IN THE SUPREME COURT OF GUAM

DOROTHEA QUICHOCHO, MERLYNA W. SMITH,
and a class of all persons similarly situated
Plaintiffs-Appellants,

v.

MACY'S DEPARTMENT STORES, INC.
FKA MACY'S WEST, INC., and DOES I-XV,
Defendants-Appellees.

OPINION

Cite as: 2008 Guam 9

Supreme Court Case No.: CVA07-013
Superior Court Case No.: CV0209-04

Appeal from the Superior Court of Guam
Argued and submitted on February 22, 2008
Hagåtña, Guam

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BEFORE: ROBERT J. TORRES, JR., Chief Justice; F. PHILIP CARBULLIDO, Associate Justice; EDWARD MANIBUSAN Justice *Pro Tempore*.

TORRES, C.J.:

[1] Plaintiffs-Appellants, Dorothea Quichocho, Merlyna W. Smith, and a class of all persons similarly situated, appeal from the dismissal of their putative class action claims against Defendant-Appellee Macy's Department Stores, Inc. and Does I to XV (collectively "Macy's"). In 2004, Macy's began adding a gross receipts tax ("GRT") charge to the advertised price of its goods at the cash register. Plaintiffs' lawsuit alleges that Macy's collection of GRT from customers violated the Deceptive Trade Practices - Consumer Protection Act ("DTPA"), and constituted unjust enrichment. The lower court rejected the DTPA claims on summary judgment and rejected the unjust enrichment claims on a motion to dismiss. On appeal, we reverse. In *Guam v. Marfega Trading Co.*, 1998 Guam 4, this court found a DTPA violation where the defendant charged separately at the register for GRT. None of the undisputed facts of this case demonstrate a meaningful distinction between Macy's conduct and that at issue in *Marfega*, making summary judgment for Macy's inappropriate. In addition, dismissal of the unjust enrichment claims is inappropriate because they can be pleaded in the alternative.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] Guam charges a gross receipts tax ("GRT"), whereas most states charge a sales tax. GRT differs from a sales tax insofar as it is levied on the seller rather than the consumer. The cost of the gross receipts tax is often passed on to consumers, but sales receipts do not necessarily show

the amount of the gross receipts tax.[1] In 2003, the Guam Legislature passed a temporary increase in the GRT rate from four percent to six percent. *See* Guam Pub. L. 27-05:V:6 (Feb. 28, 2003) (making the increase effective from April 1, 2003 to September 30, 2005). In order to allay public fears that the GRT increase would result in sharp price increases for consumers, the Legislature passed a law in November 2003 providing an incentive to businesses to make the GRT visible on sales receipts. *See* Guam Pub. L. 27-41 (Nov. 13, 2003) (codified at 11 GCA § 26201).[2] The following spring, the tax was reduced back to four percent. *See* Guam Pub. L. 27-76 (Mar. 10, 2004). After the repeal of the tax increase, the Legislature also repealed the visible GRT law. Guam Pub. L. 29-02:VII:1 (May 18, 2007) (repealing P.L. 27-41).[3]

[3] Macy's operates a chain of retail stores in the United States, and one store in the Micronesia Mall in Dededo. Prior to February 1, 2004, the prices marked on products in Macy's stores reflected the amount that consumers would pay at the cash register. Beginning on February 1, 2004, Macy's began to charge consumers an extra six percent at the cash register for the GRT. Macy's announced the change in late January 2004 in a press release. On January 25, 2004, Macy's posted signs at store entrances and at store cash registers, which stated that, "in accordance with [G]uam [P]ublic [L]aw 27-41, [M]acy's will be reflecting the 6 percent gross

[1] For a general analysis of the gross receipts tax, *see* John Mikesell, *Gross Receipts Taxes in State Government Finances: A Review of Their History and Performance*, Tax Foundation Background Paper No. 53 (Jan. 2007), *available at* http://www.taxfoundation.org/files/6p53.pdf. Mikesell criticizes GRT for discouraging economic activity, disproportionately affecting low profit-margin firms, and its lack of transparency to taxpayers.

[2] For example, if a business charged $10.00 for an item at the register and displayed an estimated GRT of $0.60 on the receipt, it could then deduct the estimated GRT from its taxable gross receipts. Its total GRT for that item would then be 6% of $9.40 or $0.56.

[3] After the visible GRT law was repealed, Macy's stopped charging separately for GRT. Appellee's Brief, p. 8 (Oct. 24, 2007).

receipts tax [GRT] on customer receipts beginning [F]ebruary 1, 2004." Appellants' Excerpts of Record ("ER") (Posted Notices), pp. 9, 11.

[4] On February 18, 2004, the Attorney General issued an advisory opinion that addressed whether Macy's practice complied with 11 GCA § 26115, including whether it was permitted by Public Law 27-41. The Attorney General opined that "the Macy's example complained of, where a 'stateside price' is posted on the goods and the GRT added at checkout, is a violation of [11] GCA § 26115." Appellees' Brief, Opp. p. 11 (Op. Att'y Gen. 04-0215 Feb. 18, 2004). The opinion further stated that "Macy's . . . may separately state the GRT, but must do so before checkout, preferably on the merchandise or at least by prominent notice where the customer will see it when entering the store." *Id.*

[5] On February 19, 2004, Macy's replaced its existing signs. The new signs stated that, "effective [F]ebruary 1, 2004, in accordance with [G]uam [P]ublic [L]aw 27-41, [M]acy's customers will be charged the 6% [G]uam gross receipts tax (grt). [R]etail prices do not include the 6% grt. [T]he 6% grt is added at the register at the time of purchase." Torres Aff., Exs. A, B.

