STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF HENNEPIN | FOURTH JUDICIAL DISTRICT

Case Type: Civil Other/Misc.

Wendy Turnidge and Amy Sutton, Individually and on behalf of similarly situated individuals,

Plaintiffs,

v.

TruGreen Limited Partnership,

Defendant.

ORDER REGARDING DEFENDANT TRUGREEN LIMITED PARTNERSHIP'S PARTIAL MOTION TO DISMISS

27-CV-14-14711

Judge: Ronald L. Abrams

The above-entitled matter came on to be heard before the Honorable Ronald L. Abrams of District Court on January 29, 2015 at 1:30 p.m., at the Hennepin County Government Center, Courtroom 1659. Shari Aberle, Esq., and Jaime Stilson, Esq., appeared on behalf of Defendant TruGreen Limited Partnership. Gregg Fischbein, Esq., and Kate Baxter-Kauf, Esq., appeared on behalf of Plaintiffs Wendy Turnidge and Amy Sutton.

Based upon the pleadings, memoranda, affidavits and arguments of counsel, the Court enters the following:

ORDER

1. Defendant TruGreen Limited Partnership's Partial Motion to Dismiss is **GRANTED in part and DENIED in part**. Count V of Plaintiffs' complaint is **DISMISSED WITH PREJUDICE**. TruGreen's motion to dismiss all other counts is **DENIED**.

2. The attached Memorandum is incorporated herein.

BY THE COURT:

Dated: April 23, 2015

_____

Ronald L. Abrams
District Court Judge

MEMORANDUM

Background

Plaintiffs Wendy Turnidge ("Turnidge") and Amy Sutton ("Sutton") have brought this putative class action against Defendant TruGreen Limited Partnership ("TruGreen") based on allegations that TruGreen's business practices violate the statutory requirements of the Minnesota Landscape Application Contracts Statute, Minn. Stat. § 325F.245 (2014) ("Landscape Act") and result in charging of customers for services they did not authorize.

TruGreen is a lawn-care provider servicing customers throughout the United States, including Minnesota. TruGreen offers "science-based" lawn-care solutions, including year-round lawn-care plans specifically designed for the turf and environmental conditions of Minnesota. By operating within Minnesota, TruGreen is subject to the Landscape Act, which establishes the requirements commercial landscape companies must comply with when entering into written contracts to provide pesticide, fertilizer, and other chemical landscape applications. Under the Landscape Act, a contract for landscape application must be in writing and contain an end date, except in instances where the property owner has verbally consented to a single or isolated landscape application. Minn. Stat. § 325F.245, subds. 2, 3, and 6.

According to Plaintiffs' complaint, TruGreen markets to and solicits customers via multiple means, including through its website, by email, telephone, and door-to-door solicitations. As part of its marketing and solicitation materials, TruGreen sends a "Minnesota Service Agreement" to potential and current customers. One version of the Minnesota service Agreement includes the following language:

> Pursuant to Minnesota Law 325F.245, TruGreen is required to provide you with a written service agreement for your lawn applications or, **after your first application**, obtain your verbal consent before providing each subsequent application. **To avoid excess calls, after your first application, we are requesting that you sign and detach this service agreement* and return it to your local branch in the enclosed envelope.**
>
> . . .
>
> *Your signature on this service agreement does not change the terms of the above agreement. You may discontinue or change your services at any time by contacting us at the above address or phone number.

(alterations in original). There is also an asterisk on the back of the offer that states the following:

> **Cancellation Policy**: Your program will continue, year after year, until you or we cancel.

(alteration in original). According to allegations in Plaintiffs' complaint, TruGreen employees leave a form work order following their provision of services, and this form work order explicitly allows for "unavailable" to be inserted in lieu of a customer signature authorizing lawn care. The work orders also contain the following language: "SERVICE WILL CONTINUE YEAR AFTER YEAR, UNTIL YOU NOTIFY US TO DISCONTINUE."

Years prior to the events giving rise to the allegations in the Plaintiffs' complaint, the State of Minnesota, through the attorney general's office, investigated allegations that TruGreen's practices violated the Landscape Act and Minnesota's Consumer Fraud Act, Minn. Stat. § 325F.69 (2014) ("MCFA"). The State alleged that "in spite of the absence of any assent to services by property owners, TruGreen went to property owners' homes, sprayed chemicals on their lawns, and left bills for the unauthorized services." The State additionally alleged that in other cases property owners orally agreed to a single landscape application and were subsequently provided additional services that were not authorized. TruGreen denied the allegations but, in order to avoid the cost and disruption associated with litigation, it entered into an Assurance of Discontinuance with the State on January 14, 2004 (the "Assurance"), which permanently enjoined future violations of the Landscape Act and MCFA.

A few years following execution of the Assurance, Turnidge became a customer of TruGreen. Turnidge has been a customer of TruGreen for approximately eight years. Since originally contracting with TruGreen, Turnidge has not signed a written contract. TruGreen contacts Turnidge every year to ask her to renew her services, providing her with a copy of a written contract. Turnidge, however, has indicated that she is not satisfied with TruGreen's services and does not want to renew until she is satisfied that the quality of service will improve. According to Turnidge's allegations, despite never having obtained a signed written contract, TruGreen's employees have entered Turnidge's lawn without authorization, provided lawn care services, and then left a ticket indicating services had been rendered.

