APPENDIX

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 19-10878
Summary Calendar

[Filed: February 27, 2020]

BRIDGET ALEX, Individually and on behalf of the Estate of Brandon Alex; JASHAWN ALEX; MICHAELLE COHEN; ESTATE OF BRANDON ALEX; DETREASURE COKER,	)
Plaintiffs - Appellants	)
v.	)
T-MOBILE USA, INCORPORATED; T-MOBILE US INCORPORATED, formerly known as MetroPCS Communications Incorporated; METROPCS MIDWAY RD; DEUTSCHE TELEKOM NORTH AMERICA INCORPORATED; T-SYSTEMS NORTH AMERICA INCORPORATED,	)
Defendants - Appellees	)

ESTATE OF BRANDON ALEX, through personal representative Detreasure Coker; DETREASURE COKER, individually and as surviving mother of Brandon Alex, deceased	)
Plaintiffs - Appellants	)
v.	)
T-MOBILE US INCORPORATED, formerly known as MetroPCS Communications Incorporated; T-MOBILE USA, INCORPORATED; T-SYSTEMS NORTH AMERICA INCORPORATED; DEUTSCHE TELEKOM NORTH AMERICA INCORPORATED	)
Defendants - Appellees	)

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:17-CV-1532
USDC No. 3:17-CV-2622

Before DAVIS, SMITH, and HIGGINSON, Circuit Judges.

PER CURIAM:[*]

This case comes before us a second time after remand to the district court. *See Alex v. T-Mobile USA, Inc.*, 776 F. App'x 205 (5th Cir. 2019). Brandon Alex's family members sued T-Mobile USA, Inc., T-Mobile US, Inc. (collectively, "T-Mobile"), Deutsche Telkom North America, Inc., and T-Systems North America, Inc. (collectively, "T-Systems"), alleging that a defect in their 9-1-1 technology prevented first responders from arriving in time to save Brandon's life. Because, as we previously concluded, T-Mobile and T-Systems are immune under Texas law, we AFFIRM the district court's dismissal.

Seven-month-old Brandon Alex was injured after falling from a daybed. His babysitter dialed 9-1-1 three separate times, and stayed on an unconnected line for over thirty minutes. Unable to connect to a dispatcher, Brandon's grandmother drove him to an emergency room over an hour after the first 9-1-1 call. Brandon was pronounced dead shortly after arriving at the hospital.

Brandon's family members sued T-Mobile and T-Systems for claims arising from Brandon's death. Both Defendants moved to dismiss, asserting statutory immunity under Texas law. Although the district court denied those motions, we reversed on interlocutory appeal and remanded "with instructions to dismiss the action against T-Mobile." *Id.* at 207.

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[*] Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

On remand, Plaintiffs argued that some of their claims survived our ruling. The district court disagreed. It correctly read our opinion "to mean that Defendants are statutorily immune from [all of] Plaintiffs' claims," and dismissed all claims against T-Mobile and T-Systems with prejudice. Plaintiffs now bring this second appeal.

This court has already held that, under the Supreme Court of Texas's decision in *City of Dallas v. Sanchez*, 494 S.W.3d 722 (Tex. 2016), Plaintiffs failed to allege proximate cause sufficient to overcome T-Mobile's immunity.[1] Plaintiffs' new appeal raises many of the same arguments. Then, as now, Plaintiffs argued that *Sanchez* does not require dismissal of each of their claims. And then, as now, we disagreed—we directed the district court to "dismiss *the action* against T-Mobile." *Alex*, 776 F. App'x at 207.

Plaintiffs try to sidestep our prior decision by arguing that we previously considered only the original complaint, and not the amended complaint. The amended complaint, however, was part of the record in the first appeal, and Plaintiffs cited exclusively to it. We still determined that dismissal of "the action"—not a particular complaint—was required by Texas law. And Plaintiffs' allegations in the amended complaint

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[1] In *Sanchez*, two parents alleged that a defect in the City of Dallas's 9-1-1 system caused their son's death by preventing first responders from timely responding to his overdose. The Texas Supreme Court announced that "the use of property that simply hinders or delays treatment does not actually cause the injury and does not constitute a proximate cause of an injury." 494 S.W.3d at 726 (citations and quotations omitted).

are based on the same causal theory: that Defendants' technology caused Brandon's death because it prevented him from receiving "timely police and/or EMT assistance."

Because T-Mobile and T-Systems are immune under Texas law, the district court did not err in dismissing Plaintiffs' claims against them—we affirm.

AFFIRMED; MOTION TO DISMISS APPEAL AS FRIVOLOUS DENIED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

Civil Action No. 3:17-cv-1532-M (Consolidated with 3:17-cv-2622-M)

[Filed: August 1, 2019]

BRIDGET ALEX, individually and on behalf of the ESTATE OF BRANDON ALEX, JASHAWN ALEX, and MICHAELLE COHEN,	)
Plaintiffs,	)
v.	)
T-MOBILE USA, INC., T-MOBILE US, INC., formerly known as MetroPCS Communications, Inc., and METROPCS MIDWAY RD.,	)
Defendants.	)

ORDER

Before the Court are Defendants T-Mobile USA, Inc. and T-Mobile US, Inc.'s Motion to Dismiss Plaintiffs' Second Amended Complaint (ECF No. 34); Defendants T-Systems North America, Inc. and Deutsche Telekom North America, Inc.'s Motion to Dismiss Plaintiffs' Second Amended Complaint (ECF No. 35); and Defendant T-Mobile's Motion to Dismiss Plaintiff's First Amended Complaint (ECF No. 38). The Motions are **GRANTED**. This Court reads the Fifth Circuit's Opinion of June 6, 2019 (ECF No. 56) to mean that Defendants are statutorily immune from Plaintiffs' claims. Therefore, Plaintiffs' claims are **DISMISSED WITH PREJUDICE**.

SO ORDERED.

August 2, 2019.

/s/ Barbara M. G. Lynn
BARBARA M. G. LYNN
CHIEF JUDGE

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 18-10555

[Filed: June 6, 2019]

BRIDGET ALEX, Individually and on Behalf of the Estate of Brandon Alex; JASHAWN ALEX; MICHAELLE COHEN; ESTATE OF BRANDON ALEX; DETREASURE COKER,	)
Plaintiffs-Appellees	)
v.	)
T-MOBILE USA, INCORPORATED; T-MOBILE US INCORPORATED, formerly known as MetroPCS Communications Incorporated,	)
Defendants - Appellants	)

Appeal from the United States District Court for the Northern District of Texas
USDC No. 3:17-CV-1532
USDC No. 3:17-CV-2622

Before CLEMENT, GRAVES, and OLDHAM, Circuit Judges.

PER CURIAM:[*]

After Brandon Alex's death, members of his family (collectively, the "Estate") sued T-Mobile USA, Inc. and T-Mobile US, Inc. (collectively, "T-Mobile") and alleged that T-Mobile caused Brandon's death because its failed technology prevented Brandon from receiving timely medical attention after an injury. The district court rejected T-Mobile's assertion of statutory immunity because the Estate had plausibly alleged that T-Mobile's service was the proximate cause of Brandon's death. Although this case is tragic, and the Estate's claim is emotionally compelling, Texas law appears to insulate T-Mobile from suit—we reverse.

FACTS AND PROCEEDINGS

On March 11, 2017, seven-month old Brandon Alex was injured after falling from a daybed. His babysitter dialed 9-1-1 three separate times from her T-Mobile/MetroPCS cell phone. She was placed on hold each time, for a total of more than forty minutes. Unable to connect to a dispatcher, she eventually called Brandon's grandmother, who drove him to an emergency room more than an hour after the first 9-1-1 call. Brandon was pronounced dead soon after arriving at the hospital.

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[*] Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

The Estate sued T-Mobile in state court for claims arising from Brandon's death. The matter was removed to the Northern District of Texas. T-Mobile moved to dismiss the claims, asserting statutory immunity. The district court held that statutory immunity did not bar the claims. The district court certified its decision for interlocutory appeal, concluding that it presented the following question of law: "whether, as a matter of law, the use of property that hinders or delays treatment, without other intervening causes, can never be the proximate cause of an injury."

STANDARD OF REVIEW

We review *de novo* a district court's denial of a motion to dismiss, "accepting all well-pleaded facts as true and viewing those facts in the light most favorable to the plaintiff[s]." *Billings v. Propel Fin. Servs., L.L.C.*, 821 F.3d 608, 611 (5th Cir. 2016) (quotation omitted).

DISCUSSION

In a four-page opinion, the Supreme Court of Texas provided guidance on what constitutes proximate cause in a similar case. *City of Dall. v. Sanchez*, 494 S.W.3d 722 (Tex. 2016). Sanchez's parents sued the City of Dallas for negligence, alleging that the City's defective 9-1-1 system caused their son's death. *Id.* The City moved to dismiss the claims, asserting governmental immunity under the Texas Tort Claims Act ("TTCA"). To establish a waiver of governmental immunity, the parents needed to establish that "the phone's condition was a proximate cause of Sanchez's death." *Id.* at 726.

The court articulated the following rule:

> Proximate cause requires both cause in fact and foreseeability. For a condition of property to be a cause in fact, the condition must serve as a substantial factor in causing the injury and without which the injury would not have occurred. When a condition or use of property merely furnishes a circumstance that makes the injury possible, the condition or use is not a substantial factor in causing the injury. To be a substantial factor, the condition or use of the property must actually have caused the injury. Thus, the use of property that simply hinders or delays treatment does not actually cause the injury and does not constitute a proximate cause of an injury.

Id. at 726 (citations and quotations omitted) (emphasis added).

Under Texas Health and Safety Code §§ 771.053(a) and 772.407, T-Mobile is immune from claims arising out of its provision of 9-1-1 services "unless the act or omission proximately causing the claim, damage, or loss constitutes gross negligence, recklessness, or intentional misconduct." So, the Estate must establish proximate cause to prevail on a claim against T-Mobile under the statutes.[1] *See id*.

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[1] The Estate argues that "[a]s long as pleadings plausibly allege gross negligence, recklessness and/or intentional misconduct, §§ 771.053(a) and 772.407 provide no immunity to T-Mobile." However, this is at odds with the quoted portion of the relevant statutes.

The parties debate the binding effect of the above-quoted *Sanchez* statement. At an absolute minimum, the statement is non-erroneous *judicial dictum*, and we must follow it under the *Erie* doctrine.[2]

In Texas, there are two types of *dicta*: *obiter dictum* and *judicial dictum*. *Autobahn Imports, L.P. v. Jaguar Land Rover N. Am., L.L.C.,* 896 F.3d 340, 346 (5th Cir. 2018). *Obiter dictum* is made in passing and is not binding. *Id. Judicial dictum* is "a statement made deliberately after careful consideration and for future guidance in the conduct of litigation." *Id. Judicial dictum* "should be followed unless found to be erroneous." *Id.*

In *Sanchez*, the statement appears as the culminating point of the rule statement. *Sanchez*, 494 S.W.3d at 726. Based on the language and structure of the opinion, this statement appears to be deliberate and "plainly intended to guide future courts and litigants" on the appropriate requirements to establish proximate cause in similar circumstances. *Autobahn*, 896 F.3d at 347 (emphasis removed). Accordingly, the statement must at least be treated as *judicial dictum*.[3]

To the extent the facts in *Sanchez* are slightly different from those at hand, "this court must make an

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[2] While T-Mobile argues that the *Sanchez* statement was not *dictum* at all, we need not reach this issue.

[3] And the Estate cannot show that the statement is somehow erroneous. Indeed, it is consistent with the approach to proximate causation that Texas outlined more than a decade earlier. *See Tex. Dep't of Criminal Justice v. Miller*, 51 S.W.3d 583, 587–88 (Tex. 2001) (cited favorably in *Sanchez*).