[6] The Plaintiff class consists of customers of Macy's who paid a charge that was designated as a GRT and was added to the purchase price at the cash register.[4] Named Plaintiff Dorothea Quichocho was charged $2.24 in GRT and Plaintiff Merlyna Smith was charged $9.09. Quichocho initiated a lawsuit on behalf of herself and the class. Quichocho named Macy's and several other retailers as defendants. After the lawsuit was filed, all of the retail stores except Macy's stopped charging separately for GRT at cash registers.

[4] The three Justices hearing this case stated on the record at oral arguments that they would opt out of the class if the class is certified.

[7] Macy's only initial change in business practices in response to the lawsuit was to begin including a notice of the GRT charge in its published advertisements, stating:

> In Guam, please add 4% to the amount stated for each item to arrive at the total purchase price. This represents the amount of Guam Gross Receipts Tax that Macy's will transmit to the Government of Guam, and it is an element of the total purchase price for each item. This amount will be added at checkout.

Supplemental ("SER"), p. 43 (Advertisement, May 26, 2004).

[8] Macy's revised its in-store signs one more time on April 1, 2004 after the legislature reduced the GRT rate back to 4%. The new signs stated that:

> [E]ffective [A]pril 1, 2004, the [G]uam gross receipts tax (grt) rate will be reduced to 4%. [I]n accordance with [G]uam public law 27-41, [M]acy's visibly displays to customers on their receipts the amount of grt that [M]acy's will remit to the government of [G]uam. [T]he grt is part of the purchase price for each item.
>
> [T]he prices displayed on the merchandise or store signs do not reflect the 4% grt. [T]he 4% grt is stated as a separate item added at the register at the time of check-out to arrive at the actual purchase price.

Torres Aff. (Apr. 4, 2008), Ex. C.

[9] On November 24, 2004, the Attorney General's Office wrote a letter to Macy's counsel stating that "the present plan of Macy's wherein they put notices prominently at the entrances to their store and at the register counters stating that the total price will include a 4% GRT . . . is acceptable." SER, p. 3 (Letter from Charles H. Troutman, Consumer Counsel, Office of the Attorney General, to Seth Forman, Esq., Berman O'Connor Mann & Sklov (Nov. 24, 2004).

[10] Plaintiffs amended their complaint several times, adding Merlyna Smith as a class representative, and adding a count for violation of Guam's Deceptive Trade Practice - Consumer Protection Act ("DTPA").

[11] On a Rule 12(b)(6) motion, the court dismissed Plaintiffs' unjust enrichment claim on the grounds that Plaintiffs have an adequate remedy at law under the DTPA. On a motion for summary judgment, the court dismissed Plaintiffs' DTPA claim because notices published by Macy's were found to be sufficient as a matter of law. Final judgment was entered on July 11, 2007, and Plaintiffs timely filed a notice of appeal on July 31, 2007.

II. JURISDICTION

[12] This court has jurisdiction over this appeal from a final order or judgment that disposes all of the parties' claims. 48 U.S.C.A. § 1424-1(a)(2) (2007); 7 GCA §§ 3107, 3108(a) (2005).

III. STANDARD OF REVIEW

[13] This court reviews issues of statutory interpretation *de novo*. *Carlson v. Guam Tel. Auth.*, 2002 Guam 15 ¶ 16. We review dismissals pursuant to Rule 12(b)(6) of the Guam Rules of Civil Procedure *de novo*. *First Hawaiian Bank v. Manley*, 2007 Guam 2 ¶ 6. We also review the grant or denial of summary judgment *de novo*. *Villanueva ex rel. United States v. Commercial Sanitation Sys., Inc.*, 2005 Guam 8 ¶ 9.

IV. DISCUSSION

[14] On appeal, Plaintiffs argue that the lower court erred in: (a) granting summary judgment for Defendant Macy's on the DTPA claims; (b) dismissing Plaintiffs' unjust enrichment claims; and (c) failing to promptly consider the class certification issue.

A. Whether Summary Judgment Under the Deceptive Trade Practices - Consumer Protection Act Was Appropriately Granted

[15] We review the grant of summary judgment *de novo*. *Villanueva ex rel. United States v. Commercial Sanitation Sys., Inc.*, 2005 Guam 8 ¶ 9. Summary judgment is proper if "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a

matter of law." Guam R. Civ. P. 56(c). There is a genuine issue of fact if there is "'sufficient evidence' which establishes a factual dispute requiring resolution by a fact-finder." *Villalon v. Hawaiian Rock Prods., Inc.*, 2001 Guam 5 ¶ 7 (quoting *Iizuka Corp. v. Kawasho Int'l. Inc.*, 1997 Guam 10 ¶ 7). A fact is material if it "is relevant to . . .a claim or defense and [its] existence might affect the outcome of the suit." *Wilkinson v. Jones*, 2004 Guam 14 ¶ 7 (quoting *Iizuka*, 1997 Guam 10 ¶ 7).