Sutton entered into a written contract with TruGreen on May 22, 2012 and prepaid for her services that year. According to Sutton's allegations, she did not sign a contract or authorize any services in 2013. Nonetheless, she alleges that TruGreen entered her lawn without authorization, provided lawn care services, and left a ticket on her door indicating services had been rendered, including her billing information.

Analysis

Plaintiffs commenced this putative class action on August 28, 2014, alleging that TruGreen's business practices violate the statutory requirements of the Landscape Act and result in charging of customers for services they did not authorize. More specifically, Plaintiffs have brought seven counts against TruGreen. Counts I-III allege violations of the Landscape Act, specifically an alleged failure to comply with written contract requirements for landscape applications (Count I), failure to have a stated end date in the contract (Count II), and failure to provide annual written notice of continued service for contracts that are for more than one year (Count III). Count IV alleges violation of Minnesota's Consumer Fraud Act, Minn. Stat. § 325F.69 ("MCFA"). The final three counts are common-law claims: trespass to chattels (Count

V), trespass (Count VI), and nuisance (Count VII). TruGreen moves to dismiss all Plaintiffs' claims except for their trespass claim.

I. Motion Standard

A court reviews a motion to dismiss under a liberal interpretation of pleadings pursuant to Rule Eight of the Minnesota Rules of Civil Procedure. *Hedlund v. Hedlund*, 371 N.W.2d 232, 235 (Minn. App. 1985). Rule 8.01 requires that a pleading setting forth a claim for relief "shall contain a short and plain statement of the claim showing that the pleader is entitled to relief and a demand for judgment for the relief sought." Minn. R. Civ. P. 8.01. The purpose and history of Rule 8.01 reflects a preference "for non-technical, broad-brush pleadings." *See Walsh v. U.S Bank, N.A.*, 851 N.W.2d 598, 604 (Minn. 2014) (citation omitted). Rule 8.01 permits "the pleading of events by way of a broad general statement which may express conclusions rather than, as was required under code pleading, by a statement of facts sufficient to constitute a cause of action." *See id* (quoting *Northern States Power Co. v. Franklin*, 122 N.W.2d 26, 29 (Minn. 1963)). A claim should be dismissed on the pleadings "'only if it appears to a certainty that no facts, which could be introduced consistent with the pleading, exist which would support granting the relief demanded.'" *Martens v. Minnesota Min. & Mfg. Co.*, 616 N.W.2d 732, 750–51 (Minn. 2000) (quoting *N. States Power Co.*, 122 N.W.2d at 29). "The reviewing court must consider only the facts alleged in the complaint, accepting those facts as true and must construe all reasonable inferences in favor of the nonmoving party." *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003) (citing *Marquette Nat'l Bank v. Norris*, 270 N.W.2d 290, 292 (Minn. 1978)).

"When reviewing cases dismissed for failure to state a claim on which relief can be granted, we determine only 'whether the complaint sets forth a legally sufficient claim for relief. It is immaterial to our consideration here whether or not the plaintiff can prove the facts alleged.'" *Doyle v. Kuch*, 611 N.W.2d 28, 31 (Minn. App. 2000) (quoting *Royal Realty Co. v. Levin*, 69 N.W.2d 667, 670 (Minn. 1955)); *see also Barton v. Moore*, 558 N.W.2d 746, 749 (Minn. 1997).

"On a motion to dismiss for failure to state a claim, the district court may consider only the complaint and the documents referred to in the complaint." *Hamann v. Park Nicollet Clinic*, 792 N.W.2d 468, 470 (Minn. Ct. App. 2010) (citing *Martens* 616 N.W.2d at 739 n. 7). A court may consider an entire written contract when the complaint refers to the contract and the contract is central to the claims alleged. *In re Hennepin co. 1986 Recycling Bond Litig.*, 540 N.W.2d 494, 497 (Minn. 1995). Other courts have found treatment of a motion as a motion to dismiss to be appropriate when the complaint references the extrinsic documents relied upon by the motion. *Martens*, 616 N.W.2d at 739 n.7; *Brown v. State*, 617 N.W.2d 421, 424 (Minn. App. 2000).

II. Plaintiffs' Landscape Act Claims (Counts I-III)

TruGreen challenges the individual merits of Plaintiffs' Landscape Act claims. Specifically, TruGreen argues that its written contracts fully comply with the Landscape Act. On

this basis, TruGreen seeks dismissal of Plaintiffs' Landscape Act claims. The Court will address each of Plaintiffs' Landscape Act claims in turn.[1]

A. Minn. Stat. § 325F.245, Subd. 2

Count I of Plaintiffs' complaint alleges violation of subdivision 2 of the Landscape Act. Subdivision two provides as follows:

> Subd. 2.**Written contract required.** (a) A contract for landscape application must be in writing, and must be signed by both the commercial application company and the property owner or the owner's agent. The contract must, at a minimum, contain the following information:
>
> > (1) the name, address, and phone number of the commercial application company;
> >
> > (2) the total number of the regularly scheduled landscape applications to be performed each year;
> >
> > (3) the cost of each regularly scheduled application and the yearly cost for all landscape applications; and
> >
> > (4) the ending date of the contract.
>
> (b) The commercial application company shall provide the property owner with a copy of the written contract.