'*Erie* guess,' i.e., forecast how the Supreme Court of Texas 'would rule.'" *Mid-Continent Cas. Co. v. Eland Energy, Inc.*, 709 F.3d 515, 520 (5th Cir. 2013) (citing *Paz v. Brush Engineered Materials, Inc.*, 555 F.3d 383, 392 (5th Cir. 2009)). "This prediction may be based on [Texas] case law, dicta, general rules on the issues, decisions of other states, and secondary sources." *Id.* (alteration in original).

Based on the express language of the *Sanchez* statement, we conclude that the Supreme Court of Texas would probably rule that the Estate has failed to plead facts that could support a finding of proximate cause. Accordingly, the district court erred in attempting to modify Texas's proximate cause law. *See W.-S. Life Assurance Co. v. Kaleh*, 879 F.3d 653, 658 (5th Cir. 2018) ("When making an *Erie* guess, [o]ur task is to attempt to predict state law, not to create or modify it." (alteration in original) (quotation omitted)).

CONCLUSION

For the foregoing reasons, we REVERSE the district court and REMAND with instructions to dismiss the action against T-Mobile.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

Civil Action No. 3:17-cv-1532-M (Consolidated with 3:17-cv-2622-M)

[Filed: April 16, 2018]

BRIDGET ALEX, individually and on behalf of the ESTATE OF BRANDON ALEX, JASHAWN ALEX, and MICHAELLE COHEN,	)
Plaintiffs,	)
v.	)
T-MOBILE USA, INC., T-MOBILE US, INC., formerly known as MetroPCS Communications, Inc., and METROPCS MIDWAY RD.,	)
Defendants.	)

ORDER

Before the Court is T-Mobile USA, Inc. and T-Mobile US, Inc.'s Motion for Reconsideration and, in the Alternative, Motion for Certification of Permissive

Interlocutory Appeal. (ECF No. 31). For the reasons stated below, the Motion for Certification is **GRANTED**, and the Motion for Reconsideration is **DENIED** as moot.

I. Factual and Procedural Background

On March 11, 2017, Brandon Alex was injured when he "rolled off the daybed and onto the floor." (Am. Compl. ¶ 25, ECF No. 28). Michaelle Cohen, his babysitter, found him "grasping and barely breathing." (*Id.*) Ms. Cohen repeatedly dialed 9-1-1 from her cellphone, but was placed on hold each time. (*Id.* ¶ 26). Collectively, Ms. Cohen was placed on hold for more than forty minutes. (*Id.*) Unable to connect to the 9-1-1 dispatcher, Ms. Cohen contacted Brandon Alex's mother, Bridget Alex, who later drove him to an emergency room. (*Id.* ¶ 29). Unfortunately, Brandon Alex was pronounced dead on arrival at the hospital. (*Id.*)

Brandon Alex's parents—Jashawn and Bridget Alex—and Michaelle Cohen filed suit against T-Mobile USA, Inc. and T-Mobile US, Inc. (collectively, "T-Mobile") for claims arising out of Brandon Alex's death. They asserted that had T-Mobile's 9-1-1 "services, software, products, and technology. . .worked as required," Brandon Alex would have received timely medical assistance and survived. (Am. Compl. ¶ 32). Brandon Alex's alleged biological mother, Detreasure Coker, filed a separate suit against T-Mobile and raised similar claims.[1]

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[1] Ms. Coker's suit was later consolidated with this one. (Consolidation Order at 1-2, ECF No. 29).

In moving to dismiss both suits, T-Mobile asserted that it was statutorily immune from all claims arising out of its provision of 9-1-1 services. *See* TEX. HEALTH & SAFETY CODE § 771.053(a). Relevant here, Plaintiffs had to allege that T-Mobile proximately caused Brandon Alex's death to overcome immunity. T-Mobile had argued that, as a matter of law, Plaintiffs could not establish proximate cause because the alleged defects in its 9-1-1 technologies simply hindered or delayed Brandon Alex's treatment. The Court rejected T-Mobile's argument and held that statutory immunity did not bar Plaintiffs' claims. *See Estate of Alex through Coker v. T-Mobile US, Inc.*, No. 3:17-cv-2622-M, 2018 WL 1122193, at *4 (N.D. Tex. Mar. 1, 2018) (ECF No. 35); *Alex v. T-Mobile USA, Inc.*, No. 3:17-cv-1532-M, 2018 WL 806992, at *4 (N.D. Tex. Feb. 9, 2018) (ECF No. 27). T-Mobile moves for reconsideration and, in the alternative, certification for interlocutory appeal of the Court's orders on statutory immunity. (Pl. Mot. at 11-14, ECF No. 31).

II. Legal Standard

In its discretion, a court may certify for interlocutory appeal an order that involves "[1] a controlling question of law [2] as to which there is substantial ground for difference of opinion and [3] that an immediate appeal . . . may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b); *see also Swint v. Chambers County Comm'n*, 514 U.S. 35, 47 (1995). In addition to the statutory requirements, the court must also consider a party's diligence in seeking certification and whether there have been any material intervening occurrences. *See,*

e.g., *T & E Inv. Grp. LLC v. Faulkner*, 2014 WL 11512366, at *2 (N.D. Tex. May 19, 2014). The moving party has the burden to demonstrate the need for interlocutory appeal. *See Coates v. Brazoria Cty. Tex.*, 919 F. Supp. 2d 863, 867 (S.D. Tex. 2013).

III. Analysis

Because the requirements under 28 U.S.C. § 1292(b) are satisfied, the Court certifies its February 9, 2018, and March 1, 2018, Orders for interlocutory appeal. The Orders both raise a controlling question of law: whether, as a matter of law, the use of property that hinders or delays treatment, without other intervening causes, can never be the proximate cause of an injury. (Def. Mot. at 11); *see Coker*, 2018 WL 1122193, at *3 n.4; *Alex*, 2018 WL 806992, at *3 n.2. The Texas Supreme Court suggested such in dicta in *City of Dallas v. Sanchez*. *See* 494 S.W.3d 722, 726 (Tex. 2016) ("[U]se of property that simply hinders or delays treatment does not 'actually cause[ ] the injury' and does not constitute a proximate cause of an injury.").

If delays caused by defects in 9-1-1 technologies are never actionable as a matter of law, due to the absence of proximate cause, then T-Mobile has statutory immunity against Plaintiffs' claims. Such a finding would eliminate the need for trial altogether. *See Coates*, 919 F. Supp. 2d at 867 (noting that immediate appeal advances the ultimate termination of litigation by "eliminate[ing] the need for trial"); *Gen. Elec. Co. v. Mitsubishi Heavy Indus., Ltd.*, 2012 WL 12985134, at *2 (N.D. Tex. Feb. 7, 2012) ("An issue of law generally is controlling if its incorrect disposition would result in reversal of a final judgment."). Indeed, interlocutory

appeal is particularly appropriate here because "immunity is intended to shield the defendant from the burdens of defending the suit, including the burdens of discovery." *See Freeman v. United States*, 556 F.3d 326, 342 (5th Cir. 2009). Without immediate appeal, this issue will not be reviewed until after trial, when T-Mobile will have lost much of the benefits of statutory immunity. Trial courts therefore often certify orders regarding immunity and jurisdiction. *See, e.g.*, *Rodriguez v. Christus Spohn Health Sys. Corp.*, 628 F.3d 731, 734 (5th Cir. 2010); *Lonatro v. United States*, 714 F.3d 866, 869 (5th Cir. 2013).

There is also a substantial ground for difference of opinion on this issue. In fact, another judge in this Court adopted the language of *Sanchez* that the Court found to be dicta, noting that "the use of property that simply hinders or delays treatment does not actually cause the injury and does not constitute a proximate cause of an injury." *See Kelley v. City of Dallas*, 2017 WL 3891680, at *1 (N.D. Tex. Aug. 17, 2017) (Toliver, M.J.), *report and recommendation adopted*, 2017 WL 3868257 (N.D. Tex. Sept. 5, 2017) (Boyle, J.) (internal quotation marks omitted). While *Kelley* is distinguishable in material respects from this case, the Court recognizes that the law is unsettled. The Court can "actually envision [*Sanchez*] being interpreted differently." *Morales v. Redco Transp. Ltd.*, 2016 WL 7734647, at *1 (S.D. Tex. Jan. 13, 2016); *see also Odle v. Wal-Mart Stores Inc.*, 2013 WL 66035, at *3 (N.D. Tex. Jan. 7, 2013) (certifying an issue for interlocutory appeal where other courts have held otherwise).

Finally, T-Mobile was diligent in moving for certification within the month of the Court's orders on statutory immunity. *See Travelers Indem. Co. of Conn. v. Presbyterian Healthcare Res.*, 2004 WL 2186547, at *2 (N.D. Tex. Sept. 28, 2004) (finding five-month delay in seeking interlocutory appeal and an intervening scheduling order sufficient to deny certification).

IV. Conclusion

For the reasons stated above, the Motion for Certification of Permissive Interlocutory Appeal is **GRANTED**. The Court certifies the orders for interlocutory appeal to resolve whether, under *City of Dallas v. Sanchez*, 494 S.W.3d 722 (Tex. 2016), the use of property that hinders or delays treatment, without another intervening cause, can never be the proximate cause of an injury.[2] Because the Court certifies the orders, the Motion for Reconsideration is **DENIED** as moot.

The case is stayed pending the interlocutory appeal. The parties are directed to advise the Court, in writing, within fifteen days of the resolution of the appeal.

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[2] The Court would have preferred to certify the question to the Texas Supreme Court, but is prohibited from doing so. *See* TEX. R. APP. P. 58.1 ("The Supreme Court of Texas may answer questions of law certified to it by any federal appellate court if the certifying court is presented with determinative questions of Texas law having no controlling Supreme Court precedent.").

SO ORDERED.

April 16, 2018.

/s/ Barbara M. G. Lynn
BARBARA M. G. LYNN
CHIEF JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

Civil Action No. 3:17-cv-2622-M

[Filed: March 1, 2018]

ESTATE OF BRANDON ALEX, through personal representative Detreasure Coker, and DETREASURE COKER, individually and as surviving mother of Brandon Alex, deceased,	)
Plaintiffs,	)
v.	)
T-MOBILE US, INC., f/k/a MetroPCS Communications, Inc.; T-MOBILE USA, INC.; T-SYSTEMS NORTH AMERICA, INC.; and DEUTSCHE TELEKOM NORTH AMERICA, INC.,	)
Defendants.	)

MEMORANDUM OPINION AND ORDER

Before the Court is Defendants' Motion to Dismiss, (ECF No. 13), and Motion for Leave to File Second Amended Complaint, (ECF No. 30). For the reasons stated below, the Motion to Dismiss is **GRANTED IN PART** and **DENIED IN PART**, and the Motion for Leave is **GRANTED**.

I. Factual and Procedural Background

On March 11, 2017, Brandon Alex was injured when he "fell from a daybed." (Am. Compl. ¶ 12, ECF No. 10). His babysitter found him "breathing too faintly." (*Id.*) The babysitter repeatedly dialed 9-1-1 from her cellphone, but was placed on hold each time. (*Id.* ¶ 13). Collectively, the babysitter was placed on hold for more than forty minutes. (*Id.*) Unable to connect to the 9-1-1 dispatcher, the babysitter contacted Brandon Alex's grandmother, Bridget Alex, who later drove him to an emergency room. (*Id.* ¶¶ 13-14). Unfortunately, Brandon Alex was pronounced dead soon after arriving at the hospital. (*Id.* ¶ 14).