[16] The DTPA generally prohibits "[f]alse, misleading, or deceptive acts or practices." 5 GCA § 32201(a) (2005). The DTPA specifically enumerates a number of examples of conduct prohibited by this provision, including "[a]dvertising goods or services with intent not to sell them as advertised," 5 GCA § 32201(c)(3), and "[d]oing any . . . act which is prohibited by the laws of Guam to mislead a consumer to his detriment." 5 GCA § 32201(b)(29). But the DTPA's general prohibition on "[f]alse, misleading, or deceptive acts or practices" is not limited to the enumerated examples. 5 GCA § 32201(a). We construe the DTPA liberally in favor of consumers.[5]

[17] The leading Guam case construing the DTPA is *Guam v. Marfega Trading Co.*, 1998 Guam 4. In *Marfega*, the defendant charged a separate five percent tax at the register, and the government of Guam brought claims under the same statutory provisions at issue here – 5 GCA §§ 32201(a)(1), (b)(29), (c)(3), along with 11 GCA § 26115, which prohibits a business from

[5] *See* 5 GCA § 32101 (2005) ("This chapter shall be liberally construed so that its beneficial purposes may be accomplished."); 5 GCA § 32108(a) ("This chapter shall be liberally construed in favor of the consumer and shall be applied to promote its underlying purposes, which are to protect consumers against false, misleading, and deceptive business practices, unconscionable actions, and breaches of warranty, and to provide efficient and economical procedures to secure such protection."); *Guam v. Marfega Trading Co.*, 1998 Guam 4 ¶ 27 ("In light of the intent of the DTPA, the Court, after balancing all interests involved, chooses to liberally construe the applicable code sections in favor of the consumer.").

indicating that the GRT "is not considered as an element of the purchase price." This court granted summary judgment for the plaintiff, finding that the defendant materially misled consumers by implying that the government required that the tax be charged to consumers, and by implying that the tax was not part of the purchase price.

[18] Macy's contends that *Marfega* is legally distinguishable because of the subsequent enactment of the visible GRT and factually distinguishable because unlike *Marfega*, Macy's did not misrepresent the nature and amount of the GRT. Macy's asserts that the lower court's ruling should be affirmed. Specifically, the parties dispute: (1) whether Macy's conduct violated 5 GCA § 32201(a), which generally prohibits "[f]alse, misleading, or deceptive acts or practices"; (2) whether Macy's conduct violated 5 GCA § 32201(c)(3), which defines the false, misleading, or deceptive acts or practices prohibited by the DTPA to include "[a]dvertising goods or services with intent not to sell them as advertised"; (3) whether Macy's conduct violated 5 GCA § 32201(b)(29), which prohibits "[d]oing any . . . act which is prohibited by the laws of Guam to mislead a consumer to his detriment," combined with 11 GCA § 26115, which prohibits a business from indicating that the GRT "is not considered as an element of the purchase price"; (4) whether this court should overrule its earlier decision in *Marfega*; and (5) whether Macy's conduct was authorized by Public Law 27-41, which encouraged businesses to make the GRT visible on sales receipts.

1. Whether Macy's Violated DTPA's General Prohibition on Deceptive Practices

[19] The DTPA generally prohibits "[f]alse, misleading, or deceptive acts or practices," and its prohibitions are not limited to the enumerated examples. 5 GCA § 32201(a). The DTPA states that courts construing the DTPA should be guided by case law construing the Federal

Trade Commission Act ("FTC Act"):

> In interpreting the definitions and other provisions of this chapter, it is the intent of the Legislature that in construing this chapter, the courts, to the extent possible, will be guided by the interpretations given by the United States Federal Trade Commission and federal courts to Section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C.A. 45(a)(1)) and the Federal Trade Act.

5 GCA § 32108(c)(A) (2005). The FTC Act prohibits "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(1). Courts interpreting the FTC Act have established a three-part test to determine if a practice is unfair or deceptive, and this court has adopted that test for deceptive conduct under the DTPA. *Marfega*, 1998 Guam 4 ¶ 11. An act violates the FTC Act and DTPA if: (1) there is a representation, omission, or practice; (2) the representation, omission, or practice is likely to mislead consumers acting reasonably under the circumstances; and (3) the representation, omission, or practice is material. *Id.* (citing cases interpreting the FTC Act).

a. Whether There Was a Representation, Omission, or Practice

[20] Under the first prong, Plaintiffs allege that Macy's made representations or omissions, or engaged in practices that misled consumers into believing that the government required consumers to pay the GRT on top of the purchase price, and into believing that the initial price was the total purchase price. There is undisputed evidence that Macy's referred to the GRT charge as being "in accordance with Guam Public Law 27-41," and charged separately for GRT at the register on top of the purchase price of the product. ER, Ex. B and C, pp. 7, 9, 11 (Posted Notices). This evidence satisfies the "representation, omission, or practice" requirement of the test. *See Marfega*, 1998 Guam 4 ¶ 13 (finding this part of the test was met where "both parties

admit that the Defendant-Appellee made the representation that there was a 5% tax charged to customers").

b. Whether the Act or Practice Was Likely to Mislead Reasonable Consumers

[21] Under the second prong of the FTC Act and DTPA test, Plaintiffs argue that Macy's practice was "likely to deceive or mislead reasonable customers." ER, p. 24 (Third Am. Compl. ¶ 4.3). An act or practice is misleading under the DTPA if it has a "tendency" or "capacity" to deceive a reasonable consumer, "regardless of the intent" to deceive, and regardless of whether there was "actual deception." *Marfega*, 1998 Guam 4 ¶ 16. In *Marfega*, the court found that it was "misleading to inform a consumer of a surcharge, over and above an expressed flat rate, after the initial rate is relied upon." *Id.* ¶ 17. The court also found it misleading to inform customers that the extra charge was a tax "mandatorily imposed by the government upon the consumer." *Id.* ¶ 18.