Minn. Stat. § 325F.245, subd. 2. Plaintiffs allege that TruGreen violated this subdivision by not providing written, signed contracts to Plaintiffs and by soliciting its practices verbally. Furthermore, Plaintiffs allege that TruGreen "solicited and enforced perpetual, verbal contracts that continued from year to year regardless of whether Plaintiffs authorized their renewal." Compl. ¶ 53. Plaintiffs also allege that, despite never renewing their contracts for landscape applications in writing, TruGreen's employees have entered the Plaintiffs' lawn without authorization and rendered services. Compl. ¶ 26.

TruGreen counters by arguing that it did provide written contracts to the Plaintiffs, noting that Plaintiffs actually quote from those agreements in their complaint. TruGreen further asserts that those written contracts comply with the Landscape Act requirements. Crucially, however, the written contracts TruGreen refers to are—with the exception of Sutton's 2012 contract and Turnidge's first written contract—unsigned form agreements. Those unsigned form agreements constitute at most written offers. But written offers are not contracts, and merely offering a

[1] The Court has chosen to address the individual merits of each of Plaintiffs' statutory claims first, prior to evaluating whether Plaintiffs' statutory claims satisfy the public benefit requirement applicable to those claims. *See Ly v. Nystrom*, 615 N.W.2d 302, 314 (Minn. 2000) (holding that "public interest must be demonstrated to state a claim under [Minn. Stat. § 8.31 (2014)]. . . ."); Minn. Stat. § 325F.245 , subd. 7 ("A person who violates this section is subject to the penalties and remedies, including a private right of action, as provided in section 8.31); Minn. Stat. § 8.31, subds. 1, 3(a) (providing private right of action for violation of laws including the MCFA).

written contract to consumers does not satisfy the Landscape Act's requirement that landscape-application contracts be in writing and signed by the property owner or the property owner's agent. *See* Minn. Stat. § 325F.245, subd. 2 (requiring a contract for landscape application to be in writing *and signed by the property owner or the owner's agent*); *see also Schwinn v. Griffith*, 303 N.W.2d 258, 261 (Minn. 1981) (noting that in instances where negotiations lead to a written offer, "the written offer does not evidence a completed contract and a written acceptance is required." (citation omitted)).

TruGreen challenges Plaintiffs' theory under Minn. Stat. § 325F.245, subd. 2 in a variety of other ways, but those challenges do not provide a basis for dismissal of Plaintiffs' subdivision 2 claim at the motion to dismiss stage. One of TruGreen's arguments focuses on the text of the Landscape Act, arguing that Plaintiffs' factual allegations support a claim under subdivision 6 of the Landscape Act, but not a claim under subdivision 2. Subdivision 6 provides in relevant part as follows:

> Subd. 6. **Exclusions**.
>
> This section does not apply to:
>
> . . .
>
> (3) any single or isolated landscape application where the property owner or its agent verbally consents to the single or isolated application.

TruGreen argues that Plaintiffs' claim under subdivision 2 is really a challenge to whether TruGreen obtained verbal consent to each single or isolated landscape application. From this premise, TruGreen argues that subdivision six is the *only* subdivision that ostensibly applies under the facts Plaintiffs allege.

TruGreen's subdivision 6 argument rests on a misreading of Minn. Stat. § 325F.245. Under Minn. Stat. § 325F.245, the written-contract requirement for landscape-application contracts applies when a property owner does not verbally consent to any single or isolated application. *See* Minn. Stat. § 325F.245, subds. 2, 6. TruGreen presupposes that failure to get verbal consent is a violation of subdivision 6, which requires verbal consent to any single or isolated landscape application in order to exempt that contractual arrangement from the Landscape Act's requirements, including the written-contract requirement. But subdivision 6 is not a legal requirement that *must* be complied with—it is only a prerequisite to obtaining exemption from the rest of the Landscape Act. Where verbal consent has not been given for each individual landscape application, subdivision 6's exemption from the requirements of the Landscape Act becomes inapplicable. Thus, if TruGreen has failed to obtain a property owner's verbal consent, it is required to comply with the Landscape Act's requirements, including the written-contract requirement.

In other words, failing to get verbal consent for individual applications and operating without a written contract in violation of the Landscape Act—Plaintiffs' theory—are two sides of the same coin. Without verbal consent to each individual application, there is no exemption

from the written-contract requirement, and the parties can be effectively operating without a written contract in violation of the Landscape Act.