Plaintiffs instituted this action in the 95th Judicial District Court of Dallas County, Texas, for claims arising from Brandon Alex's death. Their claims include negligence, gross negligence, products liability, violation of the Texas Civil Wiretap Act, ("CWA"), and violation of the Texas Deceptive Trade Practices Act ("DTPA"). (*Id.* ¶¶ 38-45, 51-64). Detreasure Coker, alleged to be Brandon Alex's biological mother, also alleges wrongful death and survival claims. (*Id.* ¶¶ 66-72). Defendants removed the case to this Court, but the case has been stayed pending the Court's

resolution of Defendants' Motion to Dismiss. (ECF No. 22).

II. Motion to Dismiss

a. Legal Standard

A pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2). The pleading standard Rule 8 announces does not require "detailed factual allegations," but it does demand more than an unadorned accusation devoid of factual support. *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555 (2007)). To survive a motion to dismiss, a complaint must contain sufficient factual matter to state a claim for relief that is plausible on its face. *Twombly,* 550 U.S. at 570. The court must accept all of the plaintiff's factual allegations as true, but it is not bound to accept as true "a legal conclusion couched as a factual allegation." *Id.* at 555. Where the factual allegations do not permit the court to infer more than the mere possibility of misconduct, the complaint has stopped short of showing that the pleader is plausibly entitled to relief. *Iqbal*, 556 U.S. at 678.

b. Analysis

i. Statutory Immunity

Under Texas law, wireless service providers and manufacturers have some statutory immunity from claims arising out of their provision of 9-1-1 services

under Section 771.053(a) of the Texas Health and Safety Code,[1] which states:

> A service provider of communications service involved in providing 9-1-1 service, a manufacturer of equipment used in providing 9-1-1 service, [or] a developer of software used in providing 9-1-1 service . . . is not liable for any claim, damage, or loss arising from the provision of 9-1-1 service unless the act or omission proximately causing the claim, damage, or loss constitutes gross negligence, recklessness, or intentional misconduct.

Accordingly, to qualify for statutory immunity, a defendant must be one of the covered entities involved in providing 9-1-1 services, and the claims against it must arise from the provision of 9-1-1 services.

Defendants meet both conditions. Plaintiffs allege that Defendants operate 9-1-1 communications

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[1] Plaintiffs argue that the Court should instead evaluate immunity under Section 772.407 of the Texas Health and Safety Code. (Pl. Resp. at 17, ECF No. 21). Section 772.407 and Section 771.053(a) are not mutually exclusive. The former covers entities involved in providing 9-1-1 services in a county whereas the latter more broadly covers such entities in the state. *Compare* § 772.047 (applying to counties with population over two million) *with* § 772.053(a) (setting forth "[s]tatewide [l]imitation" on liability). Moreover, the language of Section 772.407 is "nearly identical to the language of section 771.053(a)." *See Cook v. City of Dallas*, 683 F. App'x 315, 319 n.3 (5th Cir. 2017). Defendants argue that they are immune under Section 771.053(a), and the Court evaluates Plaintiffs' claims under that section. *See also id.* at 319 (evaluating T-Mobile's statutory immunity under Section 771.053(a) for claims related to a 9-1-1 call in Dallas).

services, (*id.* ¶¶ 17-18), create software used in providing 9-1-1 services, (*id.* ¶¶ 57-58), or provide 9-1-1 capable cellphones, (*id.* ¶ 12-13), and that their claims arise from the provision of 9-1-1 services. (*See id.* ¶ 59 ("The harm to Plaintiffs resulted directly from the software modifications that prevented Brandon's babysitter from reaching 9-1-1 in time to save his life."); *id.* ¶¶ 21-22, 38-45).[2]

However, the statutory immunity provided by Section 771.053(a) is not absolute. To overcome Defendants' claim of immunity, Plaintiffs must plausibly allege that Defendants proximately caused Brandon Alex's death and that Defendants' acts or omissions constituted gross negligence, recklessness, or intentional misconduct. *Cook*, 683 F. App'x at 319 (citing TEX. HEALTH & SAFETY CODE § 771.053(a)). Because Plaintiffs have plausibly alleged proximate cause and gross negligence, for the reasons discussed below, the Court declines to dismiss their claims on immunity grounds.

1. Proximate Cause

The components of proximate cause are cause-in-fact and foreseeability. *See Ryder Integrated Logistics, Inc. v. Fayette Cty.*, 453 S.W.3d 922, 929 (Tex. 2015) (citation omitted). A tortious act or omission is a cause-in-fact if it serves as "a substantial factor in

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[2] *See also* TEX. HEALTH & SAFETY CODE § 771.001 ("9-1-1 service means a communications service that connects users to a public safety answering point through a 9-1-1 system."). Plaintiffs' claims arise from the babysitter's inability to connect with the 9-1-1 operator.

causing the injury and without which the injury would not have occurred." *Del Lago Partners, Inc. v. Smith,* 307 S.W.3d 762, 774 (Tex. 2010). An injury is foreseeable "if, in light of all the circumstances, a reasonably prudent man would have anticipated that the injury would be a consequence of the act or omission in question." *Hall v. Atchison, T. & S. F. Ry. Co.*, 504 F.2d 380, 385 (5th Cir. 1974). Proximate cause cannot be established by "mere conjecture, guess, or speculation." *HMC Hotel Props. II Ltd. P'ship v. Keystone-Texas Prop. Holding Corp.*, 439 S.W.3d 910, 913 (Tex. 2014).

The case of *City of Dallas v. Sanchez* is instructive on what constitutes proximate cause in a circumstance similar to the one presented here. 494 S.W.3d 722 (Tex. 2016). In *Sanchez*, 9-1-1 dispatchers received two calls within ten minutes of each other. *Id.* at 725. Both calls—from two different callers—originated from the same apartment complex, and both requested assistance with a drug overdose victim. *Id.* After the dispatcher informed the person calling on behalf of Matthew Sanchez that emergency responders were on route, the call was disconnected. *Id.* Once responders arrived at the apartment complex, "they erroneously concluded that the two 9-1-1 calls were redundant and that a single individual was the subject of both calls." *Id.* Responders ultimately never went to the apartment of Sanchez, who died six hours later. *Id.* Sanchez's parents sued the City of Dallas, alleging that the 9-1-1 call was disconnected as a result of a defect in the City's phone system. *Id.* They alleged that their son would have received life-saving medical care but for this defect, which prevented responders from having

sufficient information to correctly differentiate the two calls. *Id*.

The key issue before the Texas Supreme Court was whether the plaintiffs had sufficiently alleged, to survive a motion to dismiss, that a defective 9-1-1 system proximately caused Sanchez's death.[3] *Sanchez*, 494 S.W.3d at 726. The court held that due to intervening factors, Plaintiffs could not establish proximate cause. *See id.* at 728 (The death was caused by "drugs, the passage of time, and misinterpretation of information [by the emergency responders]," and the alleged malfunction was merely one of a "series of factors that contributed to Sanchez not receiving timely medical assistance."); *id.* at 727-28 ("Between the alleged malfunction and Sanchez's death, emergency responders erroneously concluded separate 9-1-1 calls were redundant and left the apartment complex without checking the specific apartment unit the

[3] This issue came up in the following way. The City argued that governmental immunity protected it from liability. *Sanchez*, 494 S.W.3d at 725. The plaintiffs argued that immunity was waived under the Texas Tort Claims Act ("TTCA"), TEX. CIV. PRAC. & REM. CODE § 101.021. For immunity to be waived under the TTCA, "personal injury or death must be *proximately caused* by a condition or use of tangible personal or real property." *Dallas Cty. Mental Health & Mental Retardation v. Bossley,* 968 S.W.2d 339, 342–43 (Tex. 1998) (emphasis added). The City argued that immunity applied because Sanchez's death was caused by a drug overdose, not the 9-1-1 system. *Sanchez*, 494 S.W.3d at 725. Thus, although it was not addressing Section 771.053(a), *Sanchez* was addressing proximate cause in a similar factual context.

dispatcher had provided to them."). Accordingly, the court held that immunity applied.[4]

The Fifth Circuit, in an unpublished opinion in another case, reached a similar conclusion. In *Cook*, the victim, Deanna Cook, called 9-1-1 from her cellphone while an intruder was attacking her inside her home. 683 F. App'x at 317. Location-tracking technology sent Cook's location to the 9-1-1 dispatcher "within several minutes" of the call. *Id.* "Nearly fifty minutes after Cook placed her 9-1-1 call, police officers arrived at Cook's home." *Id.* However, the officers only inspected the outside of Cook's home and "left without entering the residence." *Id.* Cook's family found her body in the home two days later. *Id.* Members of Cook's family filed suit against T-Mobile, alleging that it failed to implement proper location-tracking that would have

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[4] The Texas Supreme Court also noted that "the use of property that simply hinders or delays treatment does not 'actually cause[] the injury' and does not constitute a proximate cause of an injury." *Sanchez*, 494 S.W.3d at 727. The statement is dictum because the court's actual analysis does not rely on this statement. As discussed, the court found, as a matter of law, that the alleged defect was too attenuated from Sanchez's death to constitute proximate cause.

Indeed, it is hard to believe that the Texas Supreme Court would hold that delays caused by defects in 9-1-1 technologies are, as a matter of law, never actionable due to the absence of proximate cause. *C.f. Columbia Med. Ctr. of Las Colinas, Inc. v. Hogue*, 271 S.W.3d 238, 246 (Tex. 2008) (considering proximate cause in context of whether an alleged omission delayed proper treatment); *Bustamante v. Ponte*, 529 S.W.3d 447, 456 (Tex. 2017) (same). The Court therefore rejects Defendants' argument that, as a matter of law, Plaintiffs cannot establish proximate cause because the alleged defects here simply hindered or delayed treatment.

allowed 9-1-1 operators to locate Cook "quicker than the several minutes it actually took." *Id.* at 320. Had location information been instantly transmitted, plaintiffs argued, Cook's life would have been spared. *Id*.

In dismissing the case for failure to state a claim, another judge on this Court held that T-Mobile was immune under Section 771.053(a) because, among other reasons, any alleged defect in 9-1-1 technology was not a proximate cause of Cook's death. *Cook v. T-Mobile USA, Inc.*, 2015 WL 11120974, at *1 (N.D. Tex. Sept. 22, 2015) (Solis, J.). The Fifth Circuit affirmed in an unpublished opinion, specifically highlighting the intervening factors that made the alleged defect too attenuated from Cook's death to constitute proximate cause. *See Cook*, 683 F. App'x at 321 ("Plaintiffs alleged that even after emergency personnel arrived at Cook's residence, Cook's call was not treated as serious[, and] [t]hey have failed to allege that the emergency personnel would have reacted differently had they received Cook's location sooner.").

In *Kelley v. City of Dallas*, this Court again addressed the issue of whether T-Mobile's failure to provide prompt location information from 9-1-1 calls was the proximate cause of a victim's death. 2017 WL 3891680, at *1 (N.D. Tex. Aug. 17, 2017) (Toliver, M.J.), *report and recommendation adopted*, 2017 WL 3868257 (N.D. Tex. Sept. 5, 2017) (Boyle, J.). The victim, D'Lisa Kelley, called her sister, screaming, but the call disconnected. *Id.* Kelley's grandmother called 9-1-1 for assistance. Proper procedures required the dispatcher to send police officers to Kelley's home, but in this case,

the dispatcher was instructed by a supervisor to send officers only after T-Mobile "pinged" Kelley's cellphone and collected location information. *Id.* Officers were never sent to Kelley's home, and her body was found several days later. *Id.* The Court dismissed the claims against T-Mobile for lack of proximate cause, again noting that "the intervening factors in the case at bar arguably result in even more attenuated circumstances than were present in either *Sanchez* or *Cook*." *Id.* at *5.