[22] As with the Plaintiffs in *Marfega*, reasonable customers of Macy's in this case may have initially relied on the marked or advertised price of goods, prior to the added charge for the gross receipts tax, and may have believed that the tax was mandatorily imposed on consumers. Macy's price tags and advertised prices did not include GRT, which was added at the register. Unless Macy's customers were provided a reason not to rely on the marked or advertised prices prior to or contemporaneous with their viewing Macy's prices, there may have been a "tendency" or "capacity" for reasonable customers to initially rely on those prices. *See Marfega*, 1998 Guam 4, ¶¶ 16-17. Similarly, unless they were informed otherwise, Plaintiffs may have reasonably assumed that the charge at the register on top of the purchase price, which Macy's referred to as GRT, was mandatorily imposed by the government on the consumer. *See id.* ¶ 18.

i. Whether Adequate Notice Was Provided to Prevent Consumers from Being Misled

[23] Macy's argues that its conduct was not deceptive or misleading because the customer received prior notice of the amount and nature of the charges. Appellee's Brief, p. 35 (Oct. 24, 2007). For notice to be effective, it must be clear and not itself ambiguous or misleading. *See Giant Food Inc. v. FTC*, 322 F.2d 977, 986 (D.C. Cir. 1963). In *Giant Food*, an ambiguous disclaimer was found to "only add[] to the deceptiveness" of an ad. *Id.* at 986. The advertisement compared Giant's prices to misleadingly high "suggested list prices," and the disclaimer implied that the "list prices" were prices charged by competitors. *Id.* In fact, however, competitors' actual prices were significantly lower than the "list prices." *Id.*

[24] Disclaimers may be ineffective if they are inconspicuously located. *See Am. Home Prods. Corp. v. Johnson & Johnson*, 654 F. Supp. 568, 590 (S.D.N.Y. 1987); *see also FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 43 (D.C. Cir. 1985) (criticizing, in dicta, disclaimer that "appears in virtually illegible form, placed in an inconspicuous corner of . . . advertisements"). The court in *American Home Products* stated that, "[i]f the advertisement contains a definition or disclaimer which purports to change the apparent meaning of the claims and render them literally truthful, but which is so inconspicuously located or in such fine print that readers tend to overlook it, it will not remedy the misleading nature of the claims." *Id.* (addressing Lanham Act claim) (citing *Giant Foods*, 322 F.2d at 986).

[25] Even if the advertisement contains a conspicuous and clearly-worded disclaimer, the advertisement can still be misleading if the overall impression of the ad is misleading. *In re Amway Corp.*, 93 F.T.C. 618 (1979); *see also Book-of-the-Month Club, Inc. v. FTC*, 202 F.2d 486, 489 (2d Cir. 1953). In *Amway*, the company's materials repeatedly referred to $200.00 a

month as the potential earnings of an Amway salesperson. The materials included a "prominent disclaimer" that "some will [earn] much less and some more," but the FTC nonetheless found that "the impression is [falsely] created that $200 is a typical or average monthly Business Volume." *Id.* at *27 & n.28. The FTC concluded that Amway's specific earnings and sales claims "have the capacity and tendency to [mis]lead." *Id.* at *28. In *Book-of-the-Month Club*, the court held that the defendant had engaged in misleading advertising where the defendant advertised for a "free" book, but in "much smaller print," explained that the recipient must agree to purchase four more books. 202 F.2d at 489. Although these additional terms should have made clear to most consumers that the "free" book was not actually "free," the court found that the term was nonetheless misleading. *Id.* at 488-89 ("'The fact that a false statement may be obviously false to those who are trained and experienced does not change its character, nor take away its power to deceive others less experienced.'") (quoting *FTC v. Standard Educ. Soc'y*, 302 U.S. 112, 116-17 (1937)).

[26] Macy's relies on three types of notices of the GRT charge: signs at cash registers; signs at store entrances; and small notices on printed advertisements. But none of these three notices necessarily prevented consumers from being misled. First, the notices at cash registers would not have prevented customers from *initially* relying on the marked or advertised price before tax, though they may have affected subsequent purchases.

[27] Second, the signs at Macy's store entrances may have provided notice, but there are material facts that are not adequately addressed in the record. The signs may have been "so inconspicuously located" that customers would "tend to overlook [them]," *Am. Home Prods.*

Corp., 654 F. Supp. at 590, but the record is unclear on this issue.[6]

[28] In addition, the adequacy of the content of the signs also cannot be resolved as a matter of law on the record before us. The signs stated that Macy's new policy regarding GRT was "in accordance with Guam Public Law 27-41," which could potentially have misled consumers into believing that Macy's new policy – collecting a six percent tax (and later a four percent tax) at cash registers – was required by Guam Public Law 27-41. ER, pp. 9, 11. In fact, however, Public Law 27-41 increased the tax by only two percent – an increase that was repealed on April 1, 2004 – and the law did not require Macy's to collect the tax directly from consumers. *See Marfega*, 1998 Guam 4 ¶ 23 (finding a violation of the DTPA to imply that the government requires retailers to impose GRT directly on consumers); *Giant Food*, 322 F.2d at 986 (finding that disclaimer at issue added to the misleading nature of an advertisement).

[29] The original signs stated that "[M]acy's will be reflecting the 6 percent gross receipts tax [GRT] on customer receipts." ER, p. 9.[7] Plaintiffs assert that these signs are ambiguous, and only indicate a change to content of receipts, not a change in the total amount charged. Macy's argues that the later iterations of the signs corrected any ambiguity by clarifying that the GRT would be added to the marked price of goods at the register. While the change of wording seems to have clarified this ambiguity, the overall sufficiency of the in-store signs is unclear.

