cricket's network were representations that the phones had an accessory, characteristic, use or benefit that they did not have and therefore was a deceptive trade practice as defined by section 13-301(2) of the Act.

The Respondents dispute the validity of the CPD charges. The Respondents note that the FCC regulates competition in the telecommunications industry and, under the 1996

[4] Since 2013, the General Assembly added "abusive" to language on unfair or deceptive trade practices.

Telecommunications Act,[5] the acquisition of any company holding an FCC license, by another company holding an FCC license, is subject to review and affirmative consent by the FCC. In conducting a review of a proposed transaction, if the FCC finds that there are potentially adverse implications, the FCC can condition the approval on remedial actions to be taken by the purchaser. In this case, the FCC approved of the transaction with specific remedial conditions set forth in the Merger Order.

The Respondents contend that they are entitled to a decision in their favor as a matter of law because the Respondents' pre-merger activity is not actionable under the CPA as a matter of law; the Respondents' pre-merger activity is preempted by federal antitrust laws; the Respondents' post-merger activity met and exceeded CPA disclosure requirements; and the Respondents' post-merger conduct is preempted by the FCC's oversight authority. The Respondents further contend that the civil penalties and injunctive relief sought by the CPD are unavailable as a matter of law.

II. Standard of Determination

The OAH's Rules of Procedure provide for a motion for summary decision. COMAR 28.02.01.12D; *see also* COMAR 02.01.02.18B. In considering a motion for summary decision, the administrative law judge may consider authenticated documents, affidavits, and sworn testimony. COMAR 28.02.01.12D(2); *see also Davis v. DiPino*, 337 Md. 642, 648 (1995) (comparison of motions to dismiss and for summary judgment). The administrative law judge "may issue a proposed . . . decision in favor of or against the moving party if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law." COMAR 28.02.01.12D(5);

[5] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in Title 47 of the United States Code).

see also Metro. Mortg. Fund, Inc. v. Basiliko, 288 Md. 25, 28 (1980). This summary decision standard is the same as the standard for summary judgment under Maryland Rule 2-501 and cases discussing the summary judgment standard under the Maryland Rules are instructive. *See Assateague Coastkeeper v. Md. Dep't of the Env't*, 200 Md. App. 665, 698-99 (2011).

On a motion for summary decision, the moving party bears the initial burden. COMAR 28.02.01.21K(3). To prevail on a motion for summary decision, the movant must identify the relevant legal cause of action or legal defense and then set forth sufficient, undisputed facts to satisfy the elements of the claim or defense, or detail the absence of evidence in the record to support an opponent's claim. *See Bond v. NIBCO, Inc.*, 96 Md. App. 127, 134-36 (1993). If the moving party meets this initial burden, the opposing party must come forward with admissible evidence that establishes a genuine dispute of material fact, after all reasonable inferences are drawn in its favor. *Beatty v. Trailmaster Prods., Inc.*, 330 Md. 726, 737-39 (1993). A "material fact" is one "the resolution of which will somehow affect the outcome of a case." *King v. Bankerd*, 303 Md. 98, 111 (1985).

In reviewing a motion for summary decision, an administrative law judge may be guided by case law that explains the nature of a summary judgment in court proceedings. The Supreme Court has noted, regarding the standard for summary judgment, "By its very terms, this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis in original). A mere scintilla of evidence in favor of a nonmoving party is insufficient to defeat a summary judgment motion. *Id.* at 251. A judge must "draw all justifiable inferences in favor of the nonmoving party." *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 520 (1991).

In considering a motion for summary decision, it is not my responsibility to decide any issue of fact or credibility but only to determine whether such issues exist. *See Eng'g Mgt. Servs., Inc. v. Md. State Highway Admin.*, 375 Md. 211, 226 (2003). Additionally, the purpose of the summary judgment procedure is not to try the case or to decide the factual disputes, but to decide whether there is an issue of fact, which is sufficiently material to be tried. *See Goodwich v. Sinai Hosp. of Balt., Inc.*, 343 Md. 185, 205-06 (1996); *Coffey v. Derby Steel Co.*, 291 Md. 241, 247 (1981); *Berkey v. Delia*, 287 Md. 302, 304 (1980). Only where the material facts are "conceded, undisputed, or uncontroverted" and the inferences to be drawn from those facts are "plain, definite, and undisputed" does their legal significance become a matter of law for summary determination. *Fenwick Motor Co. v. Fenwick*, 258 Md. 134, 139 (1970).

The Court of Special Appeals has discussed what constitutes a "material fact," the method of proving such facts, and the weight a judge ruling upon such a motion should give the information presented:

> "A material fact is a fact the resolution of which will somehow affect the outcome of the case." "A dispute as to a fact 'relating to grounds upon which the decision is not rested is not a dispute with respect to a *material* fact and such dispute does not prevent the entry of summary judgment.'" We have further opined that in order for there to be disputed facts sufficient to render summary judgment inappropriate "there must be evidence on which the jury could reasonably find for the plaintiff."
>
> . . . The trial court, in accordance with Maryland Rule 2-501(e), shall render summary judgment forthwith if the motion and response show that there is no genuine dispute as to any material fact and that the moving party is entitled to judgment as a matter of law. The purpose of the summary judgment procedure is not to try the case or to decide factual disputes, but to decide whether there is an issue of fact that is sufficiently material to be tried. Thus, once the moving party has provided the court with sufficient grounds for summary judgment, "[i]t is . . . incumbent upon the other party to demonstrate that there is indeed a genuine dispute as to a material fact. He does this *by producing factual assertions, under oath*, based on the personal knowledge of the one swearing out an affidavit . . . . Bald, unsupported statements or conclusions of law are insufficient."

Tri-Towns Shopping Ctr., Inc. v. First Fed. Sav. Bank of W. Md., 114 Md. App. 63, 65-66 (1997) (citations omitted) (emphasis in original).

I am cognizant of the fact that some of the arguments raised by the Respondents may involve factual concerns, that this is a proposed decision, and that absent full disposition of the charges at the motion stage, a hearing will go forward.

III. Preliminary Issues

Statute of Limitations

In the Respondents' Motion for Summary Decision, the Respondents argue that the CPD's claims for civil penalties are barred by a one-year statute of limitations. The Respondents maintain, citing *Attorney General of Maryland v. Dickson*, 717 F. Supp. 1090 (D. Md. 1989), that the one-year statute of limitations in section 5-107 of the Courts and Judicial Proceedings Article applies to the CPA actions. Section 5-107 states that a "prosecution or suit for a fine, penalty, or forfeiture shall be instituted within one year after the offense was committed." Md. Code Ann., Cts. & Jud. Proc. § 5-107 (Supp. 2020).

In *Dickson*, the State of Maryland and the Attorney General of Maryland brought claims in federal court regarding a "scheme to roll back odometers of used cars" under the federal Motor Vehicle Information and Cost Savings Act and the Maryland CPA. 717 F. Supp. at 1093. Examining the language in section 5-107, the United States District Court for the District of Maryland rejected the State's argument that it was entitled to sovereign immunity against a limitations defense. The District Court, citing *Nelson v. Real Estate Commission*, 25 Md. App. 334 (1977), stated that a "prosecution refers to a criminal action," which is "almost always brought by a government." *Id.* at 1104. Because the statute referred to both "prosecution" and "suits," the District Court found that the statutory language "suggests that the legislature intended to include within the scope of the statute both criminal and civil actions for penalties,

fines, and forfeitures." *Id.* The District Court concluded that section 5-107 waived the government's immunity to a statute of limitations defense for both criminal and civil actions for fines and, therefore, the one-year statute of limitations applied to the claim. *Id.*

The District Court also rejected the State's argument that the CPA action was a "specialty by statute" subject to the twelve-year limitations period under section 5-102 of the Courts and Judicial Proceedings Article. *Id.* Recently, in *Price v. Murdy*, 462 Md. 145 (2018), the Court of Appeals of Maryland elaborated upon the twelve-year limitations period. After consumers brought a class action in the United States District Court for the District of Maryland, the District Court certified to the Court of Appeals a question of law whether the twelve-year limitations period for a statutory specialty applied to the Maryland Consumer Loan Law. The Court of Appeals applied a test from *Master Financial, Inc. v. Crowder*, 409 Md. 51 (2009), to determine whether a statute creates an "other specialty" under section 5-102 of the Courts and Judicial Proceedings Article. *Price*, 462 Md. at 151. While explaining the test, the Court of Appeals noted, while also noting that in *Dickson* the District Court did not certify to the Court of Appeals whether the CPA was a statutory specialty under Maryland law, the following:

> Although the district judge in *Dickson* reached the right result, as this Court would later agree that the CPA is *not* an "other specialty," *the reasoning and ultimate decision of the district judge in Dickson clearly does not apply.* The district judge did not employ the yet-to-be written *Crowder* test; moreover, *Crowder* borrowed from the very cases the *Dickson* court opined this Court would not follow.