Plaintiffs here allege that Defendants' failure to provide proper technologies prevented responders from providing timely aid, thereby causing Brandon Alex's death. (Am. Compl. ¶¶ 40, 45; Pl. Resp. at 10-11). Similar allegations were held not sufficient in *Sanchez, Cook,* and *Kelley* because the chain of causation was too attenuated in those cases. Each caller in *Sanchez, Cook,* and *Kelley* connected with the 9-1-1 call center, but emergency responders did not properly act on the emergency. Medical personnel never checked on Sanchez's apartment. Police officers did not treat Cook's 9-1-1 call as serious and left without entering her home. The police dispatcher was required by Dallas Police Department's internal guidelines to send officers to Kelley's home, but chose not to do so. Accordingly, the plaintiffs in each case could not show that "any of the intervening parties [i.e. the emergency responders] would have acted differently" even if the 9-1-1 technology worked better or faster as plaintiffs allege it should have. *Cook*, 683 F. App'x at 321.

Here, Defendants' 9-1-1 technology simply did not work at all. Brandon Alex suffered a medical catastrophe unrelated to any wrongdoing. His

babysitter was placed on hold for more than 40 minutes and never connected with any emergency responder. There is no chain of causation to analyze because there are no intervening factors. If Plaintiffs' allegations are proven, Defendants' defective 9-1-1 technology was a substantial—if not the only—factor that prevented Brandon Alex from receiving timely medical aid, and his death was a foreseeable consequence of the defect. Accordingly, Plaintiffs have adequately alleged proximate cause.

2. Gross Negligence, Recklessness, or Intentional Misconduct

Gross negligence consists of both objective and subjective elements. *See U-Haul Int'l, Inc. v. Waldrip*, 380 S.W.3d 118, 137 (Tex. 2012). Plaintiffs must show that, objectively, "the act or omission involved an extreme degree of risk, considering the probability and magnitude of the potential harm to others." *Id.* (citation omitted). Plaintiffs must also show that Defendants had "actual, subjective awareness of the risk involved, but nevertheless proceeded with conscious indifference to the rights, safety, or welfare of others."[5] *Id.*

The Amended Complaint describes how Defendants made a conscious decision not to adopt technology that would have caused the babysitter's 9-1-1 call to be connected. (Am. Compl. ¶¶ 26, 40, 44). It further

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[5] Similarly, recklessness requires "proof that a party knew the relevant facts" creating the danger and "did not care about the result." *See City of San Antonio v. Hartman*, 201 S.W.3d 667, 672 (Tex. 2006).

describes how Defendants instead used outdated technology that led to more than three hundred emergency calls being placed on hold on a single day. (*Id.* ¶ 22). Prior to Brandon Alex's death, the Mayor of Dallas and various media outlets apparently publicized that Defendants' technologies failed to actually connect callers to the 9-1-1 call center, resulting in many avoidable deaths. (*Id.* ¶¶ 22, 27). Plaintiffs thus allege that Defendants' failure to adopt new technologies or fix its existing 9-1-1 telecommunications system involved an extreme degree of risk, because the system simply did not work for many callers. Many could not connect to the 9-1-1 call center at all, as a result of which Dallas residents, including Brandon Alex, allegedly did not receive timely medical treatment that could have prevented their deaths. Plaintiffs further allege that Defendants knew of this risk, but failed to take any action. Accordingly, Plaintiffs have plausibly alleged gross negligence.

Because Plaintiffs have plausibly alleged proximate cause and gross negligence, the Court does not dismiss their claims on immunity grounds.[6]

ii. Violation of the Texas Civil Wiretap Act

To state a claim for a violation of the CWA, a plaintiff must plausibly allege "(1) that defendants intercepted or attempted to intercept, (2) by using an

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[6] Defendants argue that Plaintiffs have failed to allege negligence and gross negligence claims for the same reasons that statutory immunity is applicable. Because Plaintiffs have plausibly alleged sufficient facts to overcome immunity, the Court will not dismiss Plaintiffs' negligence and gross negligence claims.

electronic, mechanical, or other device, (3) the contents of [a communication] uttered by plaintiff, (4) without the consent of at least one party to the communication." *In re DirecTV, Inc., Cases*, 2004 WL 1490092, at *3 (N.D. Tex. July 1, 2004) (Kaplan, M.J.), *report and recommendation adopted sub nom. In re Directv, Inc., Cases*, 2004 WL 1773562 (N.D. Tex. Aug. 3, 2004) (Solis, J.); *see also* TEX. CIV. PRAC. & REM. CODE § 123.002(a)(1). Plaintiffs allege that Defendants T-Mobile US, Inc. and T-Mobile USA, Inc. intercepted or attempted to intercept Plaintiffs' "communication directed to a 9-1-1 public answering point" without consent. (Am. Compl ¶ 53).

Plaintiffs have failed to plausibly allege the third element. There are no allegations that Detreasure Coker or Brandon Alex made any communications. At most, Brandon Alex's babysitter, who is not a plaintiff, attempted to communicate with the 9-1-1 emergency responders, but failed to do so. (Am. Compl. ¶ 12-13). Accordingly, Plaintiffs' CWA claim must be dismissed.

iii. Products Liability

To state a claim for products liability, a plaintiff must plausibly allege that: (1) a product has a defect, rendering it unreasonably dangerous; (2) the product reached the consumer without substantial change in its condition from the time of original sale; and (3) the defective product was the producing cause of the injury to the user. *See Syrie v. Knoll Int'l,* 748 F.2d 304, 306 (5th Cir. 1984). Texas law recognizes three different types of defects: design, manufacturing, and

marketing.[7] *See Romo v. Ford Motor Co.*, 798 F. Supp. 2d 798, 806 (S.D. Tex. 2011).

According to Defendants, "Plaintiffs do not allege that the wireless devices were defectively designed, that a defect resulted from a modification, or that there was a safer design alternative." (Def. Mot. at 15). Plaintiffs allege that the software[8] installed on mobile devices was defectively designed because the software made "accidental, duplicative or insufficiently identifiable calls to 9-1-1." (Am. Compl. ¶¶ 33-35). Plaintiffs attribute this defect to the software developed by Defendants or to Defendants' failure to guard against third parties tampering with the software. (*See, e.g.*, ¶ 44c). Plaintiffs then allege that this defect caused the 9-1-1 telecommunications system to be congested, leading to calls based on real emergencies, like the babysitter's call, to be placed on hold. (Am. Compl. ¶¶ 33-35 57-59). The fact that a product that does not work as expected can support a design defect claim. *See Barragan v. Gen. Motors LLC*, 2016 WL 3519675, at *4 (W.D. Tex. June 22, 2016)

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[7] The Amended Complaint does not explicitly refer to Plaintiffs' theory of product liability. (*See* Am. Compl. ¶ 56-69). Defendants argue that Plaintiffs' allegations are deficient under any theory. (Def. Br. at 14-15). Plaintiffs respond only that their allegations are sufficient to state a design defect claim. (Pl. Resp. at 23-24). The Court construes the pleading as alleging only one products liability claim—design defect.

[8] Although Plaintiffs use a generic term like "software," their allegations provide sufficient information to give notice of what is allegedly defective. Plaintiffs are not required, at this pre-discovery stage, to identify a product name. Additional specificity can be obtained through discovery.

(finding allegations that a "vehicle's restraint system was unable to restrain an occupant in [certain] situations" was sufficient to state a design defect claim). The lack of a feature—like protections against tampering—can also constitute a design defect. *See Flock v. Scripto-Tokai Corp.*, 319 F.3d 231, 239 (5th Cir. 2003). Accordingly, the Court concludes that Plaintiffs plausibly alleged a products liability claim.[9]

iv. Violation of the Deceptive Trade Practices Act

The DTPA prohibits trade practices deemed to be false, misleading, or deceptive. *See* TEX. BUS. & COM. CODE § 17.50(a)(1)-(2). However, in order to recover under the DTPA, a plaintiff must establish that he or she is a "consumer" under the statute by showing (1) that he or she acquired goods or services by purchase or lease, and (2) that the goods or services purchased or leased form the basis of the complaint. *McClung v. Wal-Mart*, 866 F. Supp. 306, 308 (N.D. Tex. 1994); *see also* TEX. BUS. & COM. CODE § 17.45(4).

Plaintiffs allege that Brandon Alex was a "consumer" under the DTPA, but there are no allegations Brandon Alex purchased or leased any

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[9] Presumably, the safer, alternative design here is software that does not make accidental, duplicative, or insufficiently identifiable calls, and protects against tampering. Plaintiffs do not explicitly state this in their Amended Complaint. *See Rodriguez v. Gilead Scis., Inc.*, 2015 WL 236621, at *3 (S.D. Tex. Jan. 16, 2015) ("[A] safer alternative design is a necessary component to a design defect claim."). Plaintiffs are directed to specify the safer, alternative design in an amended pleading on or before March 12, 2018, to clarify that this is their only products liability claim.

goods or services. Furthermore, even if Brandon Alex had been a consumer, any DTPA claim on behalf of his Estate must be dismissed because a DTPA claim does not survive the death of the consumer. See *Elmazouni v. Mylan, Inc.*, 220 F. Supp. 3d 736, 745 (N.D. Tex. 2016) (Lynn, C.J.) ("Although the Texas Supreme Court has not decided whether DTPA claims survive the death of the consumer, and there is no consensus on that issue among the intermediate state appellate courts, this Court has previously concluded that DTPA claims do not survive the death of the consumer."). Accordingly, Plaintiffs' DTPA claim must be dismissed.

v. Derivative Claims

1. Survival

Defendants argue that Plaintiffs do not have the capacity to bring a survival claim. Generally, only an Estate's personal representative has the capacity to bring a survival claim. *Nicholson v. XTO/EXXON Energy, Inc.*, 2015 WL 1005338, at *2 (N.D. Tex. Mar. 4, 2015) (Kinkeade, J.). Under certain circumstances, such as (1) if the heirs can prove there is no administration pending and none is necessary or (2) when a familial agreement vitiates the need for an administration of the estate, then the heirs may be entitled to sue on behalf of the decedent's estate. *Id*.

Detreasure Coker and Bridget Alex, Brandon's grandmother, had been engaged in a probate dispute over who is the Estate's proper administrator. *See In the Matter of the Estate of Brandon Alex, Deceased*, No. PR-17-01591-1 (Dallas Cty. Prob. Ct. May 3, 2017). The matter has been resolved and dismissed by settlement.

Given this settlement agreement, Detreasure Coker has plausibly alleged her capacity as Brandon Alex's heir to recover under the survival statute.

2. Wrongful Death

Defendants also argue that Plaintiffs do not have the capacity to bring a wrongful death claim. Only "the surviving spouse, children, and parents of the deceased" may bring a claim for wrongful death. TEX. CIV. PRAC. & REM. CODE § 71.004(b). An estate therefore may not assert a wrongful death claim on its own behalf. Furthermore, all persons entitled to recover under the statute must be a party to the same suit or the pleading must aver that the action is brought for the benefit of all of those entitled to recover. *See id.*; *Avila v. St. Luke's Lutheran Hosp.*, 948 S.W.2d 841, 850 (Tex. App. 1997). Detreasure Coker does allege that the claim is brought for the benefit of all of those entitled to recover.[10] (Am. Compl. ¶ 72). Accordingly, the Court concludes that Detreasure Coker has plausibly alleged her capacity to recover under the wrongful death statute.

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[10] The Court recognizes that Bridget Alex and Brandon Alex's father, Jashawn Alex, have a pending lawsuit before this Court, also alleging a wrongful death claim for Brandon Alex's death. *See Bridget Alex v. T-Mobile USA, Inc.*, No. 3:17-cv-1532-M (N.D. Tex., filed June 8, 2017). However, it is not necessary for this present suit to be brought "with the knowledge and consent of all the beneficiaries; it is enough that the suit appear to be brought for their benefit." *Martone v. Livingston*, 2015 WL 9259089, at *2 (S.D. Tex. Dec. 18, 2015). In any event, the Court intends to consolidate the cases, so any assertion that Bridget Alex and Jashawn Alex must participate in this suit in order for Detreasure Coker to recover under the wrongful death statute is moot.