[6] Macy's has filed an unopposed motion to supplement the record by including one actual sign used in Macy's stores, but this additional information is not sufficient to resolve the issue on this appeal. The court must examine not only the size of the signs, but also how conspicuously the signs were located and how likely the signs were to be overlooked.

[7] The lower court's decision did not address the potential ambiguity of the language used in the initial signs, indicating only that "Macy's posted signs at all entrances and cash registers providing notice that the GRT *would be added to the display price* to form the total purchase price of the product." ER, p. 52 (Decision & Order) (emphasis added).

[30] Third, Macy's asserts that notices in its printed advertisements adequately informed consumers of the added GRT charge, where those notices informed customers that they should "add 4% to the amount stated for each item to arrive at the total purchase price." ER, p. 40 (Newspaper ad). The notices to customers in the printed advertisements may not have been sufficiently prominent. On one advertisement in evidence, the notice regarding the GRT appeared on only one page of a twenty-four-page advertising booklet. *See Am. Home Prods. Corp.*, 654 F. Supp. at 590 (finding that an inconspicuous notice was ineffective because it was likely to be overlooked). The use of the term "final price" on some pages of the advertisement also had the potential to mislead consumers where the "final price" did not include the GRT, and the notice regarding the GRT was in smaller print and did not appear on the same page. *See* SER, pp. 41-42. Based on the record before us, we cannot say that, as a matter of law, there was sufficient notice to avoid a capacity and tendency for consumers to be misled. *Cf. Book-of-the-Month Club*, 202 F.2d at 489 (use of term "free" was misleading despite notice that customer would be required to purchase four more books).

ii. Whether the Attorney General's Opinion Supports Macy's Position that Customers Were Not Misled

[31] Defendant also contends that its actions could not have violated the DTPA where an Attorney General's opinion and a letter from the Attorney General's Office purportedly approved of Macy's practices. Appellee's Br., pp. 32-33.

[32] Like Macy's, the defendant in *Marfega* similarly argued that its conduct had not violated the DTPA because it had purportedly been authorized by an Attorney General's Opinion. The court found that Attorney General's opinions are to be "accorded substantial weight, although not controlling on courts." 1998 Guam 4 ¶ 25. Marfega relied on Opinion 84-01, in which the

Attorney General stated that it was lawful to indicate on the sales receipt the amount of GRT arising from the sale, as long as no additional representation was made stating or implying that the GRT is not being passed on to consumers as part of the purchase price. Because the *Marfega* defendant's practices contradicted the Attorney General's opinion by implying that the GRT was separate from the purchase price, the court found that the Attorney General's opinion did not support the defendant. *Id.* ¶ 26.

[33] Macy's relies on a portion of Guam Attorney General's Opinion 04-0215, which states that, "Macy's . . . may separately state the GRT, but must do so before checkout, preferably on the merchandise or at least by *prominent notice* placed where the customer will see it when entering the store." Appellee's Brief, app. p. 11 (emphasis added). Macy's also relies on a letter from the Attorney General's Office stating that, "[s]ince Macy's provides all of these notices [at entrances, at registers, and in advertisements,] we deem them in compliance with the Guam law on making the Gross Receipts Tax visible." SER, p. 3 (Letter from Troutman to Forman (Nov. 24, 2004)). While the Attorney General's Opinion and letter may tend to support Macy's, these opinions are not binding, and cite no authority for the position that Macy's practices would be authorized if there were prominent notice.[8] Moreover, even if this court were to follow the Attorney General's Opinion, it is unclear from the record whether Macy's provided such "prominent notice."

[34] Thus, we cannot say as a matter of law that Macy's representations or omissions did not have the tendency to mislead consumers.

[8] The visible GRT statute, 11 GCA §26201, does not expressly contain a "prominent notice" provision. (Appellants' Br., app. p. 11 (Op. Att'y. Gen. 04-0215).

c. Whether Macy's Acts or Practices Were Material

[35] The third prong of the FTC Act and DTPA test is the materiality of Macy's charge of four or six percent on top of the purchase price at the register. The materiality of a representation used to induce the purchase of a product "may often be presumed." *Marfega*, 1998 Guam 4, ¶ 19 & n.3. Further, "it is not necessary [to] demonstrate[] that many [consumers] were actually misled for a misleading practice to be considered material." *Id.* ¶ 19. In *Marfega*, this court found that a five percent charge was material, stating that the defendant "certainly believed that it was a material amount as it felt a need to recoup the GRT." *Id.* ¶ 20. Moreover, to consumers, the incremental amount "is material in choosing which product or service provider to choose." *Id.* Not only was it material to charge a five percent fee, but also to imply that the fee was a sales tax, because it "created the potential for misleading the public to believe that sales tax applied to all products and services available on the island," thereby implying that competitors' final prices were higher than they were. *Id.*

[36] Here, the charge at issue was four or six percent added to the stated price. In light of the *Marfega* court's finding that a five percent charge was material, we find that Macy's misrepresentation regarding a four to six percent charge is also material. *Id.*

[37] In *Marfega*, the court reversed the grant of summary judgment for the plaintiffs, finding that all three factors of the DTPA test were met with respect to 5 GCA § 32201(a)(1) because the defendant misleadingly implied that the government required the defendant to charge the consumer for the tax, and misleadingly failed to inform the customer of the surcharge until after the customer relied on the initial car rental rate. *Id.* ¶¶ 10, 17-18. Similarly, summary judgment

for the plaintiffs was inappropriate here, where none of the three factors at issue would allow a finding as a matter of law that Macy's did not violate 5 GCA § 32201(a)(1).