Id. at 152 n.3 (second emphasis added) (citations omitted). Although the Court of Appeals agreed with *Dickson* that the CPA was not a specialty statute under the Courts and Judicial Proceedings Article, the Court did not address or decide whether the one-year limitations period in the Courts and Judicial Proceedings Article applied to CPA civil penalties.

In the CPD's Opposition to the Respondents' Motion for Summary Decision, the CPD argues that the one-year statute of limitations does not apply to its civil penalties, citing

Maryland Securities Commissioner v. United States Securities Corp., 122 Md. App. 574 (1998). In *Maryland Securities Commissioner*, the Appellant argued that the statute of limitations embodied in section 5-107 of the Courts and Judicial Proceedings Article did not apply to *administrative actions* for monetary fines or penalties. *Id.* at 588. The Court of Special Appeals agreed that the statute applied "only to judicial proceedings as opposed to administrative hearings," holding that "the statute of limitations codified in [section 5-107] does not apply to the administrative proceeding . . . in this case." *Id.* at 589, 592. The court explained its holding based upon the "spirit, reasoning, and holding" of its majority opinion in the *Nelson* case (cited above in *Dickson*):

> [T]he impetus of our reasoning was two-fold: (1) an administrative hearing was not a "prosecution" or "suit" within the meaning of [section 5-107 of the Courts and Judicial Article], and (2) the underlying purpose of protecting the public from unscrupulous practices by real estate brokers preempted the defense of limitations.

Id. at 591-92. The court summarized:

> [A]dministrative boards and officials are instrumentalities of the executive . . . . Notwithstanding . . . the quasi-judicial nature of some administrative hearings, we hold fast to the definitions of "prosecution" and "suit" that we set forth in the *Nelson* majority as excluding administrative proceedings from the limitations defense embodied in [section 5-107].

Id. at 592-93.

I decline to follow the federal court in *Dickson*. Although *Price* agreed with *Dickson* that the CPA was not a specialty statute under the Courts and Judicial Proceedings Article, *Price* did not decide whether the one-year limitations period in the Courts and Judicial Proceedings Article applied to CPA civil penalties. There was no administrative action or hearing underlying *Price*. And *Price* rejected the *Dickson* court's "reasoning and ultimate decision." Moreover, *Dickson* cited *Nelson* for the proposition that a "prosecution refers to a criminal action," but *Dickson* ignored *Nelson*'s conclusion that a "hearing before such an administrative body [, the Real Estate

Commission,] is not a 'prosecution' nor is it a 'suit.'" 25 Md. App. at 341. I agree with the CPD that "this action is an administrative proceeding that is neither a 'prosecution' or 'suit,' and because the underlying purpose of the [CPD's] action is to protect the public from unfair [and] deceptive . . . trade practices, the statute of limitations in [section 5-107] does not apply, and the [CPD's] claims for civil penalties are not barred." CPD Opp'n to Resp't Mot. for Summ. Decision, at 4.

Mootness

The issuance of a cease and desist order is in the nature of injunctive relief; that is, it is a preventative and protective measure aimed at controlling current and future conduct. *See* Com. Law § 13-403(b)(1)(i) (2013); *see also Consumer Prot. Div. v. Outdoor World Corp.*, 91 Md. App. 275, 283 (1992); *New Standard Publ'g Co., Inc. v. Fed. Trade Comm'n*, 194 F.2d 181, 183 (4th Cir. 1952) (explaining that cease and desist orders issued pursuant to the Federal Trade Commission Act "are entered, not as punishment for past offenses, but for the purpose of regulating present and future practices"). When issuing a cease and desist order, the CPD may also "take affirmative action, including restitution of money or property." Com. Law § 13-403(b)(1)(i).

In the Respondents' Motion for Summary Decision, the Respondents argue that the CPD's action for injunctive relief is moot. The Respondents contend that because its actions "concluded over six years ago on Day Alpha, or at the very least upon completion of the GSM-to-CDMA network migration . . . on April 15, 2015, . . . the acts sought to be enjoined have been discontinued or abandoned." Resp't Mot. for Summ. Decision, at 29 (quoting *State v. Neiswanger Mgmt. Servs., LLC*, 457 Md. 441, 455 (2018)). The Respondents maintain that there is no continuing controversy and the circumstances of the "merger and network migration" are "impossible" to recur. *Id.* at 30.

The CPD points out that the Respondents did not dispute the appropriateness of restitution and argues that it is entitled to restitution for past violations. The CPD also argues that injunctive relief is proper because the "Respondents' violations could be repeated in the future [and] regulators can prohibit violations that are *similar* to those that were alleged." CPD Opp'n to Resp't Mot. for Summ. Decision, at 4.

The CPD, like the Federal Trade Commission, has broad powers to enforce and interpret the Act, but those "broad powers . . . must fit within the statutory scheme established by the General Assembly." *Consumer Prot. Div. v. George*, 383 Md. 505, 522-23 (2004). A cease and desist order to protect consumers from future conduct might not be enforced for transactions that occurred "a decade before [the order] was entered" and "long discontinued." *New Standard Publ'g*, 194 F.2d at 183. A cease and desist order, however, may be issued when a practice is likely to recur; that is, whether there is a reasonable expectation that the conduct could resume.

In *Neiswanger Management*, the Court of Appeals examined whether injunctive relief against the operator of nursing facilities was moot, or subject to "mootness exceptions," under the Patient's Bill of Rights. 457 Md. at 449. The nursing facility operator had closed one of its facilities and asserted it was no longer operating the remaining facilities; however, it admitted that its personnel continued to be involved in the operation of the remaining facilities. *Id.* at 455-56. The operator had also entered a Consent Agreement with the Maryland Department of Health, which required it to implement changes and install an independent monitor to supervise its compliance. *Id.* at 453. *Neiswanger*, citing the Supreme Court in *Friends of the Earth, Inc. v Laidlaw Envtl. Servs.*, 528 U.S 167, 189 (2000), stated that the party seeking to prove mootness carries a "heavy burden." *Id.* at 456. A party's voluntary cessation of conduct does not make a case moot if there is a "reasonable expectation of recurrence," especially if the "cessation was

motivated by a desire to evade liability." *Id.* at 457. The Court found that the factual circumstances did not make the case moot and remanded to the Circuit Court. *Id.*

Here, while the specific circumstances of the merger and network migration might be impossible to replicate, the Respondents continue to sell phones to consumers that may not be compatible with network changes or upgrades. I agree with the CPD that the misrepresentations and omissions alleged by the CPD may reasonably be expected to recur "in any future equipment infrastructure change by the Respondents, including any merger the Respondents participate in." CPD Opp'n to Resp't Mot. for Summ. Decision, at 7. The action is not moot, and the CPD may seek injunctive relief and restitution for past violations.