In a similar vein, TruGreen argues that Sutton received only one application, making Plaintiffs' theory regarding "perpetual verbal contracts that continued from year to year regardless of whether Plaintiffs authorized their renewal" inapplicable. [2] But a claim should not be dismissed on the pleadings unless it appears to a certainty that no facts could be introduced consistent with the pleading to support granting the relief granted. *See Martens*, 616 N.W.2d at 750–51. Sutton does not affirmatively allege that TruGreen entered her lawn on just one occasion, and Plaintiffs in their memo state that "on *at least* one occasion" TruGreen entered her lawn without authorization. It is certainly possible that facts could be developed showing more than one unauthorized entry onto Sutton's lawn in 2013.

TruGreen also challenges the logic of Turnidge's theory, arguing that a construction of the Landscape Act to permit her claim would lead to an impermissibly absurd result that must be rejected. *See* Minn. Stat. § 645.17(1) (stating that "[t]he legislature does not intend a result that is absurd, impossible of execution, or unreasonable."). TruGreen's argument fails both because it distorts the allegations in Plaintiffs' complaint and because that rule of construction is not applicable to these circumstances.

TruGreen rewrites Turnidge's theory as follows: (a) she refused to enter into a written contract with TruGreen; (b) she demanded TruGreen provide services to see if the quality would improve, and (c) TruGreen nonetheless violated subdivision 2 by not *requiring* Turnidge to enter into a written contract. TruGreen's Reply Memo at 4. But nowhere in Plaintiffs' complaint does Turnidge allege that she "demanded TruGreen provide services to see if the quality would improve." Quite to the contrary, Plaintiffs specifically allege that Turnidge told TruGreen representatives that she "*does not want to renew* her lawn care *until* she is satisfied that the quality of service will improve." Compl. ¶ 25 (emphasis added). Presumably, Turnidge intended to verify service quality through means other than renewal of her own lawn services, i.e. by word of mouth, customer reviews, and other measures of assessing business service. While TruGreen's interpretation of Turnidge's allegations may be borne out by discovery, it is not alleged, nor is the Court permitted to adopt TruGreen's inferences on a motion to dismiss. *See Bodah*, 663 N.W.2d at 553 (stating that a reviewing court must construe all reasonable inferences in favor of the non-moving party on a motion to dismiss).

Furthermore, TruGreen's reliance on the canon in Minn. Stat. § 645.17(1) is misplaced. That rule of construction "is not available to override the plain language of a clear and unambiguous statute, except in an exceedingly rare case in which the plain meaning of the statute 'utterly confounds' the clear legislative purpose of the statute." *See Axelberg v. Comm'r of Pub.*

[2] TruGreen makes a number of arguments that challenge Plaintiffs' "perpetual unwritten contract" theory in an attempt to narrowly frame Plaintiffs' pleading in a manner that undercuts the Plaintiffs' claim that their statutory claims provide a public benefit. While the Court addresses the public-benefit requirement more fully in Section IV, the Court would note here that pursuant to the applicable standard of review, a claim should be dismissed on the pleadings "'only if it appears to a certainty that no facts, which could be introduced consistent with the pleading, exist which would support granting the relief demanded.'" *Martens*, 616 N.W.2d at 750–51 (quoting *N. States Power Co.*, 122 N.W.2d at 29). The extent to which Plaintiffs' experiences are isolated or the product of a more pervasive business practice is an issue for discovery.

Safety, 848 N.W.2d 206, 210 n. 5 (Minn. 2014) (quoting *Schatz v. Interfaith Care Ctr.*, 811 N.W.2d 643, 651 (Minn. 2012)). The legislature, in enacting Minn. Stat. § 325F.245, clearly intended to impose on lawn-care service providers the burden of obtaining written contracts from landowners for landscape applications, and the legislature buttressed that obligation by expressly providing a private right of action to consumers. *See* Minn. Stat. § 325F.245, subd. 7. If Turnidge's theory regarding TruGreen's practices is borne out, such action would fall within the Landscape Act's prohibition against multiple-application oral contracts and would not "utterly confound" the clear legislative purpose of the statute.

Lastly, at oral argument, TruGreen pointed to Plaintiffs' allegations that TruGreen annually solicits current and former customers to enter into year-long written agreements for landscape applications and argued that this allegation is inconsistent with Plaintiffs' theory that TruGreen is operating under "perpetual verbal contracts that continued from year to year regardless of whether Plaintiffs authorized their renewal." However, while evidence of those allegations would constitute circumstantial evidence that is probative of a lack of perpetual verbal contracts that continue year to year regardless of landowner authorization, such allegations are not necessarily incompatible with Plaintiffs' theory. TruGreen may have preferred to have signed agreements but opted to operate without them—regardless of landowner authorization—in cases where they couldn't get signed written contracts. At the motion to dismiss stage, these allegations do not provide a basis to dismiss Plaintiffs' subdivision 2 claim. *See Martens*, 616 N.W.2d at 750–51 (stating that claim should be dismissed on the pleadings only if it appears to a certainty that no facts, which could be introduced consistent with the pleading, exist which would support granting the relief demanded).