III. Motion for Leave to Amend

a. Legal Standard

Rule 15(a) provides that "[t]he court should freely give leave [to amend] when justice so requires." FED. R. CIV. P 15(a); *see also Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 598 (5th Cir. 1981) ("The policy of the federal rules is to permit liberal amendment to facilitate determination of claims on the merits and to prevent litigation from becoming a technical exercise in the fine points of pleading."). Leave to amend should not be denied unless there is a substantial reason to do so. *See Jacobsen v. Osbourne*, 133 F.3d 315, 318 (5th Cir. 1998). Substantial reasons include "undue delay, bad faith, dilatory motive on the part of the movant, or undue prejudice to the non-movant." *Cover Four, L.L.C. v. Cardiac Sci. Corp.*, 2007 WL 4245486, at *1 (N.D. Tex. Dec. 3, 2007).

b. Analysis

There are no apparent substantial reasons to deny leave to amend, and the Court concludes that the motion should be granted. Nothing in the record suggests bad faith or a dilatory motive on Plaintiffs' part. Allowing Plaintiffs to amend would not materially prejudice Defendants because the case has been stayed, and the Court has not yet issued a scheduling order. Indeed, courts typically grant leave to amend "unless the defect is simply incurable or the plaintiff has failed to plead with particularity after being afforded repeated opportunities to do so." *Hart v. Bayer Corp.*, 199 F.3d 239, 247 n.6 (5th Cir. 2000).

However, the Court makes two observations. First, Plaintiffs' proposed pleading does not address all of the defects identified in this Order. For example, Plaintiffs do not make any material changes to the allegations underlying their DTPA and CWA claims. Plaintiffs thus must further amend their pleading to plausibly allege those claims. Second, the proposed pleading includes claims against the City of Dallas. The Court denied joinder of the City, and all claims asserted against the City were dismissed without prejudice. (ECF No. 34).

IV. Conclusion

For the reasons stated above, the Motion to Dismiss is **GRANTED IN PART** and **DENIED IN PART**, and the Motion for Leave is **GRANTED**. Plaintiffs' DTPA and CWA claims are **DISMISSED WITHOUT PREJUDICE**. Plaintiffs have leave to amend their pleading, addressing those defects identified in this Order that are curable, by March 12, 2018.

Because the Court's November 20, 2017, Order stayed the case pending the resolution of Defendants' Motion to Dismiss, (ECF No. 23), the stay is therefore **LIFTED**. The parties are directed to confer and submit a revised joint proposal for the contents of a scheduling order, by March 22, 2018.

SO ORDERED.

March 1, 2018.

/s/ Barbara M. G. Lynn
BARBARA M. G. LYNN
CHIEF JUDGE

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

Civil Action No. 3:17-cv-01532-M

[Filed: February 9, 2018]

BRIDGET ALEX, individually and on behalf of the ESTATE OF BRANDON ALEX, and JASHAWN ALEX,	)
Plaintiffs,	)
v.	)
T-MOBILE USA, INC., T-MOBILE US, INC., formerly known as MetroPCS Communications, Inc., and METROPCS MIDWAY RD.,	)
Defendants.	)

MEMORANDUM OPINION AND ORDER

Before the Court is T-Mobile USA, Inc. and T-Mobile US, Inc.'s Motion for Judgment on the Pleadings, (ECF No. 8), and Motion for Leave to File Notice of Subsequent History, (ECF No. 22). For the reasons stated below, the Motion for Leave is

GRANTED, and the Motion for Judgment on the Pleadings is **GRANTED IN PART** and **DENIED IN PART**.

I. Factual and Procedural Background

On March 11, 2017, Brandon Alex was injured when he "rolled off the daybed and onto the floor." (Original Pet. ¶ 27, ECF No. 1). Michelle Cohen, his babysitter, found him "grasping and barely breathing." (*Id.*) Ms. Cohen repeatedly dialed 9-1-1 from her cellphone, but was placed on hold each time. (*Id.* ¶ 28). Collectively, Ms. Cohen was placed on hold for more than forty minutes. (*Id.*) Unable to connect to the 9-1-1 dispatcher, Ms. Cohen contacted Brandon Alex's mother, Bridget Alex, who later drove him to an emergency room. (*Id.* ¶¶ 31, 76). Unfortunately, Brandon Alex was pronounced dead on arrival at the hospital. (*Id.*)

Brandon Alex's parents, Jashawn and Bridget Alex, instituted this action in the 101st Judicial District, Court of Dallas County, Texas, against T-Mobile USA, Inc. and T-Mobile US, Inc. (collectively, "T-Mobile") and MetroPCS Midway Rd. Plaintiffs allege that had T-Mobile's 9-1-1 "services, software, products, and technology . . . worked as required," Brandon Alex would have received timely medical assistance and survived. (Original Pet. ¶ 34). Their claims include strict liability, negligence, gross negligence, breach of express and implied warranties, violations of the Texas Deceptive Trade Practices Act ("DTPA"), and misrepresentation. (*Id.* ¶¶ 36-70). Plaintiffs also derivatively allege wrongful death, survival, and bystander claims. (*Id.* ¶¶ 71-82). T-Mobile removed the

case to this Court, and the case has been stayed pending the Court's resolution of T-Mobile's Motion for Judgment on the Pleadings. (ECF No. 21).

II. Legal Standard

A party may move for judgment on the pleadings after the pleadings are closed and when doing so would not delay trial. FED. R. CIV. P. 12(c). A motion brought pursuant to Rule 12(c) is designed to dispose of cases where "the material facts are not in dispute and a judgment on the merits can be rendered by looking to the substance of the pleadings and any judicially noticed facts." *Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 312 (5th Cir. 2002). The standard of review for a Rule 12(c) motion is the same as for a Rule 12(b)(6) motion to dismiss for failure to state a claim. *See Johnson v. Teva Pharm. USA, Inc.*, 758 F.3d 605, 610 (5th Cir. 2014). To avoid dismissal, a plaintiff must plead sufficient facts to state a claim for relief that is "plausible on its face." *Gentilello v. Rege*, 627 F.3d 540, 544 (5th Cir. 2010). The court must accept all of the plaintiff's factual allegations as true, but it is not bound to accept as true "a legal conclusion couched as a factual allegation." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555 (2007). Where the facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has stopped short of showing that the plaintiff is plausibly entitled to relief. *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009).

III. Motion for Leave to File Notice of Subsequent History

T-Mobile moves for leave to file notice that the Supreme Court denied *certiorari* review of *Cook v. City of Dallas*, 683 F. App'x 315 (5th Cir. 2017). The Motion is **GRANTED**. The Supreme Court's denial of certiorari review "is not subject to reasonable dispute" and is relevant to the Court's resolution of T-Mobile's Motion for Judgment on the Pleadings. *See* FED. R. CIV. P. 201.

IV. Motion for Judgment on the Pleadings

a. Statutory Immunity

Under Texas law, wireless service providers and manufacturers have some statutory immunity from claims arising out of their provision of 9-1-1 services under Section 771.053(a) of the Texas Health and Safety Code, which states:

> A service provider of communications service involved in providing 9-1-1 service, a manufacturer of equipment used in providing 9-1-1 service, [or] a developer of software used in providing 9-1-1 service . . . is not liable for any claim, damage, or loss arising from the provision of 9-1-1 service unless the act or omission proximately causing the claim, damage, or loss constitutes gross negligence, recklessness, or intentional misconduct.

Accordingly, to qualify for statutory immunity, T-Mobile must be one of the listed entities involved in

providing 9-1-1 services, and the claims against it must arise from its provision of 9-1-1 services.

T-Mobile meets both conditions. Plaintiffs allege that T-Mobile operates 9-1-1 communications services, (Original Pet. ¶¶ 13-15), and provides 9-1-1 capable cellphones, (*id.* ¶ 49), and that their claims arise from T-Mobile's provision of 9-1-1 services. (*See, e.g.*, *id.* ¶ 34 ("[I]f the Defendants' services, software, products and technology had worked as required, BRANDON ALEX would have received timely police and/or EMT assistance.")). However, the statutory immunity provided by Section 771.053(a) is not absolute. To overcome T-Mobile's immunity, Plaintiffs must plausibly allege that T-Mobile proximately caused Brandon Alex's death and that T-Mobile's acts or omissions constituted gross negligence, recklessness, or intentional misconduct. *Cook*, 683 F. App'x at 319 (citing TEX. HEALTH & SAFETY CODE § 771.053(a)). Because Plaintiffs have plausibly alleged proximate cause and gross negligence, for the reasons discussed below, the Court does not dismiss their claims on immunity grounds.

i. Proximate Cause

The components of proximate cause are cause in fact and foreseeability. *See Ryder Integrated Logistics, Inc. v. Fayette Cty.*, 453 S.W.3d 922, 929 (Tex. 2015) (citation omitted). A tortious act or omission is a cause in fact if it serves as "a substantial factor in causing the injury and without which the injury would not have occurred." *Del Lago Partners, Inc. v. Smith,* 307 S.W.3d 762, 774 (Tex. 2010). An injury is foreseeable "if, in light of all the circumstances, a reasonably prudent

man would have anticipated that the injury would be a consequence of the act or omission in question." *Hall v. Atchison, T. & S. F. Ry. Co.*, 504 F.2d 380, 385 (5th Cir. 1974). Proximate cause cannot be established by "mere conjecture, guess, or speculation." *HMC Hotel Props. II Ltd. P'ship v. Keystone-Texas Prop. Holding Corp.*, 439 S.W.3d 910, 913 (Tex. 2014).

The case of *City of Dallas v. Sanchez* is instructive on what constitutes proximate cause in a circumstance similar to the one presented here. 494 S.W.3d 722 (Tex. 2016). In *Sanchez*, 9-1-1 dispatchers received two calls within ten minutes of each other. *Id.* at 725. Both calls—from two different callers—originated from the same apartment complex, and both requested assistance with a drug overdose victim. *Id.* After the dispatcher informed the person calling on behalf of Matthew Sanchez that emergency responders were on route, the call was disconnected. *Id.* Once responders arrived at the apartment complex, "they erroneously concluded that the two 9–1–1 calls were redundant and that a single individual was the subject of both calls." *Id.* Responders ultimately never went to the apartment of Sanchez, who died six hours later. *Id.* Sanchez's parents sued the City of Dallas, alleging that the 9-1-1 call was disconnected as a result of a defect in the City's phone system. *Id.* They alleged that their son would have received life-saving medical care but for this defect, which prevented responders from having sufficient information to correctly differentiate the two calls. *Id.*

The key issue before the Texas Supreme Court was whether the plaintiffs had adequately alleged, to

survive a motion to dismiss, that a defective 9-1-1 system proximately caused Sanchez's death.[1] *Sanchez*, 494 S.W.3d at 726. The court held that due to intervening factors, Plaintiffs could not establish proximate cause. *See id.* at 728 (The death was caused by "drugs, the passage of time, and misinterpretation of information [by the emergency responders]," and the alleged malfunction was merely one of a "series of factors that contributed to Sanchez not receiving timely medical assistance."); *id.* at 727-28 ("Between the alleged malfunction and Sanchez's death, emergency responders erroneously concluded separate 9–1–1 calls were redundant and left the apartment complex without checking the specific apartment unit the dispatcher had provided to them."). Accordingly, the court held that immunity applied.[2]

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[1] This issue came up in the following way. The City argued that governmental immunity protected it from liability. *Sanchez*, 494 S.W.3d at 725. The plaintiffs argued that immunity was waived under the Texas Tort Claims Act ("TTCA"), TEX. CIV. PRAC. & REM. CODE § 101.021. For immunity to be waived under the TTCA, "personal injury or death must be *proximately caused* by a condition or use of tangible personal or real property." *Dallas Cty. Mental Health & Mental Retardation v. Bossley,* 968 S.W.2d 339, 342–43 (Tex. 1998) (emphasis added). The City argued that immunity applied because Sanchez's death was caused by a drug overdose, not the 9-1-1 system. *Sanchez*, 494 S.W.3d at 725. Thus, although it was not addressing Section 771.053(a), *Sanchez* was addressing proximate cause in a similar factual context.