IV. CPD Charges

The purpose of the CPA is to "set certain minimum standards for the protection of consumers across the State . . . ." Com. Law § 13-102(b)(1) (2013). In enacting the CPA, the General Assembly determined that the State

> should take strong protective and preventive steps to investigate unlawful consumer practices, to assist the public in obtaining relief from these practices and to prevent these practices from occurring in Maryland.

Id. § 13-102(b)(3). The General Assembly further instructed that the CPA shall be "construed and applied liberally to promote its purpose." *Id.* § 13-105. The CPA prohibits all trade practices that are unfair or deceptive. *Id.* § 13-303

At all relevant times, the Respondent acted as a "merchant" pursuant to section 13-101(g)(1) of the Commercial Law Article. "Merchant" is defined as a person "[w]ho directly or indirectly either offers or makes available to consumers any consumer goods, consumer services, consumer realty, or consumer credit." *Id.* § 13-101(g)(1) (Supp 2020). "Consumer services" are services which are primarily for personal, household, family, or agricultural purposes. *Id.* § 13-101(d)(1).

The CPA provides a non-exclusive list of unfair or deceptive trade practices at section 13-301. *Golt v. Phillips*, 308 Md. 1, 8 (1986). The Respondent is charged with committing unfair or deceptive trade practices as defined by sections 13-301(1), (2), and (3) of the Act; specifically, the Respondent unlawfully made false representations; made representations that their consumer goods have an accessory, characteristic, use, and benefit that they do not have; and failed to state material facts to consumers, both pre-merger and post-merger. None of these subsections requires proof of *scienter* on the part of the merchant. *See Consumer Prot. Div. v. Morgan*, 387 Md. 125, 210 (2005); *Golt*, 308 Md. at 10-11.

In this case, the Respondents' cell phones and cell phone services were sold primarily for personal purposes, and thus constitute "consumer services" pursuant to the CPA. As a result, the Respondent is prohibited from engaging in any unfair or deceptive trade practices in the sale of their cell phones and cell phone services to Maryland consumers. Com. Law § 13-303(1) (Supp. 2020).

A misrepresentation, as defined in section 13-301(1) of the Act, is any "false, falsely disparaging, or misleading oral or written statement, visual description, or other representation of any kind which has the capacity, tendency or effect of deceiving or misleading consumers." The Court of Appeals has stated that "[f]or consumer protection purposes, the meaning of any statement or representation is determined not only by what is explicitly stated, but also by what is reasonably implied." *Golt*, 308 Md. at 9. The Federal Trade Commission (FTC) has long held that a representation by a merchant is judged on the total, or overall, impression it makes on the consumer's mind. *F.T.C. v. Sterling Drug, Inc.*, 317 F.2d 669, 674-75 (2nd Cir. 1963); *see also American Home Prods. Corp. v. F.T.C.*, 695 F.2d 681, 687-88 (3rd Cir. 1983); *In re Cliffdale*

Assocs., Inc., 103 F.T.C. 110 (1984) app. (Policy Statement on Deception (Oct. 14, 1983)) (cited with approval in *Luskin's, Inc. v. Consumer Prot. Div.*, 353 Md. 335, 352 (1999)).[6]

The burden is not on the consumer to inquire into the truth of a representation. *See Sterling Drug, Inc.*, 317 F.2d at 674; *Resort Car Rental Sys., Inc. v. F.T.C.*, 518 F.2d 962, 964 (7th Cir.), *cert. denied*, 423 U.S. 827 (1975). Instead, the burden is on the party who is making the representation to convey the truth with the total impression of its advertisement. *Spiegel, Inc. v. F.T.C.*, 494 F.2d 59, 62 (7th Cir.), *cert. denied*, 419 U.S. 896 (1974). Additionally, the CPD does not need to show that consumers relied upon a misrepresentation or omission in order to prove a violation of the Act. *Consumer Prot. Div. v. Morgan*, 38 Md. 125, 162 (2005).

The "[f]ailure to state a material fact if the failure deceives or tends to deceive" is an unfair or deceptive trace practice under section 13-301(3) of the Act. An "omission is material if a significant number of unsophisticated consumers would find that information important in determining a course of action." *Green v. H & R Block, Inc.*, 355 Md. 488, 524 (1999) (citing *Luskin's*, 353 Md. at 358-58; *Golt*, 308 Md. at 10; *State v. Cottman Transmissions Sys., Inc.*, 86 Md. App. 714, 723, *cert. denied*, 324 Md. 121 (1991)).

Under section 13-301(2)(i) of the Act, it is a deceptive practice to represent that a consumer good has an "an accessory, characteristic, . . . use, benefit, or quantity which they do not have . . . ." The representation may be express or implied. *Golt*, 308 Md. at 9-10. A "characteristic," following the "well settled rule that the words of a statute should be assigned their natural and ordinary meanings," is a "distinguishing feature or attribute." *Hartford Accident & Indem. Co. v. Scarlett Harbor Assocs. Ltd. P'ship*, 109 Md. App. 217, 243 (1996).

---

[6] The CPA provides that "due weight and consideration be given to the interpretation of § 5(a)(1) of the Federal Trade Commission Act by the Federal Trade Commission and the federal courts." Com. Law § 13-105 (2013). Section 5(a)(1) of the FTC Act declares unlawful unfair methods of competition and unfair or deceptive acts that affect commerce. 15 U.S.C.A. § 45(a)(1) (Supp. 2019).

Pre-Merger Unfair or Deceptive Trade Practices Under the Act

Prior to the merger, Cricket offered and sold cell phones and prepaid cell phone services in Maryland. Cricket's cell phone services were provided on a CDMA network, one of two types of cell phone networks used by cell phone service providers in the U.S. The other network was the GSM network. Cell phones would generally only work on either the CDMA network or the GSM network. AT&T also offered and sold cell phones and cell phone services to Maryland consumers, but not under prepaid plans, and its services were provided on a GSM network. Thus, because the merger would result in a change of networks for Cricket customers, in order to have continued service, the Cricket customers would have to replace their CDMA-only phones with ones that worked on the GSM network.

It is undisputed that between the dates the proposed merger was publicly announced on July 12, 2013, and the date the merger was approved and closed on March 13, 2014, Cricket sold at least 50,000 CDMA-only phones in Maryland and did not disclose to consumers that their CDMA-only cell phones would not work on AT&T's GSM network if the merger was approved. It is also undisputed that Cricket knew as of the date of the announcement of the merger that AT&T planned to transition Cricket's customers onto AT&T's GSM network upon approval of the merger. The CPD contends that these undisputed facts entitle it to a decision in its favor as a matter of law.

The CPD argues that the fact that the Cricket CDMA-only phones would not work on AT&T's GSM network should the merger go through was information material to consumers that would tend to deceive if not disclosed. Furthermore, the disclosure was required even if the approval of the merger was not certain. CPD Mot. for Summ. Decision, at 21-22. On the other hand, the Respondents argue that the Act does not require merchants to make "speculative disclosures about future plans of a competitor." Resp't Mot. for Summ. Decision, at 14. The

Respondents argue that the Act does not require the Respondents to disclose information that is contingent upon the "unpredictable future actions of a federal regulator and the business strategies of a then-competitor third party." *Id.*

In support of its position that the Act requires the disclosure about uncertain future problems, the CPD relies upon two cases, neither of which involve the Act, *Md. Real Estate Comm'n v. Garceau*, 234 Md. App. 324 (2017), and *FTC v. NorVergence, Inc.*, No. Civ.A.04-5414, 2005 WL 3754864 (D.N.J. July 22, 2005). In *Garceau*, a real-estate broker was sanctioned by the Maryland Real Estate Commission under its statute and regulations for, among other things, not disclosing in a contract for sale that the property was subject to periodic testing for potential well-water contamination from an ExxonMobil gas leak. *Id.* at 331, 335-36. The broker knew about the litigation and testing. *See id.* at 359. The Court of Special Appeals found that the broker's failure to inform the buyers of the potential well contamination was a material omission and, citing CPA cases, held that the fact the property "was subject to periodic well testing for possible contamination" was a "material fact in this transaction" that the broker was required to disclose. *Id.* at 361. The court stated, however, regarding other issues in the case, that "[i]t is not mind-bending to conclude that a non-existent fact cannot be a 'material' fact." *Id.* at 358.