B. Minn. Stat. § 325F.245, Subd. 3

TruGreen also challenges Plaintiffs' claim under subdivision 3 of the Landscape Act. Minn. Stat. § 325F.245, subd. 3 provides that every contract must contain a stated ending date and that to extend service beyond the stated ending date, the commercial application company and property owner must enter into a separate written contract. Minn. Stat. § 325F.245, subd. 3.

TruGreen argues that its contracts comply with this requirement and contain stated end dates. But for the same reasons as discussed in Section II.A, TruGreen's proffer of unsigned form agreements does not conclusively demonstrate compliance with Minn. Stat. § 325F.245, subd. 3. Plaintiffs have alleged that TruGreen is operating under "perpetual verbal contracts that continued from year to year regardless of whether Plaintiffs authorized their renewal." If true, TruGreen's oral contracts with consumers do not have stated end dates, and TruGreen has also failed to enter into written contracts as part of their renewal practices.

TruGreen again argues, as it did in response to Plaintiffs' subdivision 2 claim, that allegations that TruGreen attempts to get customers to agree to year-long services and sign an agreement to that effect every year demonstrates that they did not operate in a manner consistent with Plaintiffs' theory. However, as described above in Section II.A, those allegations are not necessarily incompatible with Plaintiffs' theory and do not provide a basis for dismissal on a Rule 12 motion.

C. Minn. Stat. § 325F.245, subd. 4

TruGreen similarly argues for dismissal of Plaintiffs' claim under subdivision 4 of the Landscape Act. Minn. Stat. § 325F.245, subd. 4 provides as follows:

> **Annual notice to property owner.** If a contract is for more than one year, then the commercial application company shall each year provide written notice to the property owner that the contract remains in effect and that landscape applications will resume according to the terms of the contract. The written notice must be provided to the property owner at least 15 days prior to the first landscape application of the year.

TruGreen objects to this claim on the grounds that the written contracts the Plaintiffs signed did not have durations of "more than one year." But as already discussed in Sections II.A and II.B, Plaintiffs have alleged that TruGreen operated under alleged "perpetual verbal contracts that continue year to year." It is possible that Plaintiffs can introduce evidence that TruGreen operated under an oral agreement that in effect lasted more than one year, making it a violation for TruGreen to fail to provide the annual notice required by this subdivision. *See Martens,* 616 N.W.2d at 750–51 (stating that claim should be dismissed on the pleadings only if it appears to a certainty that no facts, which could be introduced consistent with the pleading, exist which would support granting the relief demanded).

In summary, TruGreen is not entitled to dismissal of Plaintiffs' Landscape Act claims at this stage of the proceedings.

III. Plaintiffs' MCFA Claim (Count IV)

Count IV of Plaintiffs' complaint alleges violations of the MCFA. The MCFA prohibits "any fraud, false pretense, false promise, misrepresentation, misleading statement or deceptive practice with the intent that others rely thereon in connection with the sale of any merchandise." Minn. Stat. § 325F.69, subd. 1; *see also Graphic Communications Local 1B Health & Welfare Fund A v. VCS Caremark Corp.*, 850 N.W.2d 682, 694 (Minn. 2014). "The conduct proscribed by the CFA is broad." *Graphic Communications*, 850 N.W.2d at 694. "The language of the statute indicates that the target of the CFA is deceitful conduct in connection with the sale of merchandise." *Id.* To state a claim under the MCFA, a plaintiff "need only plead that the defendant engaged in conduct prohibited by the statutes and that the plaintiff was damaged thereby." *See Group Health Plan, Inc. v. Phillip Morris, Inc.*, 621 N.W.2d 2, 12 (Minn. 2001).

The terms used in the MCFA have a well-defined meaning at common law. *Id.* The common law—and by extension the MCFA—recognizes that a party may be liable for fraud either by making an affirmative statement or by concealing or not disclosing facts under certain circumstances. *See id.* Plaintiffs allege that TruGreen violated the MCFA by way of affirmative statements and by failing to disclose "statutorily required information."

As a threshold matter, the parties dispute the pleading standard applicable to an MCFA claim. Under Rule 9.02 of the Minnesota Rules of Civil Procedure, when a party pleads a fraud

claim, "the circumstances constituting fraud . . . shall be stated with particularity." Minn. R. Civ. P. 9.02; *see also Baker v. Best Buy Stores, LP*, 812 N.W.2d 177, 182 (Minn. App. 2012) (applying Rule 9.02 to MCFA claim). "A fraud claim is pleaded with particularity when "the ultimate facts are alleged." *Baker*, 812 N.W.2d at 182 (quoting *Purdy v. Nordquist (in re Estate of Williams)*, 95 N.W.2d 91, 100 (Minn. 1959)).