[2] The Texas Supreme Court also noted that "the use of property that simply hinders or delays treatment does not 'actually cause[] the injury' and does not constitute a proximate cause of an injury." *Sanchez*, 494 S.W.3d at 727. The statement is dictum because the court's actual analysis does not rely on this statement. As

The Fifth Circuit, in an unpublished opinion, reached a similar conclusion. In *Cook*, the victim, Deanna Cook, called 9-1-1 from her cellphone while an intruder was attacking her inside her home. 683 F. App'x at 317. Location-tracking technology sent Cook's location to the 9-1-1 dispatcher "within several minutes" of the call. *Id.* "Nearly fifty minutes after Cook placed her 9-1-1 call, police officers arrived at Cook's home." *Id.* However, the officers only inspected the outside of Cook's home and "left without entering the residence." *Id.* Cook's family found her body two days later. *Id.* Members of Cook's family filed suit against T-Mobile, alleging that it failed to implement proper location-tracking that would have allowed 9-1-1 operators to locate Cook "quicker than the several minutes it actually took." *Id.* at 320. Had location

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discussed, the court found that, as a matter of law, the alleged defect was too attenuated from Sanchez's death to constitute proximate cause.

Indeed, it is hard to believe that the Texas Supreme Court would hold that delays caused by defects in 9-1-1 technologies are never actionable, as a matter of law, due to the absence of proximate cause. *C.f. Columbia Med. Ctr. of Las Colinas, Inc. v. Hogue*, 271 S.W.3d 238, 246 (Tex. 2008) (considering proximate cause in context of whether an alleged omission delayed proper treatment); *Bustamante v. Ponte*, 529 S.W.3d 447, 456 (Tex. 2017) (same); *see also Dusek v. State*, 978 S.W.2d 129, 133 (Tex. App. 1998) (holding evidence insufficient to support injury-to-child conviction because child's broken leg treated same day as injury and no evidence treatment was delayed or recovery hindered by treatment timing). The Court therefore rejects T-Mobile's argument that, as a matter of law, Plaintiffs cannot establish proximate cause because the alleged defects here simply hindered or delayed treatment.

information been instantly transmitted, plaintiffs argued, Cook's life would have been spared. *Id.*

In dismissing the case for failure to state a claim, another judge on this Court held that T-Mobile was immune under Section 771.053(a) because, among other reasons, any alleged defect in 9-1-1 technology was not a proximate cause of Cook's death. *Cook v. T-Mobile USA, Inc.*, 2015 WL 11120974, at *1 (N.D. Tex. Sept. 22, 2015) (Solis, J.). The Fifth Circuit affirmed in an unpublished opinion, specifically highlighting the intervening factors that made the alleged defect too attenuated from Cook's death to constitute proximate cause. See *Cook*, 683 F. App'x at 321 ("Plaintiffs alleged that even after emergency personnel arrived at Cook's residence, Cook's "call was not treated as serious[, and] [t]hey have failed to allege that the emergency personnel would have reacted differently had they received Cook's location sooner.").

In *Kelley v. City of Dallas*, this Court again addressed the issue of whether T-Mobile's failure to provide prompt location information from 9-1-1 calls was the proximate cause of a victim's death. 2017 WL 3891680, at *1 (N.D. Tex. Aug. 17, 2017) (Toliver, M.J.), *report and recommendation adopted*, 2017 WL 3868257 (N.D. Tex. Sept. 5, 2017) (Boyle, J.). The victim, D'Lisa Kelley, called her sister, screaming, but the call disconnected. *Id.* Kelley's grandmother called 9-1-1 for assistance. Proper procedures required the dispatcher to send police officers to Kelley's home, but in this case, the dispatcher was instructed by a supervisor to send officers only after T-Mobile "pinged" Kelley's cellphone and collected location information. *Id.* Officers were

never sent to Kelley's home. *Id.* Her body was found several days later. *Id.* The Court dismissed the claims against T-Mobile for lack of proximate cause, again noting that "the intervening factors in the case at bar arguably result in even more attenuated circumstances than were present in either *Sanchez* or *Cook*." *Id.* at *5.

Plaintiffs here allege that T-Mobile's failure to provide proper hardware and software led to Ms. Cohen's 9-1-1 call being placed on hold. (Original Pet. ¶ 53). They also allege that T-Mobile failed to implement proper location-tracking technology that would have sent Ms. Cohen's call location to emergency responders. (*Id.* ¶ 42). These failures, according to Plaintiffs, prevented responders from providing timely aid, thereby causing Brandon Alex's death. (*Id.* ¶ 34). These allegations, if proven, would be sufficient to establish proximate cause. Plaintiffs allege that T-Mobile's alleged defects were a substantial, if not the only, factor in causing Brandon Alex's death, and that his death was a foreseeable consequence of those defects. The allegations were held not sufficient in *Sanchez, Cook,* and *Kelley* because the chain of causation was too attenuated in those cases. Each caller in *Sanchez, Cook,* and *Kelley* connected with the 9-1-1 call center, but emergency responders did not properly act on the emergency. Medical personnel never checked on Sanchez's apartment. Police officers did not treat Cook's 9-1-1 call as serious and left without entering her home. The police dispatcher was required by Dallas Police Department's internal guidelines to send officers to Kelley's home, but chose not to do so. Accordingly, the plaintiffs in each case could not show that "any of the intervening parties

would have acted differently" even if the 9-1-1 technology worked better or faster as plaintiffs allege it should have. *Cook*, 683 F. App'x at 321.

That is not the circumstance in this case. T-Mobile's 9-1-1 technology simply did not work at all. Ms. Cohen was placed on hold for more than 40 minutes and never connected with the 9-1-1 call center. There is no chain of causation to analyze because there are no intervening factors. If Plaintiffs' allegations are proven, T-Mobile's defective 9-1-1 technology was the only factor that prevented Brandon Alex from receiving timely medical aid. Accordingly, Plaintiffs have adequately alleged proximate cause.

ii. Gross Negligence, Recklessness, or Intentional Misconduct

Gross negligence consists of both objective and subjective elements. *See U-Haul Int'l, Inc. v. Waldrip*, 380 S.W.3d 118, 137 (Tex. 2012). Plaintiffs must show that, objectively, "the act or omission involved an extreme degree of risk, considering the probability and magnitude of the potential harm to others." *Id.* (citation omitted). Plaintiffs must also show that T-Mobile had "actual, subjective awareness of the risk involved, but nevertheless proceeded with conscious indifference to the rights, safety, or welfare of others."[3] *Id*.

[3] Similarly, recklessness requires "proof that a party knew the relevant facts" creating the danger and "did not care about the result." *See City of San Antonio v. Hartman*, 201 S.W.3d 667, 672 (Tex. 2006).

The Original Petition describes how T-Mobile made a conscious decision not to adopt technology that would have allowed Ms. Cohen's 9-1-1 call to be connected within a reasonable time, or that would have physically located her cellphone when she dialed 9-1-1. (Original Pet. ¶¶ 22-26, 42, 52). It further describes how T-Mobile instead continued to use outdated technology that led to hundreds of emergency calls being placed on hold. (*Id.* ¶ 25). The Mayor of Dallas apparently repeatedly warned that T-Mobile's technologies failed to actually connect callers to the 9-1-1 call center, resulting in many avoidable deaths. (*Id.* ¶¶ 26, 52, 53). Taken as true, Plaintiffs allege that T-Mobile's failure to adopt new technologies or fix its existing 9-1-1 telecommunications system involved an extreme degree of risk because the system simply did not work for many callers; they could not connect to the 9-1-1 call center at all. Plaintiffs further allege that T-Mobile knew of this risk, but failed to take any action. Accordingly, Plaintiffs have plausibly alleged gross negligence.

Because Plaintiffs have plausibly alleged proximate cause and gross negligence, the Court does not dismiss their claims on immunity grounds.[4]

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[4] T-Mobile argues that Plaintiffs have failed to allege negligence and gross negligence claims for the same reasons that statutory immunity is applicable. Because Plaintiffs have plausibly alleged sufficient facts to overcome immunity, the Court will not dismiss Plaintiffs' negligence and gross negligence claims.

b. Strict Liability

To state a claim for strict products liability, a plaintiff must plausibly allege that: (1) a product has a defect rendering it unreasonably dangerous; (2) the product reached the consumer without substantial change in its condition from the time of original sale; and (3) the defective product was the producing cause of the injury to the user. *Syrie v. Knoll Int'l,* 748 F.2d 304, 306 (5th Cir. 1984). Unreasonably dangerous means dangerous "to an extent beyond that which would be contemplated by the ordinary user of the product, with the ordinary knowledge common to the community as to the product's characteristics." *Id*.

T-Mobile argues that Plaintiffs have failed to plausibly allege the first element. Plaintiffs must "identify a specific product" that is allegedly defective. *Del Castillo v. PMI Holdings N. Am. Inc*., 2016 WL 3745953, at *16 (S.D. Tex. July 13, 2016). Identifying a product in "vague, generic, and collective terms" is not sufficient. *Id.* (dismissing strict liability claim where plaintiffs complained of a "quick shut-off valve," which was a "generic term" and could refer to "any one of hundreds of valves"). Here, Plaintiffs identify as defective T-Mobile's "telecommunications technology" which connects calls from its cellphones to a 9-1-1 call center. (Original Pet. ¶¶ 37-40). Although Plaintiffs use a generic term like "technology," their allegations provide sufficient information to give notice of what is allegedly defective. There is no requirement, at this stage, for Plaintiffs to identify a product name, which may or may not be public information. Additional specificity can be obtained through discovery.

Accordingly, the Court concludes that Plaintiffs plausibly allege a strict liability claim.[5]

T-Mobile can only be strictly liable for its defective products, not services. *See First Nat. Bank of Hot Springs v. Tex Sun Beechcraft, Inc.*, 1992 WL 86624, at *4 (Tex. App. Apr. 29, 1992). To the extent Plaintiffs mean their strict liability claim to be based on allegedly defective services, the claim must be dismissed.

c. Breach of Express Warranties

To state a claim for breach of an express warranty, a plaintiff-buyer must plausibly allege that (1) the defendant-seller made an express affirmation of fact or promise relating to the goods; (2) that affirmation or promise became part of the bargain; (3) the plaintiff relied upon that affirmation or promise; (4) the goods did not comply with the affirmation or promise; (5) the plaintiff was damaged by the noncompliance; and (6) the failure of the product to comply was the proximate cause of the plaintiff's injury. *See Omni USA, Inc. v. Parker-Hannifin Corp.*, 964 F. Supp. 2d

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[5] T-Mobile also argues that Plaintiffs have failed to allege that any of its products are unreasonably dangerous. True, the fact that T-Mobile might have designed "a better, safer product" does not necessarily mean that the product it did design was unreasonably dangerous. *See Daberko v. Heil Co.*, 681 F.2d 445, 448 (5th Cir. 1982). However, Plaintiffs further add that Defendants' products allegedly did not operate properly with the 9-1-1 call center, leading to "hundreds of unanswered [9-1-1] calls" and people being placed on hold for more than 20 minutes at a time. (Original Pet. ¶¶ 23, 25-26, 39). This is enough to allege that T-Mobile products are unreasonably dangerous.