In *NorVergence*, an unreported case in the United States District Court of New Jersey, NorVergence sold consumers substantially discounted long-term telecommunications services. 2005 WL 3754864, at *2. The telecommunication services were not provided, however, because NorVergence did not have a long-term commitment from any service provider for the services it was promising. *Id.* at *2-3. The District Court held that NorVergence violated section 5(a) of the FTC Act by failing to disclose the material facts that NorVergence did not have a long-term

commitment from providers and the equipment (routers) provided by NorVergence were of "little or no value" without the promised telecommunications services. *Id.* at *3.

Neither of these cases is controlling. Nor do I find them persuasive. In *Garceau*, at the time of sale, the property was subject to testing for potential well-water contamination. This testing was a fact in existence at the time of sale, and such testing could disclose, although it did not in the *Garceau* case, that the water was contaminated from the leak. In *Norvergence*, the company did not have the service agreements required in order to provide the discounted telecommunications services that it promised consumers. It was promising a service that it could not deliver. Here, during the pre-merger stage, there was no possibility that the phones would not work on the CDMA network. The contracts ran month-to-month, and the phones worked on the CDMA network each month. The consumers had no expectation that the phones would work on another network. The phones would not work on the CDMA network *only if* the merger was approved and the CDMA network was no longer operational. It was a non-existent fact at the pre-merger time that the phones would not work on the CDMA network.

In their Reply, the CPD also cites two out-of-state consumer cases for their argument that the Respondents have a duty to disclose uncertain future facts. In *Hess v. Chase Manhattan Bank, USA*, 220 S.W.3d 758 (Mo. 2007), the bank did not disclose to the buyer prior to the sale that the property was being investigated by the EPA for hazardous waste dumping, even though the EPA had not made any determination that remedial measures were necessary. Again, like *Garceau*, this investigation was a fact in existence at the time of sale. The EPA investigation into hazardous waste dumping was a material fact because a "reasonable consumer would likely consider [it] to be important in making a purchasing decision." *Id.* at 766, 773.

The CPD is comparing facts (contamination) that *might be* disclosed in relation to a material fact (investigation, testing) with "facts" (network incompatibility) *only if* a material fact

(merger) were to occur. The merger, unlike the testing in *Garceau* or investigation in *Hess*, was not in existence at the time of the Cricket phone sales.

The CPD also relies upon *York v. Sullivan*, 338 N.E.2d 341 (Mass. 1975), a forty-five-year-old Massachusetts case with brief analysis, and for which the CPD draws conclusions from facts out of context. In *York*, the landlord of a federally assisted housing development had an application pending before HUD for rent increases. *Id.* at 344. Tenants signed one-year leases, which provided that the rents were "subject to adjustments on approval by HUD . . . ." *Id.* The tenants maintained, however, that the landlord had led them to believe that adjustments during the lease period would only occur if the tenant's income changed. *Id.* When HUD approved the increase, the rents were increased during the one-year lease period. *Id.* The court stated that the deceptive practice was that the landlord "led a tenant to believe that the rent under a lease *will be stable during its one-year term* [and] the tenant is entitled to the benefit of the bargain the landlord induced him to think he was making." *Id.* at 347 (emphasis added). Here, there was no change in services month-to-month during the pre-merger stage. Consumers did not bargain for something that they did not receive.

On the other hand, the cases cited by the Respondent, where a merchant did not know or have reason to know of certain facts at the time of the alleged misrepresentation or omission, are also distinguishable from this case. *See, e.g.*, *Sternberger v. Kettler Bros., Inc.*, 123 Md. App. 303, 310 (1998) (holding no CPA violation when builder did not know or have reason to know of roofing material deficiencies at the time of the transaction); *Allen v. Bank of Am., N.A.*, 933 F. Supp. 2d 716, 727 (D. Md. 2013) (holding no CPA violation when bank did not know of a system glitch that caused missed payments until after they had not occurred.) The merger was not speculative. It was a publicly announced, major business restructure that was in motion, and

for which Cricket was certainly aware, but the merger was only certain upon final approval by the FCC and DOJ, which was not guaranteed.

Until that point, I do not find that Cricket was misleading or deceptive. The Cricket CDMA-only phones were fit for the purpose for which they were sold. Merchants constantly consider product changes and may later roll-out differing products. A merchant is not deceptive because it is not transparent about every aspect of its business *plans*, which would include material facts not yet in existence. There is not a definite point on the continuum for when business ideas and plans that might affect a consumer should be disclosed. But that point has not been met here when the merger, and change in network compatibility, was not yet approved by regulators. The Respondents did not make misrepresentations, omit material facts, or represent that the phones had a characteristic that they did not have during the pre-merger stage. Accordingly, regarding the pre-merger facts, I grant summary judgment for the Respondents under section 13-301(1), (2), and (3) of the Act.

Federal Preemption of CPD's Pre-Merger Claims

Even if I were to find that the CPD had cognizable claims under the Act for the Respondents' premerger activity, these claims are preempted by federal antitrust law. The Supreme Court described the preemption doctrine in *Altria Grp., Inc. v. Good*, 555 U.S. 70 (2008). In the most basic sense, when State and federal law conflict, federal law preempts State law due to the Supremacy Clause of the U.S. Constitution.[7] As the CPD points out, it is a well-established and often cited principle that analysis of federal preemption must "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Thus, the question of intent is the central issue for all forms of

---

[7] U.S. Const. art. VI, § 2.

preemption. *Gobeille v. Liberty Mut. Ins. Co.*, 136 S. Ct. 936, 946 (2016). There is express and implied preemption. Express exemption usually occurs when a statute includes a preemption clause.[8] In this case there is no express preemption. Preemption can also be implied by way of conflict preemption. A conflict may occur between federal and state laws when they impose different requirements on a party. This could make it impossible for a party to comply with both federal and state law or put the party in a position in which compliance with one law puts them in violation of the other so that it is impossible to comply with both at the same time. Conflict preemption can also apply because a state law interferes with the objectives of federal law or is an obstacle to the accomplishment of a federal purpose. For example, the case of *Sperry v. Florida*, 373 U.S. 379 (1963), involved a conflict between patent laws and State law governing the licensure of attorneys. The U.S. Patent office had licensed the person as a patent agent, but Florida had determined this to be the unauthorized practice of law. The Supreme Court held that federal patent law preempted State law regarding the person's ability to act as a patent agent in Florida. *Id.* at 403. Although Congress did not expressly state that it intended patent law to preempt state licensure law, preemption was necessary and proper to accomplish the goals of patent law.

The Respondents' position is that the CPD's charges must be dismissed based on conflict preemption. According to the Respondents, the pre-merger disclosures that the CPD contends are mandated by the Act regarding the inability of CDMA-only phones to function on the post-merger network directly conflict with federal antitrust laws. Resp't Mot. for Summ. Decision, at 21. The Respondents argue that the pre-merger disclosures would constitute what is referred to

---

[8] An example of express preemption is the case of *Arizona v. United States*, 567 U.S. 387 (2012). The Court held that federal immigration law preempted a State law penalizing undocumented immigrants who worked without authorization. The Immigration and Control Act of 1986 contained an express exemption clause codified at 8 U.S.C. § 1324a(h)(2). The Court found that the Arizona law was an obstacle to the regulatory system Congress chose. *Id.* at 410.

in antitrust law as "gun jumping." Gun jumping violations could result in fines, penalties, and even criminal charges. *See United States v. Gemstar-TV Guide Int'l, Inc.*, No. Civ.A. 03-0198, 2003 WL 21799949 (D.D.C. July 11, 2003). Gun jumping is an expression not defined in U.S. antitrust law. In the context of this matter, Respondents contend that it relates to impermissible pre-merger coordination between Cricket and AT&T.