2. Whether Macy's Advertised Goods with the Intent Not to Sell As Advertised

[38] The DTPA also prohibits "[a]dvertising goods or services with intent not to sell them as advertised." 5 GCA § 32201(c)(3). This provision of the DTPA was violated in *Marfega*, where the defendant advertised a base price, plus a five percent tax or service fee, which the defendant stated was a sales tax or service charge. 1998 Guam 4 ¶¶ 21-22. The defendant argued that it had not engaged in "advertising" because it had not made any newspaper, television, or radio advertisements. The *Marfega* court rejected this argument, finding that defendant's public display of a sign board was advertising. *Id.* ¶ 22.

[39] Macy's advertised its prices in newspapers, and also advertised the prices of its goods on store displays and on product price tags. Macy's did not intend to sell its goods at the advertised or marked price, but instead intended to charge an additional four or six percent. As discussed above, Macy's made representations, the representations were material, and they may have been deceptive. Thus, Macy's potentially violated the DTPA's prohibition on advertising with the intent not to sell as advertised. 5 GCA § 32201(c)(3); *Marfega*, 1998 Guam 4 ¶¶ 21-22; *cf. Helbros Watch Co. v. FTC*, 310 F.2d 868, 869-70 (D.C. Cir. 1962) (finding that price tags with markdowns from fictitious retail price was a violation of the FTC Act). While Macy's print ads indicated that four percent must be added to advertised prices, the disclaimer may have been too inconspicuous, and the notices in stores may have been too subtle and ambiguous. The lower court erred in granting summary judgment for Macy's under 5 GCA § 32201(c)(3).

3. Whether Macy's Violated 11 GCA § 26115 and 5 GCA § 32201(b)(29)

[40] The DTPA prohibits committing any unlawful act that is likely to induce a person to purchase goods to his detriment. 5 GCA § 32201(b)(29). Title 11 GCA § 26115 makes it an unlawful act to "hold out to the public in any manner, directly or indirectly, that any tax levied hereunder is not considered as an element of the purchase price." Thus, if Macy's violated 11 GCA § 26115, and this violation was likely to induce purchases to the consumer's detriment, then Macy's will have violated both 11 GCA § 26115 and 5 GCA § 32201(b)(29). *Marfega*, 1998 Guam 4 ¶ 23.

[41] In *Marfega*, this court found that the defendant violated these provisions by misrepresenting to the detriment of consumers that the five percent fee was a government levied tax "above the purchase price, rather than an element of the purchase price." 1998 Guam 4 ¶ 23. The court explained that "[t]o tell a customer that the charge is GRT leads the customer to believe that payment of this tax is imposed directly on the consumer by the government, in violation of 11 GCA § 26115 and 5 GCA § 32201(b)(29)." *Id.* The court found that an additional misrepresentation in violation of 11 GCA § 26115 could be found in defendant's sign board, which stated the price of rentals, plus "5% tax," or "Plus Service Charge of 5%." *Id.* ¶¶ 2, 24. The court also found that the misrepresentation "leads to the consumer's detriment." *Id.* ¶ 23.

[42] Defendant Macy's made essentially the same misrepresentation, stating that the charge at the register represented or reflected GRT. SER, p. 43 (Newspaper Ad); ER, p. 9 (Posted Store Notice). Consistent with *Marfega*, this may be a violation of both 11 GCA § 26115 and 5 GCA § 32201(b)(29). 1998 Guam 4 ¶¶ 23-24. Because there are factual issues regarding the

sufficiency of notice to consumers, however, we cannot say whether the violation was likely to induce consumer purchases as a matter of law.

4. Whether *Marfega* Should Be Overruled

[43] Macy's argues that, even if its conduct was inconsistent with *Marfega*, the court's *Marfega* ruling misconstrued 11 GCA § 26115 and should be overruled. "We do not overturn precedent lightly, . . . as the doctrine of *stare decisis* 'permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact.'" *San Miguel v. Dep't Public Works*, 2008 Guam 3 ¶ 40 (quoting *Vasquez v. Hillery*, 474 U.S. 254, 265-66 (1986)).

[44] Macy's asserts that other states with statutes similar to 11 GCA § 26115 have interpreted the statute to allow Macy's conduct. With the exception of Hawaii, each of the states relied upon by Macy's has a sales tax, not a GRT. Appellee's Brief, p. 25. A retail sales tax "'is separately stated and collected on a transaction-by-transaction basis *from the consumer*.'" Black's Law Dictionary (8th ed.) (quoting 68 Am. Jur. 2d *Sales & Use Tax* § 1, at 11 (1993)) (emphasis added). By contrast, Guam collects the GRT as "monthly privilege taxes against the persons on account of their business and other activities in Guam." 11 GCA § 26201(a) (2005). Thus, cases involving sales tax have little relevance here, where consumers may have been misled by a separate charge at the register.