Pursuant to both *Baker* and the terms of Rule 9.02, Rule 9.02 applies to a claim brought under the MCFA. Plaintiffs argue that Rule 9.02 does not apply, citing *Graphic Communications*. *See Graphic Communications*, 850 N.W.2d at 692 (citing Minn. R. Civ. P. 8.01 while reciting the pleading standard applicable to a Rule 12 motion to dismiss in case alleging an MCFA violation). Plaintiffs' reliance on *Graphic Communications* is misplaced because there is no indication in that opinion that the Minnesota Supreme Court was ever asked to decide whether Rule 9.02 applies to a claim brought under the MCFA. *See Amcon Block & Precast, Inc. v. Suess*, 794 N.W.2d 386, 390–91 (Minn. App. 2011) (stating that reliance on previous decision was misplaced because the court was not asked to decide the issue presented here). "[A]ssumptions underlying an opinion that are not the subject of a court's analysis are not precedential on the point that is assumed." *In re Rollins*, 738 N.W.2d 798, 802 (Minn.App.2007); *see also Skelly Oil Co. v. Comm'r of Taxation*, 131 N.W.2d 632, 645 (Minn. 1964) (stating that "language used in an opinion must be read in the light of the issues presented."). There is no indication that any party even argued for application of Rule 9.02 in *Graphic Communications*. The Court accordingly concludes that Rule 9.02 applies to Plaintiffs' MCFA claim and will proceed to analyze the claims under that standard.

A. Affirmative Statements

Plaintiffs first argue that TruGreen violated the MCFA by affirmatively misrepresenting the nature of contract renewal of landscape-application contracts entered into pursuant to the Landscape Act. More specifically, Plaintiffs argue that TruGreen includes the following statement in solicitations to prospective customers: "[y]our program will continue, year after year, until you or we cancel." Similarly, Plaintiffs allege that TruGreen includes the following statement in work orders provided to current customers: "Your service will continue year after year, until you notify us to discontinue." Plaintiffs allege that these affirmative statements constitute fraud, misrepresentations, misleading statements, and/or deceptive practices in connection with the sale of merchandise under the MCFA.

Plaintiffs have adequately pled a violation of the MCFA based on these affirmative statements. Plaintiffs have alleged the circumstances constituting fraud: they have set forth the specific statements and the means by which the statements were conveyed to current and prospective customers of TruGreen. They have alleged that these statements are fraudulent or misleading because they do not conform to Minnesota statutory requirements for landscape-application contracts. Plaintiffs have alleged that TruGreen made those statements with the intent that Plaintiffs would rely on them in connection with the sale of merchandise, and Plaintiffs further allege that they relied on TruGreen's misrepresentations and omissions to their detriment and that they are entitled to damages resulting from TruGreen's wrongful conduct. *See Group Health Plan*, 621 N.W.2d at 12. These allegations properly state a claim for violation of the MCFA based on affirmative statements.

TruGreen makes a variety of arguments in support of its argument that Plaintiffs have not adequately pled their MCFA claim.[3] First, TruGreen argues that the claim is at odds with the Plaintiffs' complaint because Plaintiffs do not allege that TruGreen told customers that services would continue without any action from the customer or any contract. But the complaint expressly references and quotes from the solicitation materials and work orders containing the affirmative representations that Plaintiffs allege are fraudulent and/or misleading. TruGreen also restates its argument that this theory is at odds with allegations that every year TruGreen contacts customers to try and get them to sign an annual contract, but as discussed in Section II.A, those allegations are not necessarily inconsistent with an intent to mislead or operate without a written contract where TruGreen cannot otherwise obtain a signed written contract.

TruGreen also argues that there is nothing literally false or true but likely to mislead about the statements Plaintiffs allege are violations of the MCFA. TruGreen argues that Plaintiffs admit that TruGreen continued to offer and provide lawn care services to her year after year all while she declined to sign a contract. But continuously offering to provide further services is not tantamount to perpetual continuation of the services themselves until one party provides notification of the intent to discontinue. As such, TruGreen's argument does not provide a basis for dismissal at the motion to dismiss stage. In a similar vein, TruGreen argues that Sutton admittedly only received a single service in 2013 after contracting for annual services in 2012, which TruGreen argues contradicts Plaintiffs' allegation that services continued year after year without further action. However, as described in Section II.A, Plaintiffs' allegations do not definitively admit that Sutton only received a single service in 2013. Just as importantly, whether or not the practice was actually employed does not address whether the statement itself was false or misleading.[4]

Lastly, TruGreen argues that Plaintiffs must show that TruGreen intentionally made the misrepresentation and that they suffered damages caused by the misrepresentation. TruGreen again argues that allegations regarding TruGreen's efforts to get customers to sign annual-services contracts demonstrates that they did not intend for Plaintiffs to rely on these affirmative statements. But "[d]etermining a party's intent is a question of fact[.]" *Brown v. Cannon Falls Tp.*, 723 N.W.2d 31, 44 (Minn. App. 2006); *see also State v. Jacobson*, 697 N.W.2d 610, 616 (Minn. 2005) ("Because the existence of intent is a question of fact, it must be submitted to the jury."). Paragraph 63 of Plaintiffs' complaint alleges that TruGreen engaged in its practices with the intent that Plaintiffs and the class would rely on those practices in connection with the sale of merchandise. That allegation distinguishes the case from *Baker*, which TruGreen cites, because in *Baker* the Plaintiffs' complaint was "devoid of any allegation" that the defendant intended to deceive anyone. *See Baker*, 812 N.W.2d at 182. Because intent is a question of fact, Plaintiffs' allegation that intent exists is sufficient to survive a motion to dismiss. *See* Minn. R. Civ. P. 9.02

[3] Their initial argument was that Plaintiffs did not plead their claim with particularity, but as outlined above, Plaintiffs have pled the specific statements that they allege constitute the fraudulent conduct and have identified the means by which those statements were conveyed to consumers, satisfying the particularly requirement.