The Respondents cite the following two federal laws that prohibit the disclosures at issue: (1) Section 1 of the Sherman Act, 15 U.S.C. § 1, which prohibits agreements in restraint of trade, and (2) the Hart-Scott Rodino Act (HSR Act), Section 7A of the Clayton Act, 15 U.S.C. § 18a, which requires merging parties to abide by waiting periods before consummating the proposed transaction following notification to the FTC and DOJ of certain stock or asset acquisitions.

Federal antitrust laws are intended to ensure the marketplace remains competitive for the benefit of consumers. The antitrust laws reflect the government's position that firms must remain competitors until closing of the merger and cannot lessen the competition in order to facilitate a merger not yet closed. Section 1 of the Sherman Act prohibits any "contract, combination . . . or conspiracy" that is "in restraint of trade." Simply put, the pendency of a proposed merger does not excuse the merging parties of their obligations to compete independently. Thus, pending consummation, activities by one party to control or affect decisions of another regarding price, output, or other competitively significant matter may violate Section 1.

Prior to the merger proposal Cricket and AT&T were competitors in the cell phone and cell phone service market. The Respondents contend that the pre-merger approval disclosures that the CPD contends were mandated, specifically AT&T's plan to migrate Cricket customers to

the GSM network, would have the practical effect of directing Cricket consumers to AT&T and ceding control of Cricket's product and services to AT&T. The Respondents' alleged required disclosures would be similar to the activity of the parties in *United States v. Computer Associates International Inc.*, No. Civ.A. 01-02062, 2002 WL 31961456 (D.D.C Nov. 20, 2002). In *Computer Associates*, the parties, Computer Associates International, Inc. (Computer Associates) and Platinum Technology International, Inc. (Platinum), were competitors on numerous software markets prior to their merger. The DOJ brought charges against the parties for violating Section 1 of the Sherman Act and section 7A of the Clayton Act. Under Section 1, the DOJ charged that the parties' premerger conduct had the effect of "chilling" Platinum's ability to compete against Computer Associates in the sale of certain software products when, among other conduct, Computer Associates exercised the right to approve offered discounts. *Id.* at *5. The parties consented to the entry of a final judgment in the District Court, which "remedie[d] the Section 1 violation by prohibiting [Computer Associates] in future acquisitions from agreeing on prices, approving customer contracts, and misusing competitively sensitive bid information." *Id.* at *6.

The CPD argues that *Computer Associates* is distinguishable from the instant matter because the advertising disclosures required would be unilateral action without any input, direction, or control by AT&T, the acquiring party. In this case, one can reasonably predict that if Cricket informed its consumers of AT&T's plan to migrate their cell phone service to the GSM network, on which Cricket phones would no longer function, consumers would leave Cricket and give their business to AT&T prior to the consummation of the merger. The disclosures and the effect of customers migrating to AT&T would, as admitted by the CPD, give the appearance of Cricket ceding control to AT&T and opens the Respondents to possible antitrust liability. Despite the CPD's assertion to the contrary, I find that if the Respondents provided the pre-

merger disclosures mandated by the CPD, they could not do so without conflicting with federal antitrust law. I also find that the disclosures would interfere with the objectives of the antitrust law, which is to maintain a competitive marketplace.

Similarly, the DOJ has interpreted the HSR Act to prohibit an acquirer from exercising substantial operational control over a firm prior to the expiration of the HSR Act waiting period. *Computer Associates*, 2002 WL 31961456, at *7 (stating in the final judgment that "Platinum conceded that the Merger Agreement placed Platinum substantially under [Computer Associate's] operational control"). For the same reasons previously articulated, the CPD's required pre-merger disclosures would be in violation of the HSR Act and therefore the federal statute preempts CPD law. Therefore, the antitrust laws preempt the Act's purported disclosure requirements.

Federal Preemption of CPD's Post-Merger Claims

The FCC has the power under the Telecommunications Act to impose terms and conditions on a business acquisition. (CPD Ex. B21, at 7.) The FCC's "public interest authority enables [it] . . . to impose and enforce narrowly tailored, transaction-specific conditions that ensure that the public interest is served by the transaction." (*Id.* at 9.) Because the FCC concluded that the public interest benefits did not outweigh the potential public harms from the proposed transaction, it imposed remedial conditions on the Respondents for approval of the proposed merger transaction. (*Id.* at 63.) These conditions, such as offering certain roaming, rate plan, and trade-in commitments, generally focused on "current [Cricket] customers" who had purchased Cricket phones that would no longer be operational on the CDMA network.

(*Id.* at 71.)[9] Following the close of the merger, the FCC monitored the Respondents' compliance with the Merger Order through quarterly detailed reports in which the Respondents documented the status of the implementation of the remedial conditions and the migration of the Cricket customers to the new network.

The CPD did not challenge the Merger Order. The Respondents maintain, however, that the CPD has called into question the Merger Order's "thorough, expert assessment." Resp't Mot. for Summ. Decision, at 27. The Respondents highlight that the Merger Order required particular trade-in commitments to Cricket customers, both before and after the close of the merger, as well as required "an aggressive messaging campaign notifying customers of the network upgrade and of their device trade-in options." *Id.* at 7. They argue that the CPD's post-merger claims conflict with the "comprehensive, statutorily-mandated" Merger Order and are, therefore, preempted by the Merger Order. *Id.* at 25-26.

The CPD counters that the Merger Order is silent regarding requirements or prohibitions on the Respondents' marketing or advertising of the CDMA-only phones. CPD Opp'n to Resp't Mot. for Summ. Decision, at 22. The CPD asserts that the Merger Order "contains no prohibitions, requirements, or even *discussion* about the Respondents' advertising or sale of phones, let alone any mention of stickers, price cards, or website disclosures." *Id.* at 24. The CPD argues there is no conflict arising from the Merger Order that would preempt the CPD's claim.

---

[9] The Merger Order stated in summary:

> [W]e find that considering AT&T's various commitments, involving spectrum divestitures, the offering of certain rate plans, LTE network deployment, roaming, and device trade-in and trade-in credits for certain groups of current [Cricket] customers, all of which we impose as conditions to our approval, in conjunction with the public interest benefits we find will likely arise from the transaction, there is sufficient evidence on this record for us to conclude that Applicants have met their burden of demonstrating that the likely public interest benefits outweigh the likely public interest harms, such that we are able to approve the proposed transaction.

(CPD Ex. B21, at 71.)

The Respondents cite *PLIVA Inc. v. Mensing*, 564 U.S. 604 (2011), *Murray v. Motorola*, 982 A.2d 764 (D.C. Cir. 2009), and *McCormick v. Medtronic*, 219 Md. App. 485 (2014), to support that "state consumer protection claims are preempted to the extent they arise from alleged conduct specifically approved by a federal agency operating under its statutory authority." Resp't Mot. for Summ. Decision, at 25. The Respondents maintain that the CPD "may not 'second guess' the FCC's 'unambiguous conclusion' about how to best resolve concerns posed by the merger of two telecommunication companies." *Id.* at 28 (quoting *Farina v. Nokia*, 625 F.3d 97, 125 (3d Cir. 2010)). The CPD argues, however, that the "standard invented by the Respondents" is a "gross misstatement of the law" that essentially finds that any conduct arising out of the merger "is immune from compliance with state consumer protection law." CPD Opp'n to Resp't Mot. for Summ. Decision, at 24.