805, 814 (S.D. Tex. 2013). Furthermore, privity is required between the plaintiff and the defendant.

T-Mobile argues that Plaintiffs have failed to plausibly allege privity. Plaintiffs argue that T-Mobile breached express warranties that the cellphone[6] purchased by Bridget Alex was "reliable and of a quality that rendered [it] suitable for [its] intended use, including in emergency situations requiring the caller to be located quickly."[7] (Original Pet. ¶ 60). Plaintiffs, however, do not allege that Bridget Alex's phone did not comply with any warranty. They allege that Ms. Cohen's phone failed to satisfy the warranty on it, but nothing in the pleading suggests that any Plaintiff purchased or owned Ms. Cohen's phone. *See also Elsholtz v. Taser Int'l, Inc.*, 2007 WL 2781664, at *5 (N.D. Tex. Sept. 25, 2007) ("[Plaintiff's] express-warranty claim is unavailing inasmuch as she was not the purchaser of [defendant's] product, and

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[6] The Original Petition vaguely refers to "telecommunications technology, software and/or mobile device services or products." (Original Pet. ¶ 60). However, in their briefs, Plaintiffs narrow their allegations to mobile devices. (*See* Pl. Resp. at 19, ECF No. 12). Plaintiffs are directed to specify the particular device in an amended pleading.

[7] T-Mobile argues that this is not an affirmation of fact necessary to create an express warranty. *See Bill & Jo Deane Bradford Investments, Inc. v. Cutter Aviation San Antonio, Inc.*, 2005 WL 3161083, at *2 (Tex. App. Nov. 23, 2005) ("In this case, [plaintiff] relies on statements that the [defendant's] engine was 'good, safe and reliable.' These statements amount to mere opinion or puffing."). However, the statement that a phone will allow the caller to be physically located in 9-1-1 calls is an affirmation of fact that could constitute an express warranty.

therefore no privity exist."). Accordingly, Plaintiffs' claim for breach of express warranty on either cellphone must be dismissed.

d. Breach of Implied Warranty of Merchantability

To state a claim for breach of implied warranty of merchantability, a plaintiff must plausibly allege "a defect in the condition of the goods that renders them unfit for the ordinary purposes for which they are used." *Strauss v. Ford Motor Co.*, 439 F. Supp. 2d 680, 685 (N.D. Tex. 2006) (citation omitted). Privity is not required. *Garcia v. Texas Instruments, Inc.*, 610 S.W.2d 456, 465 (Tex. 1980). Plaintiffs allege that the cellphone[8] sold to Ms. Cohen was defective because it did not allow for location tracking during 9-1-1 calls. (Original Pet. ¶ 60). What constitutes an ordinary purpose of cellphones is a question of fact, and the Court finds that Plaintiffs have thus plausibly alleged a claim for breach of implied warranty of merchantability.

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[8] Again, the Original Petition vaguely refers to "telecommunications technology, software and/or mobile device services or products." (Original Pet. ¶ 60). However, in their briefs, Plaintiffs narrow their allegations to mobile devices. (*See* Pl. Resp. at 19). Indeed, T-Mobile's services are not even actionable. *See, e.g.*, *Sw. Bell Tel. Co. v. FDP Corp.*, 811 S.W.2d 572, 574 (Tex. 1991). Plaintiffs are directed to specify the particular device in an amended pleading.

e. Violations of the Deceptive Trade Practices Act

The DTPA prohibits trade practices deemed to be false, misleading, or deceptive. *See* TEX. BUS. & COM. CODE § 17.50(a)(1)-(2). However, in order to recover under the DTPA, a plaintiff must establish that he or she is a "consumer" under the statute by showing (1) that he or she acquired goods or services by purchase or lease, and (2) that the goods or services purchased or leased form the basis of the complaint. *McClung v. Wal-Mart*, 866 F. Supp. 306, 308 (N.D. Tex. 1994); *see also* TEX. BUS. & COM. CODE § 17.45(4).

Plaintiffs are not "consumers" under the DTPA. There are no allegations that Jashawn Alex purchased any of T-Mobile's goods or services. Bridget Alex allegedly purchased T-Mobile's cellphone and service, but her claims do not arise from them. The basis of the Original Petition is the alleged defects and misrepresentations related to Ms. Cohen's cellphone and service. Again, nothing in the Original Petition suggests that any Plaintiffs purchased Ms. Cohen's cellphone or service.

Furthermore, even if Brandon Alex had been a consumer, any DTPA claim on behalf of his Estate must be dismissed because a DTPA claim does not survive the death of the consumer. DTPA. *See Elmazouni v. Mylan, Inc.*, 220 F. Supp. 3d 736, 745 (N.D. Tex. 2016) (Lynn, C.J.) ("Although the Texas Supreme Court has not decided whether DTPA claims survive the death of the consumer, and there is no consensus on that issue among the intermediate state appellate courts, this Court has previously concluded

that DTPA claims do not survive the death of the consumer."). Accordingly, Plaintiffs' DTPA claims must be dismissed.

f. Misrepresentation

The Original Petition is unclear as to whether Plaintiffs bring a claim for negligent misrepresentation, fraudulent misrepresentation, or both.[9] Regardless of the particular claim, Federal Rule of Civil Procedure 9(b) requires allegations of "fraud or mistake" to be "state[d] with particularity. At a minimum, Plaintiffs must "specify the statements contended to be fraudulent, identify the speaker, state when and where the statements were made, and explain why the statements were fraudulent." *Flaherty & Crumrine Preferred Income Fund, Inc. v. TXU Corp.*, 565 F.3d 200, 207 (5th Cir. 2009) (citation omitted).

T-Mobile allegedly and falsely represented that its products and services "are reliable and of a quality that rendered them suitable for their intended use, including in emergency situations requiring the caller to be located quickly," and that its "technology is state of the art and that the safety of [its] customers is paramount." (Original Pet. ¶ 68). For the former, Plaintiffs do not identify the speaker nor state when and where the statements were made. For the latter, the Court finds that the representation is not an actionable statement of fact. *See Deburro v. Apple, Inc.*,

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[9] In their briefs, Plaintiffs aver that they only seek recovery for negligent misrepresentation. (*See* Pl. Resp. at 22). Plaintiffs are directed to specify their claim is for negligent misrepresentation, not fraud, in an amended pleading.

2013 WL 5917665, at *4 (W.D. Tex. Oct. 31, 2013) ("Many of the representations identified by Plaintiffs are mere puffery, incapable of being labeled true or false (e.g., 'state of the art,' 'breakthrough')."). Accordingly, Plaintiffs' misrepresentation claim must be dismissed.

g. Derivative Claims

i. Bystander

In Texas, bystanders may recover damages for mental anguish suffered as a result of witnessing a serious or fatal accident involving a close family member. A bystander plaintiff must establish that: (1) the plaintiff was located near the scene of the accident; (2) the plaintiff suffered shock as a result of a direct emotional impact upon the plaintiff from a sensory and contemporaneous observation of the accident, as opposed to learning of the accident from others after its occurrence; and (3) the plaintiff and victim were closely related. *See United Servs. Auto Ass'n v. Keith,* 970 S.W.2d 540, 541–42 (Tex. 1998); *see also Rodriguez v. Riddell Sports, Inc.*, 242 F.3d 567, 578 (5th Cir. 2001). Some lower courts have held that "actual observance of the accident is not required if there is otherwise an experiential perception of it," but they still require that the plaintiff not learn of the accident from others after its occurrence. *See, e.g.*, *Landreth v. Reed*, 570 S.W.2d 486, 490 (Tex. App. 1978).

Bridget Alex asserts a claim for bystander recovery, but she did not witness Brandon Alex's accident. (*See* Original Pet. ¶¶ 31, 72). She learned of the accident

from Ms. Cohen. (*Id.*) Only then did she drive home and later take Brandon Alex to the emergency room. Because Bridget Alex did not witness the accident and instead learned of the accident from another person, she cannot recover as a bystander.[10]

ii. Survival

T-Mobile argues that Plaintiffs do not have the capacity to bring a survival claim. Generally, only the estate's personal representative has the capacity to bring a survival claim. *Nicholson v. XTO/EXXON Energy, Inc.*, 2015 WL 1005338, at *2 (N.D. Tex. Mar. 4, 2015) (Kinkeade, J.). Under certain circumstances, such as (1) if the heirs can prove there is no administration pending and none is necessary or (2) when a familial agreement vitiates the need for an administration of the estate, then the heirs may be entitled to sue on behalf of the decedent's estate. *Id.*

Bridget Alex and Detreasure Coker, Brandon's alleged biological mother, had been engaged in a

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[10] The Texas Supreme Court's decision in *United Services Auto. Ass'n v. Keith* is analogous. 970 S.W.2d at 542. In *Keith,* Dianna Keith arrived on the scene of her daughter's car accident and heard the "scary noises" her daughter was making due to her injuries. *Id.* at 541. Keith watched as emergency responders removed her daughter from the car; she then accompanied her daughter in the ambulance to the hospital. *Id.* Despite Keith being a witness to her daughter's pain and suffering that resulted from the accident, the court denied the bystander claim. *Id.* at 542 ("Texas law still requires the bystander's presence when the injury occurred and the contemporaneous perception of the accident."). Accordingly, in Texas, plaintiffs cannot recover even where the observation of the effects of the injury creates an emotional impact.

probate dispute over who is the Estate's proper administrator. *See In the Matter of the Estate of Brandon Alex, Deceased*, No. PR-17-01591-1 (Dallas Cty. Prob. Ct. May 3, 2017). The matter has been resolved and dismissed by settlement. (*See* Not. at 1, ECF No. 25). Plaintiffs further allege that the Estate "has no debts and no administration upon the estate is pending and none is necessary or desired by those interested in the estate." (Original Pet. ¶ 5). Accordingly, Plaintiffs have plausibly alleged their capacity as Brandon Alex's heirs to recover under the survival statute.

iii. Wrongful Death

T-Mobile also argues that Plaintiffs do not have the capacity to bring a wrongful death claim. Only "the surviving spouse, children, and parents of the deceased" may bring a claim for wrongful death. TEX. CIV. PRAC. & REM. CODE § 71.004(b). An estate therefore may not assert a wrongful death claim on its own behalf. Furthermore, all persons entitled to recover under the statute must be a party to the same suit or the pleading must aver that the action is brought for the benefit of all of those entitled to recover. *See id.*; *Avila v. St. Luke's Lutheran Hosp.*, 948 S.W.2d 841, 850 (Tex. App. 1997). Jashawn Alex and Bridget Alex do allege that the claim is brought for the benefit of all of those entitled to recover.[11] (Original

[11] The Court recognizes that Detreasure Coker has a pending lawsuit before this Court, also alleging a wrongful death claim for the death of Brandon Alex. *See Estate of Brandon Alex v. T-Mobile US, Inc.*, No. 3:17-cv-2622-M (N.D. Tex. Oct. 16, 2017). However, it is not necessary for this present suit to be brought "with the

Pet. ¶ 76). Accordingly, the Court concludes that Plaintiffs plausibly allege a wrongful death claim.

V. Conclusion

For the reasons stated above, the Motion for Judgment on the Pleadings is **GRANTED IN PART** and **DENIED IN PART**, and the Motion for Leave is **GRANTED**. Plaintiffs' breach of express warranty, misrepresentation, DTPA, and bystander claims are **DISMISSED WITHOUT PREJUDICE**. Plaintiffs have leave to amend their pleading, addressing those defects identified in this Order that are curable, by March 1, 2018. *See also Hart v. Bayer Corp.*, 199 F.3d 239, 248 n.6 (5th Cir. 2000) ("Although a court may dismiss the claim, it should not do so without granting leave to amend, unless the defect is simply incurable.").