[45] Macy's also cites to legal interpretations from Hawaii, which has a form of GRT. Macy's relies on an unpublished 1957 Circuit Court criminal decision, *Territory v. Sundstrom*, Cr. No. 29709 (Haw. Cir. Ct. Dec. 10, 1957), and a Hawaii Attorney General's Opinion citing

Sundstrom with approval. SER, pp. 45-50. In *Sundstrom*, the defendant was a restaurant owner who advertised prices that did not include Hawaii's general excise tax ("GET"), which was a form of gross receipts tax, but the defendant charged customers an additional amount for the GET. Hawaii had a statute, equivalent to 11 GCA § 26115, that prohibited retailers from advertising that the GET was not considered an element of the purchase price. Haw. Rev. Stat. § 117-14.6(3)(d) (1955).[9] The court held that this provision "is intended only to prevent advertising by a retailer that the tax is being absorbed by him and thereby possibly giving to such retailer an unfair competitive advantage over other retailers." SER, p. 45 (*Sundstrom*, Cr. No. 29709, at 1).

[46] While *Sundstrom* provides a reasonable interpretation of the statute, it does not provide any compelling basis for overruling our decision in *Marfega*. The reasoning of *Marfega* is not inconsistent with *Sundstrom*, as the *Marfega* court similarly found that the challenged conduct could have given the defendant an unfair competitive advantage over other retailers. 1998 Guam 4 ¶ 20. Further, the facts in the *Sundstrom* decision can be distinguished from the facts here because retailers follow different standard practices in Hawaii and Guam. Retailers in Hawaii typically add a separate charge at the register on top of the marked or advertised prices. SER, p. 46 (*Sundstrom*, Cr. No. 29709, at 2) ("The practice of not only 'passing on' this tax but also of showing it as a visible item in the total price has been carried on in this jurisdiction by many retailers and service establishments for a long period of time."); *see also* SER, p. 5-6 (Decl. of Jane Sinnott) (stating that typical modern practice for retailers in Hawaii is to add a GET charge

[9] The statute is now codified as Haw. Rev. Stat. § 237-49.

at the register without providing any notice to consumers of the charge).[10] By contrast, consumers in Guam are unaccustomed to a separate charge for GRT, and are therefore more likely to be misled or confused by it.

[47] Given that Hawaiian precedent is not binding on this court, and given that the *Sundstrom* case is factually distinguishable, we decline to overturn this court's *Marfega* decision.

5. Whether Macy's Conduct Was Permitted by P.L. 27-41, 11 GCA § 26201

[48] Macy's argues that its conduct was authorized by Public Law 27-41, which provided an incentive to businesses to make the GRT visible. Specifically, it stated that "[a] person engaging in . . . business in Guam, who . . . show[s] to each customer the amount that will be transmitted to the government of Guam as a result of the customer's transaction, may exclude GRT reimbursement collected from the measure of taxable gross receipts." P.L. 27-41: 2 (codified at 11 GCA § 26201), *repealed* P.L. 29-02. Similarly, the regulations implementing Public Law 27-41 provide that a taxpayer is entitled to a price break if he "separately indicates on each customer invoice . . . the price of the item or items sold . . . to each customer, and . . . the amount of gross receipts tax to be transmitted to the [G]overnment of Guam as a result of the customer's transaction." Guam Dep't Rev. & Tax Reg. § 26201-3(b)(1)(E) (Dec. 5, 2003). Macy's asserts that Public Law 27-41 and Regulation 26201-3(b)(1)(E) conflict with the provision of 11 GCA § 26115 that makes it an unlawful act to "hold out to the public in any manner, directly or indirectly, that any tax levied hereunder is not considered an element of the purchase price."

[10] *But cf.* Hawaii Dep't of Taxation, *Tax Facts*, *at* http://www.hawaii.gov/tax/taxfacts/tf96-01.pdf ("Businesses must ensure that their intention to visibly pass on the general excise tax is prominently noted and thoroughly understood by customers before the transaction takes place.").

Appellee's Brief, p. 31. Where there is a conflict, Macy's argues that the more recent law, Public Law 27-41, prevails. *Id.*

[49] "'When two provisions of the code conflict, if reconciliation is possible, effect should be given to both sections.'" *Cruz v. Guam Election Comm'n*, 2007 Guam 14 ¶ 30 (quoting 1A Norman Singer, Statutes & Statutory Construction § 2812 at 661 (6th ed. 2000)). Reconciliation of Public Law 27-41 and section 26115 is possible. A sales receipt can state both the GRT and the price of the items sold (as permitted by P.L. 27-41 and Regulation 26201-3(b)(1)(E)) without suggesting that the tax is not an element of the purchase price (as prohibited by 11 GCA § 26115). *See* Op. Att'y Gen. 04-0215 (Feb. 18, 2004). For example, some Guam businesses, such as Payless Supermarkets, listed the price of each product, the total price for all products sold, and on a separate line stated that "[y]our approximate [total] GRT is $__." *Id.* The Attorney General opined that such practices complied with the law. *Id.* Alternatively, the receipt could state the price of each product (including GRT), and separately state the amount of GRT included in the price of that product. Either of these options would be consistent with the applicable laws, and Public Law 27-41 does not authorize Macy's conduct or require us to overturn *Marfega*.

[50] Macy's argues that the damages sought by Plaintiffs are excessive, and that the statute should not be interpreted to allow them. Appellee's Brief, p. 29. But damages are not at issue in this appeal, and it is not clear that the damages would be as high as Macy's suggests.

[51] Macy's also argues that following the *Marfega* decision will deprive Guam of the benefits of uniform pricing. Appellee's Brief, pp. 44-48. This is a policy issue for the Legislature, not the court.

[52] In addition, Macy's argues that we should reverse *Marfega* in order to bring Guam law into closer accord with the statutory commercial law of other states. Appellee's Brief, pp. 48-51. This argument is similarly unconvincing.