Mensing and Motorola assessed whether state law was preempted because of conflict with federal law. In *Mensing*, the Supreme Court found that a state tort claim imposing a duty on a generic drug manufacturer to independently change the wording of its safety label, which federal drug regulations prohibited it to change unilaterally, presented an impossible conflict and was, therefore, preempted. 564 U.S. at 618-19. In *Motorola*, the FCC adopted radio frequency radiation standards in cellular telephones, balancing public health and marketplace demands. 982 A.2d at 776. The court held that consumer injury claims against FCC-certified cell phones that met the standard were preempted under conflict preemption. *Id.* at 777. The court explained that if the court were to find otherwise, its findings would conflict with the FCC's determination that the phones were safe for use by the general public. *Id.* at 778; *see also Nokia*, 625 F.3d at 133-34 (holding state law class action against cellular telephone manufacturer and retailers of wireless handheld telephones for marketing cell phones without headsets was preempted because

claim conflicted with FCC's regulatory scheme for radio frequency emissions, which represented a "balance of its competing objectives").

In *Medtronic*, the only case the Respondents cited from Maryland, the Court of Special Appeals decided, among other things, whether CPA misrepresentation claims were "impliedly" preempted by the federal Food and Drug Administration. Finding that certain claims were not impliedly preempted, the court stated that to the extent a "state-law misrepresentation claim would not impose any requirements different from or in addition to those imposed under federal law," it is not preempted. 219 Md. App. at 519.

The CPD cites *Washington Suburban Sanitary Commission v. Cae-Link Corp.*, 330 Md. 115 (1993), to support that compliance with both the Merger Order and Act was not impossible. CPD Opp'n to Resp't Mot. for Summ. Decision, at 16. In *Washington Suburban*, State nuisance claims were not preempted by a federal order requiring a company to operate a sewage composting site because the federal order did not require the operator to "build and operate a composting site that emits obnoxious odors that invade the property of others." *Id.* at 138 (quoting case below in Court of Special Appeals).

The Respondents essentially argue that because the proposed merger transaction was approved by the FCC after comprehensive evaluation of the public interest and remediation in the public interest, any consumer claims related to the merger transaction are preempted. I do not read the Merger Order or case law so broadly. The CPD is not challenging the scheme that was achieved under the FCC's Merger Order. The Merger Order imposed requirements on the Respondents for the network transition, but the Merger Order did not impose requirements on the Respondents regarding the form of disclosures to purchasers of CDMA-only phones *prior to or at the time of sale*. The general focus of the Merger Order was remediating public harms to "current [Cricket] customers" who *had bought* CDMA-only phones that would no longer be

operational. I do not find a conflict between the Merger Order and the CPA claim; therefore, the post-merger CPA claim is not preempted.

Post-Merger Deceptive Trade Practices Under the Act

The merger was approved on March 13, 2014. It is undisputed that after the merger was approved, the Respondents continued to sell CDMA-only cellphones for approximately two months. In fact, the Respondents sold an additional 1,668 phones after the merger was approved. The CPD argues that consumers had a reasonable expectation that the cell phones they purchased from the Respondents would continue to operate on the Cricket network for the functional life of the product. The CPD contends that the Respondent's disclosures to consumers regarding the inability of the CDMA-only phones to function after the impending shutdown of the CDMA network were insufficient to alert the consumers to this critical fact and constituted a deceptive trade practice under section 13-301(3) of the Act.

The Respondents countered the CPD charges with the assertion that they provided the post-merger consumers with the contracted service and provided "ample express notice of the impending network transition." Resp't Mot. for Summ. Decision, at 21. The Respondents contend that they provided notice of the impending shutdown of the CDMA network through "clear and conspicuous disclosures on the product packaging and price cards at the time of sale." *Id.* The Respondents assert that because their disclosure met the "clear and conspicuous" standard they were not in violation of the Act.

The Respondents' planned shutdown of the CDMA network was a material fact for those consumers who purchased Cricket's cell phones after the closing of the merger. A phone's ability to operate on its network is essential information a consumer would want to have when purchasing a phone. The *Golt* court determined that "[f]or consumer protection purposes, the meaning of any statement or representation is determined by not only what is explicitly but what

is also reasonably implied." 308 Md. at 9. Similarly, whenever a good or service is offered, there is an implied representation that the good or service can be used for its intended purpose. *In re Int'l Harvester Co.*, 104 F.T.C. 949, 1984 WL 565290 (1984). Thus, when the Respondents sold Cricket phones in stores after the closing of the merger, it was still implied that the phones would work on the network they were sold for the life of the phone. The implied representation was inaccurate because even though the phones were activated on the Respondents' network when purchased, the phones would be incapable of fulfilling their purpose when the CDMA network was shut down. The Respondents argue that there was no deception or violation of the Act because they disclosed to the consumers that the phones would in fact not be operational after the shutdown of the CDMA network.

When disclaimers are necessary, as they are in this case, it is well established that the disclosure must be "clear and conspicuous" in order to be effective. *Donaldson v. Read Magazine, Inc.*, 333 U.S. 178, 185-86 (1948); *see also Joint FTC-Federal Communications Commission Policy Statement on Advertisements for Various New Telecommunications Services*, No. FCC 00-72 (Mar. 1, 2000) [hereinafter *Joint FTC-Federal Communications Commission Policy*].

In determining the adequacy of these required disclosures applying the clear and conspicuous standard, the FTC has articulated four principals, although not binding, that provide some guidance. The four principals are: 1) the prominence of the qualifying information; 2) proximity and placement of qualifying information; 3) absence of distracting elements such as texts, graphics, or sound; and 4) clarity and understanding of disclosures text. *Joint FTC-Federal Communications Commission Policy, supra.*

Most post-merger purchases of Cricket cell phones were made in a store. These consumers had no other way of knowing that these cell phones would soon be obsolete other

than the Respondents' disclosures. Based on the importance of this information for unsuspecting consumers, the Respondents had the duty to ensure that the disclosures were prominent and clear. The undisputed facts establish that the Respondents' disclosure was anything but clear and conspicuous. The disclosure consisted of small print statements on stickers placed on the phone boxes and additional small print disclosures on the store's price cards displayed near the boxes. Although the disclosure sticker was placed directly on the phone box, it measured approximately a meager two inches by three-quarters an inch in height, was outlined in a black border, and was printed on a lighter backdrop. The small sticker was not prominently displayed on the box where a consumer's eyes would be naturally drawn but rather was placed on the bottom left hand corner of the box. Not only was the placement of the sticker not readily noticeable, but the print on the sticker was extremely small and difficult to read. (*See* CPD Ex. 33, at 4.) Given the critical information that the disclosure contained, the prominence of the disclosure in both placement and size was not conspicuous.

In addition to the lack of prominence of the disclosure, the disclosure on the box contained a distracting element. The very first sentence of the disclosure was "Información en español includa." Although the Respondents shrugged off the argument as inconsequential, I find this fact to be of significance. The prominence of the Spanish sentence is confusing and at the very least has the possible effect of diverting consumers from reading further and may suggest to the majority of consumers that the information that followed this sentence was insignificant.[10] Additionally, although the leading sentence of the disclosure is in Spanish, none of the essential terms of the disclosure were written in Spanish, which gives support to the

[10] There were no facts admitted concerning the percentage of Spanish speaking consumers but given that English is the first language in the United States, it is reasonable to infer that most Respondents' consumers were English speaking.

conclusion that the sentence was used as a diversionary tactic to steer consumers away from reading the disclosure.

In addition to the box stickers, a small-print disclosure on the stores' price cards also failed to meet the clear or conspicuous standard. The price card disclosure is even less prominent than the box sticker. The fine-print disclosure was the smallest font on the price card and was placed at the very bottom of the card below the price and phone features. Not only was the print small, but a price card is not a conspicuous location for this disclosure. Consumers generally refer to the price cards to ascertain the cost of the product, and perhaps some features of the phones, but the unsophisticated consumer would not expect to find such an important disclosure within the small print of a price card.