Because the Court's November 2, 2017, Order stayed the case pending the resolution of T-Mobile's Motion for Judgment on the Pleadings, (ECF No. 21), the stay is therefore **LIFTED**. The parties are directed to confer and submit a revised joint proposal for the contents of a scheduling order, by March 8, 2018.

SO ORDERED.

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knowledge and consent of all the beneficiaries; it is enough that the suit appear to be brought for their benefit." *Martone v. Livingston*, 2015 WL 9259089, at *2 (S.D. Tex. Dec. 18, 2015). In any event, the Court intends to consolidate Ms. Coker's suit with this one, so any assertion that Ms. Coker must participate in this suit in order for Plaintiffs to recover under the wrongful death statute is moot.

February 9, 2018.

/s/ Barbara M. G. Lynn
BARBARA M. G. LYNN
CHIEF JUDGE

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-10878

[Filed: April 9, 2020]

BRIDGET ALE X, Individually and on behalf of the Estate of Brandon Alex; JASHAWN ALEX; MICHAELLE COHEN; ESTATE OF BRANDON ALEX; DETREASURE COKER,	)
Plaintiffs-Appellants	)
v.	)
T-MOBILE USA, INCORPORATED; T-MOBILE US INCORPORATED, formerly known as MetroPCS Communications Incorporated; METROPCS MIDWAY RD; DEUTSCHE TELEKOM NORTH AMERICA I NCORPORATED; T-SYSTEMS NORTH AMERICA INCORPORATED,	)
Defendants-Appellees	)

ESTATE OF BRANDON ALEX, through personal representative Detreasure Coker; DETREASURE COKER, individually and as surviving mother of Brandon Alex, deceased	)
Plaintiffs-Appellants	)
v.	)
T-MOBILE US INCORPORATED, formerly known as MetroPCS Communications Incorporated; T-MOBILE USA, INCORPORATED; T-SYSTEMS NORTH AMERICA I NCORPORATED; DEUTSCHE TELEKOM NORTH AMERICA INCORPORATED	)
Defendants-Appellees	)

Appeal from the United States District Court
for the Northern District of Texas

ON PETITION FOR REHEARING EN BANC

(Opinion 2/27/20, 5 Cir., _____ _____ F.3d_____)

Before DAVIS, SMITH, and HIGGINSON, Circuit Judges.

PER CURIAM:

(*X*) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/_____
UNITED STATES
CIRCUIT JUDGE

APPENDIX H

47 U.S.C. § 615a
47 U.S. Code § 615a - Service provider parity of protection

(a) Provider parity

A wireless carrier, IP-enabled voice service provider, or other emergency communications provider, and their officers, directors, employees, vendors, and agents, shall have immunity or other protection from liability in a State of a scope and extent that is not less than the scope and extent of immunity or other protection from liability that any local exchange company, and its officers, directors, employees, vendors, or agents, have under Federal and State law (whether through statute, judicial decision, tariffs filed by such local exchange company, or otherwise) applicable in such State, including in connection with an act or omission involving the release to a PSAP, emergency medical service provider or emergency dispatch provider, public safety, fire service or law enforcement official, or hospital emergency or trauma care facility of subscriber information related to emergency calls, emergency services, or other emergency communications services.

(b) User parity

A person using wireless 9–1–1 service, or making 9–1–1 communications via IP-enabled voice service or other emergency communications service, shall have

immunity or other protection from liability of a scope and extent that is not less than the scope and extent of immunity or other protection from liability under applicable law in similar circumstances of a person using 9–1–1 service that is not via wireless 9–1–1 service, IP-enabled voice service, or other emergency communications service.

(c) PSAP parity

In matters related to 9–1–1 communications via wireless 9–1–1 service, IP-enabled voice service, or other emergency communications service, a PSAP, and its employees, vendors, agents, and authorizing government entity (if any) shall have immunity or other protection from liability of a scope and extent that is not less than the scope and extent of immunity or other protection from liability under applicable law accorded to such PSAP, employees, vendors, agents, and authorizing government entity, respectively, in matters related to 9–1–1 communications that are not via wireless 9–1–1 service, IP-enabled voice service, or other emergency communications service.

(d) Basis for enactment

This section is enacted as an exercise of the enforcement power of the Congress under section 5 of the Fourteenth Amendment to the Constitution and the power of the Congress to regulate commerce with foreign nations, among the several States, and with Indian tribes.

Tex. Health & Safety Code Ann. § 771.053(a)

HEALTH AND SAFETY CODE
TITLE 9. SAFETY
SUBTITLE B. EMERGENCIES
CHAPTER 771. STATE ADMINISTRATION OF EMERGENCY COMMUNICATIONS
SUBCHAPTER C. ADMINISTRATION OF STATE EMERGENCY COMMUNICATIONS

Sec. 771.053. STATEWIDE LIMITATION ON LIABILITY OF SERVICE PROVIDERS AND CERTAIN PUBLIC OFFICERS. (a) A service provider of communications service involved in providing 9-1-1 service, a manufacturer of equipment used in providing 9-1-1 service, a developer of software used in providing 9-1-1 service, a third party or other entity involved in providing 9-1-1 service, or an officer, director, or employee of the service provider, manufacturer, developer, third party, or other entity involved in providing 9-1-1 service is not liable for any claim, damage, or loss arising from the provision of 9-1-1 service unless the act or omission proximately causing the claim, damage, or loss constitutes gross negligence, recklessness, or intentional misconduct.

(b) A member of the commission or of the governing body of a public agency is not liable for any claim, damage, or loss arising from the provision of 9-1-1 service unless the act or omission causing the claim, damage, or loss violates a statute or ordinance applicable to the action.

(c) This section shall be interpreted to provide protection relating to confidentiality and immunity and

protection from liability with at least the same scope and to at least the same extent as described by federal law, including 47 U.S.C. Section 615a and 47 U.S.C. Section 1472.

Acts 1989, 71st Leg., ch. 678, Sec. 1, eff. Sept. 1, 1989. Amended by Acts 1993, 73rd Leg., ch. 936, Sec. 2, eff. Aug. 30, 1993; Acts 1999, 76th Leg., ch. 1405, Sec. 15, eff. Sept. 1, 1999. Amended by:

Acts 2013, 83rd Leg., R.S., Ch. 331 (H.B. 1972), Sec. 2, eff. September 1, 2013.

Acts 2013, 83rd Leg., R.S., Ch. 331 (H.B. 1972), Sec. 3, eff. September 1, 2013.

Tex. Health & Safety Code Ann. § 772.407

HEALTH AND SAFETY CODE
TITLE 9. SAFETY
SUBTITLE B. EMERGENCIES
CHAPTER 772. LOCAL ADMINISTRATION OF EMERGENCY COMMUNICATIONS
SUBCHAPTER E. EMERGENCY COMMUNICATION SERVICE: COUNTIES WITH POPULATION OVER TWO MILLION

Sec. 772.407. LIABILITY OF SERVICE PROVIDERS. A service supplier involved in providing 9-1-1 service, a manufacturer of equipment used in providing 9-1-1 service, or an officer or employee of a service supplier involved in providing 9-1-1 service is not liable for any claim, damage, or loss arising from the provision of 9-1-1 service unless the act or omission proximately causing the claim, damage, or loss constitutes gross

negligence, recklessness, or intentional misconduct.

Added by Acts 1995, 74th Leg., ch. 638, Sec. 21, eff. Sept. 1, 1995.

APPENDIX I

23 October 2017

Chief Justice Roberts, Jr.
The Supreme Court of the United States
1 First Street, NE
Washington, DC 20543

RE: *Vickie Cook, et al. v. T-Mobile USA, Inc., et al.*
No. 17-191.
Supreme Court of the U.S. 29 March 2017

Dear Chief Justice Roberts, Jr.:

This letter is filed in support of the aforementioned petition filed with the Supreme Court of the United States. This case is of special significance to the citizens of the United States of America and public safety.

The International Academies of Emergency Dispatch (the "Academy") is a non-profit corporation based in Salt Lake City, Utah. The mission of the Academy is "[t]o advance and support public-safety emergency telecommunication professionals and ensure that citizens in need of emergency, health, and social services are matched safely, quickly and effectively with the most appropriate resource."

The Academy was created in 1988 as a standard-setting organization in the field of emergency 9-1-1 dispatch and response. The Academy has occupied two roles: one as a membership-driven association for the professional recognition of dispatchers, and the other as an organization that develops and maintains dispatch protocols and curriculum for use in effectively responding to emergency calls for help (*e.g. 9-1-1 calls*) by providing state-of-the-art protocols that assists in the most appropriate allocation of an emergency communication center's resources.

The Academy's medical, fire, police, and nurse triage protocols are used in over 3,500 communication centers, 46 countries and 24 languages and dialects. The protocols represent the de facto standard of care and practice in 9-1-1 dispatching. The Academy's protocols will take approximately 80 million calls this year with over 71 million people living in communities using the protocols. The Academy has trained and certified over 210,000 emergency medical, police, fire, and nurse dispatchers.

Organizationally, the Academy has 17 boards, councils, and special committees. These boards, councils and committees include the world's foremost experts in medical, fire, police, and nurse triage dispatch. To stay current, the Academy's protocols are continuously examined and studied, changes are made based upon continuing scientific research, along with practical field experience provided as feedback from thousands of emergency dispatch users. More information about the Academy can be found at http://www.emergencydispatch.org/.

9-1-1 calls are often quite literally a matter of life or death. Properly handled 9-1-1 calls can, and do, save lives. Mishandled 9-1-1 calls can lead to, or even cause, death. The margin of error for 9-1-1 emergency communication centers and the technology providers they partner with is thin; thus, following the standard of care and practice is of paramount importance.

The Academy has 30 years of experience dealing with questions and issues in and around the question of liability for emergency dispatch at both the judicial and the legislative level. In general, the Academy is opposed to sovereign, governmental, or technology provider immunity. In the Academy's experience, the liability at the point of dispatch should not turn on the applicability of immunity, but rather whether or not the standard of care and practice was met. In today's world of technological advances, not following the standard of care and practice at dispatch is prima facie evidence of gross negligence, recklessness, or intentional misconduct. In other words, the Academy believes that even if immunity does apply, it should be pierced based on a failure to follow the standard of care and practice.

Based on the facts in the present case, the Academy believes that giving immunity to the mobile providers will take the science of dispatching back to the "stone age." Providers of mobile services must be held to perform their emergency services with reasonableness based on the industry standards of care and practice. In this case, Deanna Cook fatally relied on the statements of the Respondents regarding their

emergency 9-1-1 location services. The statements were false, and Ms. Deanna Cook is dead.

The Academy believes that a mobile provider delivering accurate location services in a 9-1-1 situation is the standard of care and practice in today's technological world. Not providing such location services is prima facie evidence of gross negligence, recklessness, or intentional misconduct. At minimum, the case should at least be adjudicated on its merits to determine if liability exists.

Should blanket immunity be applied to mobile providers in this case, and in others like it, it becomes hard to imagine a case where immunity would never apply. By setting this precedent, mobile providers of 9-1-1 services will never be subject to the risk of liability, and therefore shall have no incentive for advancing their technology or promptly fixing issues which arise. In such a scenario, mobile providers can advertise and do whatever they want without the fear of accountability or reprisal, and people will continue to die unnecessarily. 9-1-1 emergency dispatchers will also be put at occupational and legal risk when routine information they must rely on is flawed or missing. The Academy believes this will lead to a slippery slope of unintended consequences in the public safety realm. Those that have died or are injured because of inferior mobile providers, or their hollow promises, must have their day in court to determine whether the mobile providers have met the standard of care and practice. Mobile providers must be held to a standard of care.

Sincerely,

/s/ Brent Hawkins
Brent Hawkins
General Counsel

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