[4] Whether the practice was actually employed may have some effect on damages, but as described below, Plaintiffs' have adequately pled that they were damaged by these statements/practices.

("Malice, intent, knowledge, and other condition of mind of a person may be averred generally.").[5]

Contrary to TruGreen's argument, Plaintiffs have also pled a connection between the alleged fraudulent statements and their claim for damages. In paragraph 65 of Plaintiffs' complaint, Plaintiffs allege that they "relied on TruGreen's misrepresentations and omissions to their detriment." In the wherefore clause of Plaintiffs' complaint, Plaintiffs allege that they suffered damages "caused as a result of [Defendant's] unlawful conduct." These allegations are sufficient with respect to causation and damages. *See Group Health Plan*, 621 N.W.2d 13 n. 8 (holding that allegations that injuries arose "on account of defendants' wrongful conduct" were sufficient to state a MCFA claim with respect to causation).

In sum, Plaintiffs' MCFA claim is adequately plead with respect to the alleged affirmative misrepresentations.[6]

B. Omission-Based Fraud

In its reply memorandum, TruGreen also challenged Plaintiffs' MCFA claim with respect to TruGreen's alleged failure to disclose statutorily required information. Specifically, TruGreen argues that Plaintiffs needed to—and failed to—plead special circumstances that trigger a duty to disclose in order to state claim for omission-based fraud under the MCFA.

TruGreen is correct that a plaintiff alleging an omission-based consumer fraud claim must "plead and prove . . . special circumstances that trigger a duty to disclose." *See Graphic Communications*, 850 N.W.2d at 696. However, the Court cannot dismiss the omission-based fraud claim asserted by Plaintiffs because TruGreen failed to raise this argument in its opening brief. *See* Minn.Gen.R.Prac. 115.03(c) ("The moving party may submit a reply memorandum, *limited to new legal or factual matters raised by an opposing party's response to a motion . . .*" (emphasis added)). In its opening brief, TruGreen argued that Plaintiffs did not plead their MCFA claim with particularity—namely by failing to specify the "who, what, where, when, why and how" of the alleged fraud. Plaintiffs responded by identifying specific fraudulent statements in their opposition brief. TruGreen then submitted a reply memorandum raising—for the first time—the argument that Plaintiffs had failed to plead special circumstances that trigger a duty to disclose. Unsurprisingly, Plaintiffs did not—and were not able to—address this argument in the briefing before the Court. Accordingly, the Court declines to dismiss the omission-based portion of Plaintiffs' MCFA claim. *See* Minn.Gen.R.Prac. 115.03(c).

[5] The *Baker* decision contains a statement that could suggest that the MCFA claim was "not stated with the requisite particularity" with respect to intent. *Baker*, 812 N.W.2d at 182. However, the Court does not read that statement as requiring a heightened pleading requirement for intent, given that Rule 9.02 itself expressly provides that intent can be averred generally. Minn. R. Civ. P. 9.02. Rather, the Court interprets *Baker* as merely stating that the plaintiffs in that case failed to properly plead their case where there was no allegation at all with respect to intent, unlike the Plaintiffs' pleading in this case.

[6] The Court would additionally note that TruGreen did not argue nor provide a basis for dismissing Plaintiffs' MCFA claim with respect to alleged deceptive trade practices—namely, Plaintiffs' allegations that TruGreen performed lawn-care services that were not authorized by Plaintiffs.

IV. The Public Benefit Requirement (Counts I-IV)

In addition to challenging the independent merits of Plaintiffs' Landscape Act and MCFA claims, TruGreen argues that these claims do not satisfy the public-benefit requirement required to prosecute these actions under the Private Attorney General Statute, Minn. Stat. § 8.31. The legislature has specifically authorized private enforcement of claims under the Landscape Act and MCFA. *See* Minn. Stat. § 325F.245, subd. 7 ("A person who violates this section is subject to the penalties and remedies, including a private right of action, as provided in section 8.31); Minn. Stat. § 8.31, subds. 1, 3a (listing the MCFA in subdivision one and stating that "any person injured by a violation of any of the laws referred to in subdivision 1 may bring a civil action and recover damages . . . ."); *see also Ly*, 615 N.W.2d at 311 ("The Private AG Statute thus advances the legislature's intent to prevent fraudulent representations and deceptive practices with regard to consumer products by offering an incentive for defrauded consumers to bring claims in lieu of the attorney general."). Private enforcement is limited to those claimants who demonstrate that their cause of action benefits the public. *Ly*, 615 N.W.2d at 314 ("[W]e hold that the Private AG Statute applies only to those claimants who demonstrate that their cause of action benefits the public.").