The fact that the disclosures on the phone box as well as the store price card were neither clear nor conspicuous is supported by the Affidavit of Angela Ayres, a consumer of a Cricket phone after the merger. (CPD Ex. F.) Ms. Ayres' affidavit avers that she and her husband purchased two cells phones on May 8, 2014. She specifically affirmed, in pertinent part:

> When we bought the phones, we were not told that the phones might stop working on Cricket's network within one year, or that Cricket had purchased AT&T and would be changing networks. If there were disclosures to that effect in the store or on the phones' packages, they were not obvious and we did not see them. Had we known the phones would stop working, we would never had bought them.

(*Id.*)

The Respondents' shutdown of the CDMA network was a material fact for consumers of the cell phones. The Respondents' failure to adequately disclose this fact deceived or tended to deceive consumers who purchased the phones in stores after the merger. The Respondents' actions regarding the sale of cell phones in stores post-merger constituted a deceptive trade practice as defined by section 13-301(3) of the Act.

Due to the inadequacy of the Respondents' disclosures, the Respondents' sale of the CDMA-only phones post-merger violated section 13-301(1) of the Act. Section 13-301(1) precludes any "[f]alse, falsely disparaging, or misleading oral or written statement, visual description, or other representation of any kind which has the capacity, tendency, or effect of deceiving or misleading consumers . . . ." Com. Law § 13-301(1) (Supp. 2020). When the Respondents offered the CDMA-only phones post-merger, they implicitly represented that the phones would continue to work on the CDMA network for the life of the phone. As correctly noted by the CPD, whenever a good or service is offered, there is an implied representation that the good or service can be used for its intended purposes. *Int'l Harvester Co.*, 1984 WL 565290, at *87. The Respondents' representations were false as the phones would only continue to operate for the short period that the CDMA network was operational. Thus, the Respondents' offer and sale of CDMA-only phones post-merger was a deceptive trade practice under section 13-301(1) of the Act.

Despite the CPD's assertions to the contrary, there were no facts in the record to support the assertion that the Respondents claimed or implied that the CDMA-only phones had any characteristic or use that it did not have. The Respondents never represented that the phones sold before the merger or post-merger would function on a network other than the CDMA network. Therefore, the Respondents did not violate section 13-301(2) of the Act regarding the post-merger sale of phones.

For the small percentage of consumers, approximately 4-5%, who purchased the phones from the Respondents online, fine print disclosures were included on the website. For the even smaller number of sales made by telephone, a script informed the consumers of the pending shutdown. There are insufficient undisputed facts and no supporting affidavits for me to conclude that there are no issues of fact regarding these disclosures made by the Respondents.

PROPOSED CONCLUSION OF LAW

Upon consideration of the motions, and for the reasons set forth above, I propose: The CPD's claim for civil penalties is not barred by the statute of limitations, *Md. Sec. Comm'r v. United States Sec. Corp.*, 122 Md. App. 574 (1998);

The CPD's claims for civil penalties and injunctive relief are not moot, Md. Code Ann., Com. Law § 13-403(b)(1)(i) (2013); *State v. Neiswanger Mgmt. Servs., LLC*, 457 Md. 441 (2018); *Consumer Prot. Div. v. George*, 383 Md. 505 (2004);

The CPD failed to state cognizable claims under the Act regarding the Respondents' pre-merger actions, Md. Code Ann., Com. Law § 13-301(1), (2), and (3) (Supp. 2020); COMAR 02.01.02.18B; COMAR 28.02.01.12D(5);

The CPD's claims regarding the Respondents' pre-merger violations of the Act are preempted by federal antitrust law, 15 U.S.C.A. § 1 (2009); 15 U.S.C.A. § 18a (Supp. 2020);

The CPD's claims regarding the Respondents' post-merger violations of the Act are not preempted by federal law, *PLIVA Inc. v. Mensing*, 564 U.S. 604 (2011); *McCormick v. Medtronic*, 219 Md. App. 485 (2014); and

The Respondents violated section 13-301(1), (3) of the Act in conjunction with its disclosure to consumers of cell phones after the merger regarding the shut-down of the CDMA network. Md. Code Ann., Com. Law § 13-301(1), (3) (Supp. 2020); COMAR 02.01.02.18B; COMAR 28.02.01.12D(5).

PROPOSED ORDER

I **PROPOSE** that the CPD's Motion for Summary Decision is hereby **GRANTED IN PART** and **DENIED IN PART**;

I FURTHER PROPOSE that summary decision is issued in favor of the CPD on the violations of section 13-301(1), (3) of the Act in conjunction with the Respondents' disclosure to consumers of cell phones after the merger;

I FURTHER PROPOSE that summary decision is denied to the CPD against Respondents, on the alleged violations of sections 13-301(1), (2), and (3) of the Act prior to the merger;

I FURTHER PROPOSE that the Respondents' Motion for Summary Decision is hereby **GRANTED IN PART** and **DENIED IN PART**;

I FURTHER PROPOSE that summary decision is issued in favor of the Respondents on the issue of the Respondents' violations of sections 13-301(1), (2), and (3) of the Act prior to the merger;

I FURTHER PROPOSE that summary decision is issued in favor of the Respondents on the issue of the Respondents' violations of sections 13-301(2) of the Act after the merger;

I FURTHER PROPOSE that summary decision is denied to the Respondents on the issue of violations of section 13-301(1), (3) of the Act;

I FURTHER PROPOSE that as there are no remaining issues of material fact to be addressed in this matter that no further proceedings before the Office of Administrative Hearings are necessary.

October 8, 2020
Date Ruling Mailed

Geraldine A. Klauber
Administrative Law Judge

GAK/da
#187316

RIGHT TO FILE EXCEPTIONS

A party aggrieved by this proposed decision may file exceptions thereto and request an opportunity to present oral argument. Such exceptions and any request for argument must be made within thirty (30) days from the date of this proposed decision. COMAR 02.01.02.21. The written exceptions and request for argument, if any, should be directed to Clerk, Administrative Hearings, Consumer Protection Division, 200 St. Paul Place, 16th Floor, Baltimore, Maryland 21202.

Copies Mailed To:

Patrick McCormally, Assistant Attorney General
Office of the Attorney General
Consumer Protection Division
200 Saint Paul Place, 16th Floor
Baltimore, MD 21202

Milton Marquis, Esquire
Hugh J. Marbury, Esquire
1200 19th Street, N.W
Washington, DC 20036

Cricket Wireless, LLC
575 Morosgo Drive, N.E.
Atlanta, GA 30324

AT&T, Incorporated
208 South Akard Street
Dallas, TX 75202

CONSUMER PROTECTION DIVISION,	*	**BEFORE GERALDINE A. KLAUBER,**
OFFICE OF THE ATTORNEY GENERAL,	*	**AN ADMINISTRATIVE LAW JUDGE**
PROPONENT,	*	**OF THE MARYLAND OFFICE OF**
v.	*	**ADMINISTRATIVE HEARINGS**
CRICKET WIRELESS, LLC	*	**OAH CASE No.: OAG-CPD-04-20-13579**
AND	*	
AT&T, INC.,	*	
RESPONDENTS	*	

* * * * * * * * * * * * *

APPENDIX – FILE EXHIBT LIST

The following documents were attached to the CPD's Memorandum of Law in Support of the Motion for Summary Decision:

Ex. A *FTC v. NorVergence, Inc.*, No. Civ.A.04-5414, 2005 WL 3754864 (D.N.J. July 22, 2005)

Ex. B Stipulation and Agreement of Settlement, Bond v. cricket Communications LLC, Caseno. 1:15-cv-923-MJG, Document 56-3, file November 22, 2017

The following exhibits were attached to the CPD's Proposed Findings of Fact and Conclusions of Law

Ex. A Transcript of deposition of David Dennis, September 27, 2018

Ex. B Affidavit of Diana McGee, CPD Investigator, June 4, 2020

Ex. B1 AT&T Press Release, July 12, 2013

Ex. B2 Declaration of S. Douglas Hutcheson, CEO of Leap Wireless Int'l, August 1, 2013

Ex. B3 Leap Form 10-K for Fiscal Year Ended December 31, 2013 ("2013 Leap 10-K")

Ex. B4 Description of Transaction, Public Interest Showing and Related Demonstrations ("Public Interest Statement"), August 1, 2013

Ex. B5 Leap Press Release, June 23, 2009

Ex. B6 Declaration of Rick Moore, Sr. V.P., AT&T, Inc., August 1, 2013 ("Moore Dec.")