[53] In sum, there are disputed issues of material fact regarding Macy's alleged violations of the three relevant provisions of the DTPA, and we must reverse the lower court's grant of summary judgment for Macy's.

B. Unjust Enrichment

[54] The lower court dismissed Plaintiffs' unjust enrichment claim on a motion to dismiss because a plaintiff may not recover under the equitable theory of unjust enrichment where there is an adequate remedy at law. ER, p. 20 (Decision & Order) (citing *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 381 (1992); *McKesson HBOC, Inc. v. N.Y. State Common Retirement Fund*, 339 F.3d 1087, 1093 (9th Cir. 2003)).[11]

[55] Even if the court determines that Plaintiffs cannot *prevail* on both the DTPA and unjust enrichment claims, Rule 8(e)(2) of the Guam Rules of Civil Procedure explicitly allows alternative *pleading* of inconsistent claims. Rule 8(e)(2) states that "[a] party may set forth two or more statements of a claim or defense alternately or hypothetically," and that "[a] party may . . . state as many separate claims or defenses as the party has regardless of consistency and whether based on legal or equitable grounds." Guam R. Civ. P. 8(e)(2). Federal courts construing the

[11] Macy's asserts that unjust enrichment is not an independent cause of action in Guam. Appellee's Brief, p. 53. Most states permit unjust enrichment claims, and Guam cases have allowed recovery on an unjust enrichment theory. *See, e.g., Tanaguchi-Ruth & Assocs. v. MDU Guam Corp.*, 2005 Guam 7. While some courts have stated that unjust enrichment is "not a cause of action," they have indicated that, "[r]ather, it is an element of an action for restitution." *Barnett v. Coppell N. Tex. Court, Ltd.*, 123 S.W.3d 804, 817 (Tex. App. 2003); *see also McBride v. Boughton*, 123 Cal. App. 4th 379, 388 (2004) ("[W]e construe [plaintiff's] purported cause of action for unjust enrichment as an attempt to plead a cause of action giving rise to a right to restitution."). Plaintiffs here requested restitution, ER, p. 16 (Second Am. Compl.), and it would be inappropriate to affirm the lower court's ruling on the grounds that there is no cause of action for unjust enrichment.

corresponding federal rule[12] have specifically permitted unjust enrichment claims to be pleaded in the alternative. *See S. Broward Hosp. Dist. v. MedQuist*, 516 F. Supp. 2d 370, 386 (D.N.J. 2007) ("At this [motion to dismiss] stage in the litigation, the Court will allow Plaintiffs' equitable claim[] for . . . unjust enrichment to go forward [along with their legal claims].") (citing Fed. R. Civ. P. 8(e)(2)); *United States ex rel. Purcell v. MWI Corp.*, 254 F. Supp. 2d 69 (D.D.C. 2003) (permitting pleading under Fed. R. Civ. P. 8(e)(2) of both unjust enrichment and legal claims at the motion-to-dismiss stage); *United States v. Kensington Hosp.*, 760 F. Supp. 1120, 1135 (E.D. Pa. 1991) (denying motion to dismiss unjust enrichment claim despite claim for contract remedies because the rules permit alternative pleading).

[56] We find that Plaintiffs may plead claims in the alternative, and the dismissal of Plaintiffs' unjust enrichment claims must be reversed.

C. Class Certification

[57] Rule 23(c)(1) of the Guam Rules of Civil Procedure provides that "[a]s soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained." Plaintiffs request that "this court should order on remand that it will be one of the lower 'court's first tasks to make the determination required by Rule 23 with all deliberate speed.'" Appellant's Brief, pp. 16-17 (quoting *City of Inglewood v. City of Los Angeles*, 451 F.2d 948, 951-52 (9th Cir. 1972)).[13] We decline to micromanage the lower courts in such a fashion.

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[12] Fed. R. Civ. P. 8(e)(2) was very similar to Guam R. Civ. P. 8(e)(2), but stylistic revisions to the federal rules were made in 2007, and the former Rule 8(e)(2) is now listed in modified form as Fed. R. Civ. P. 8(d)(2). *See* Fed. R. Civ. P. 8(d)(2) & notes to 2007 amendment; *see also* Fed. R. Civ. P. 1, notes to 2007 amendment (discussing stylistic revisions and elimination of distinction between law and equity).

[13] Plaintiffs initially included class certification in their statement of issues for appeal based on a different issue, but after further research, Plaintiffs chose not to pursue that issue. Appellant's Brief, p. 16.

VI. CONCLUSION

[58] This case is substantially similar to *Marfega*, in which DTPA violations were found, and there are no undisputed material facts that sufficiently distinguish this case to allow a finding as a matter of law that Macy's did not violate the DTPA. Moreover, based on the record before us regarding the sufficiency of notice to consumers, we cannot say as a matter of law that Macy's violated the DTPA. We therefore **REVERSE** the lower court's grant of summary judgment for Macy's. We also **REVERSE** the lower court's dismissal of the unjust enrichment claim because Guam R. Civ. P. 8(e)(2) expressly authorizes alternative pleading of inconsistent claims. This matter is **REMANDED** for further proceedings consistent with this opinion.

F. PHILIP CARBULLIDO

F. PHILIP CARBULLIDO
Associate Justice

EDWARD MANIBUSAN

EDWARD MANIBUSAN
Justice *Pro Tempore*

ROBERT J. TORRES, JR.

ROBERT J. TORRES, JR.
Chief Justice