Ex. B7 CDMA vs. GSM, "What's the Difference," Sascha Segan, PC Mag., May 24, 2019

Ex. B8 AT&T Quarterly Report, June 30, 2014 ("First Quarterly Report")

Ex. B9 Cricket Essentials: Dealer 1Day Merger Training Instructor Guide, pages 1, 38-39, 56, 65, 96 and 143, April 7, 2014 ("Dealer Training Guide")

Ex. B10 Important Message to All Retail Locations that Sell Cricket Devices, undated

Ex. B11 Alpha Summary, undated

Ex. B12 Cricket Galaxy Amp Prime Terms and Conditions

Ex. B13 Declaration of Rick Cochran, *Scott v. Cricket Commc'ns, LLC*, Case no. 15-cv-03330-GLR (D. Md.), Document 18-1, filed December 10, 2015

Ex. B14 Weekly Hoopla Training Module, January 14, 2015

Ex. B15 mycricket.com/coverage/cell-phone-coverage webpage, June 29, 2013

Ex. B16 AT&T Press Release, March 13, 2014

Ex. B17 Declaration of William Hogg, Sr. VP of Network Planning and Engineering, AT&T Services, Inc., August 1, 2013

Ex. B18 FCC Public Notice, August 28, 2013

Ex. B19 Letter from William E. Cook, Jr., Esq., counsel for AT&T and James H. Barker, Esq., counsel for Leap, to Marlene H. Dortch, Secretary, FCC, August 20, 2013

Ex. B20 Joint Opposition of AT&T and Leap Wireless Int'l Inc., to Petitions to Deny and Condition and Reply to Comments, October 23, 2013

Ex. B21 FCC Memorandum Opinion and Order, March 13, 2014

Ex. B22 Second Supplemental Response of AT&T Inc. to Information and Discovery Request, January 23, 2014

Ex. B23 Letter to "Our Valued Cricket Customers" from Doug Hutcheson, CEO and Jerry Elliot, President and COO, Mycricket.com, July 13, 2013

Ex. B24 Declaration of Chad Walker in Support of Notice of Removal of Action by Defendant Cricket Communications, *Scott v. Cricket Commc'ns, LLC*, Case No. 24-C-15-004918-GLR (D. Md.), filed October 30, 2015

Ex. B25 AT&T Form 8-K, March 13, 2014

Ex. B26 Cricket Wireless Press Release, "New Cricket Wireless Answers Nationwide Call for Network Quality, Value Prices, Great Service and No Annual Contract," May 18, 2014

Ex. B27 AT&T Quarterly Report Regarding Transfer of Licenses from Leap Wireless to AT&T ("Sixth Quarterly Report"), October 30, 2015

Ex. B28 Evolving Markets: Assigned Migration Overview, undated

Ex. B29 Device Specifications.com Comparison between ZTE Prelude, Nokia Lumia 630, Samsung Galaxy S3 and Samsung Galaxy S4 I9506

Ex. B30 AT&T Quarterly Report Regarding Transfer of Licenses from Leap Wireless to AT&T ("Fifth Quarterly Report"), July 30, 2015

Ex. B31 Spreadsheet of Consumers Who Bought CDMA Devices Between March 13, 2014 and September 15, 2015

Ex. B32 Weekly Hoopla Training Module, December 31, 2014

Ex. B33 National Retail Legal Disclaimer Sticker Direction (Sticker Directions"), undated

Ex. B34 Notice Regarding Posting of CDMA Handset Price Cards in all Stores Immediately After Regulatory Approval of the AT&T- Cricket Wireless Merger, undated

Ex. B35 HTC One SV Price Card, undated

Ex. B36 Cricket Telesales Script, undated

Ex. B37 Purchasing a Phone Related FAQs on myCricket.com, undated

Ex. B38 mycricket.com/cell-phones webpage, March 15, 2014

Ex. B39 mycricket.com/cellphones/details/Samsung-galaxy-discover-r740c webpage ("Samsung Galaxy Discover Details Page"), March 15, 2014

Ex. B40 mycricket .com webpage, June 19, 2013

Ex. B41 Promotional and Trade-In Credits Spreadsheet, undated

Ex. B42 Spreadsheet of Activations on the CDMA Network after March 2014, undated

Ex. B43 Fourth Supplemental Response of AT&T Inn. to Information and Discovery Request Dated November 8, 2013 ("Fourth Supplemental Response"), February 5, 2014

Ex. B44 Cricket Migration Overview ("Migration Overview"), April 11, 2014

Ex. B45 Service Termination Notice, undated

Ex. B46 Spreadsheet of Cricket Text Messages, undated

Ex. B47 AT&T Quarterly Report Regarding Transfer of Licenses from Leap Wireless to AT&T ("Fourth Quarterly Report"), January 30, 2015

Ex. B48 AT&T Quarterly Report Regarding Transfer of Licenses from Leap Wireless to AT&T ("Second Quarterly Report"), October 30, 2014

Ex. B49 Wave 1 Assisted Migration, undated

Ex. C Affidavit of Derrick Cox, December 4, 2019

Ex. D Affidavit of Oral Henry, December 3, 2019

Ex. E Affidavit of Robert McGhee, October 18, 2019

Ex. F Affidavit of Angela Ayres, October 7, 2019

The following documents were attached to the Respondents' Motion for Summary Decision:

Ex. A Third Supplemental Response of AT&T, Inc., to Information and Discovery Request, dated November 8, 2013, January 23, 2014

Ex. B Cricket information regarding trade-in offers

Ex. C *Kirk v. Md. Dep't of Nat. Res.*, No. 0399, 2016 WL 4170497 (Md. Ct. Spec. App. Aug. 5, 2016)

Ex. D *Javitt v. Cunningham Contracting, Inc.*, No. 1649, 2016 WL 4493367 (Md. Ct. Spec. App. Aug. 26, 2016)

Ex. E *Wiseman v. First Mariner Bank*, No. ELH-12-2423, 2013 WL 5375248 (D. Md. Sept. 23, 2013)

Ex. F *FTC v. NorVergence, Inc.*, No. Civ.A.04-5414, 2005 WL 3754864 (D.N.J. July 22, 2005)

Ex. G *In re Vistaprint Corp. Mktg. & Sales Practices Litig.*, No. MDL 4:08-MD-1994, 2009 WL 2884727 (S.D. Tex. Aug. 31, 2009)

Ex. H *F.T.C. v. Braswell*, No. CV03-3700DT(PJWX), 2005 WL 3618269 (C.D. Cal. Dec. 28, 2005)

Ex. I *Ramsay v. Sawyer Prop. Mgmt. of Md., LLC*, No. 1673, 2016 WL 6583892 (Md. Ct. Spec. App. Nov. 4, 2016)

Ex. J *Ingram v. Auto Palace, Inc.*, No. BPG-09-2660, 2012 WL 5077633 (D. Md. Oct. 17, 2012)

Ex. K *United States v. Gemstar- TV Guide Int'l*, No. Civ.A. 03-0198, 2003 WL 21799949 (D.D.C. July 11, 2003)

Ex. L *United States v. Computer Assocs. Int'l Inc.*, No. Civ.A. 01-02062, 2002 WL 31961456 (D.D.C Nov. 20, 2002).

Ex. M *Lubin v. Beneficial Assurance, Ltd.*, No. 24-C-02-006515, 2006 WL 5781983 (Md. Cir. Ct. Nov. 19, 2002)