TruGreen argues that Plaintiffs' allegations fail to give rise to a public benefit for two reasons. First, TruGreen points to the 2004 Assurance, arguing that Minnesota's attorney general has already acted to remedy the issues raised by Plaintiffs' complaint such that no further public benefit can arise from Plaintiffs' suit. Second, TruGreen argues that even in the absence of the Assurance, the "essence of Plaintiffs' Complaint seeks only to remedy individual harm arising out of one-to-one transactions with TruGreen." According to TruGreen, such "artful pleading" cannot transform Plaintiffs individualized claims into a lawsuit benefitting the public. The Court addresses these arguments in turn.

A. The 2004 Assurance Does Not Operate as A Bar to Plaintiffs' Claims

The Assurance contains allegations made by the state pursuant to its investigation into TruGreen's practices. Those allegations are similar to the allegations here. Principally, the state alleged that "in spite of the absence of any assent to services by property owners, TruGreen went to property owners' homes, sprayed chemicals on their lawns and left bills for the unauthorized services." The state also alleged that many property owners would orally agree to purchase a single landscape application and weeks later, without obtaining authorization for additional services, TruGreen would return to the properties, spray chemicals, and leave bills for the unauthorized applications. TruGreen denied the allegations but agreed to settle in order to avoid the cost and disruption of protracted litigation.

The Assurance expressly resolved "all claims brought by the Attorney General for the alleged conduct described in this Assurance, up to and including the date of the signing of this Assurance . . . ." Assurance, ¶ 26. The Assurance further provided that TruGreen "understands that a violation of this Assurance may result in sanctions for contempt . . . ." Assurance, ¶ 22. Violation of the Assurance may also result in an "additional civil penalty of $50,000 if a district court finds, in an action brought by the Attorney General, that TruGreen has engaged in a pattern

of violating any provision or provisions of this Assurance . . . within ten years of the date of the Court Order approving this Assurance." Assurance, ¶¶ 23, 32.

The Assurance also contained injunctive relief. Under Paragraph 27 of the Assurance, TruGreen was "permanently enjoined" from engaging in conduct that would violate Minn. Stat. §§ 325F.245 or 325F.69. Assurance, ¶¶ 27(A)-(E). The Assurance also "enjoined" TruGreen from "referring any Minnesota property owners that have not paid the balance due for services rendered to a collection agency" unless the debt alleged by TruGreen is based on a contract that conforms with paragraph 27(B). Assurance, ¶ 28. The Assurance also "enjoined" TruGreen from making any efforts to collect "on any debt for landscape application services for which TruGreen has not received payment if that debt is disputed by the property owner, unless TruGreen has a contract with such property owner that complies with Paragraph 27 (B)." Assurance, ¶ 29. In cases where TruGreen had already referred a property owner without a contract that complies with Paragraph 27 (B) to a collection agency, TruGreen was required to notify the collection agency to cease collection efforts. Assurance, ¶ 30.

TruGreen argues that the Assurance operates as a bar to Plaintiffs' claims in this lawsuit because the Assurance has already provided any public benefit that could arise from Plaintiffs' lawsuit.

In support of TruGreen's argument, it points to the unpublished decision of the Minnesota Court of Appeals in *Weigand v. Walser Automotive Group, Inc.*, No. A05-1911, 2006 WL 1529511 (Minn. App. June 6, 2006). In *Weigand*, the plaintiff had purchased a vehicle from the defendant on or about September 26, 1998. *Weigand*, 2006 WL 1529511 at *1. In the plaintiff's complaint, he alleged that one of the defendant's salespeople had deceived him by falsely telling him he was required to purchase a $1,500 service contract and a $340 credit-insurance policy in order to obtain financing for the vehicle. *Id.* Prior to the plaintiff's initiation of his suit, the Minnesota Attorney General entered into a settlement agreement and consent order following investigation into the defendant's practices. *Id.* That consent order prevented the defendant from "in any way suggest[ing] to a consumer that a Service Contract is a required purchase or that [it would] increase the likelihood that a consumer will be approved for financing. *Id.* That consent order further constituted a "full and final resolution between the Minnesota Attorney General's Office and [the defendant] . . . of all claims relating to the investigation of . . . Service Contracts[.]" *Id.*

The defendant in *Weigand* subsequently moved for summary judgment, arguing that the plaintiff could not demonstrate the requisite public benefit under Minn. Stat. § 8.31, subd. 3a because the attorney general had already acted to protect the public interest. *Id.* at *2. The court of appeals concluded that "there is no longer any public benefit to protect because the attorney general's office has already intervened to correct the complained-of sales activity and provided a remedy for aggrieved consumers." *Id.* at *3. The court of appeals noted that the consent order provided a remedy by requiring the defendant to attempt to resolve "all consumer complaints" and by providing consumers with an option to have their complaints arbitrated. *Id.* The court of appeals further noted that the consent order drew no distinction between past and future consumer complaints. *Id.*

Based on *Weigand*, TruGreen argues that Plaintiffs cannot demonstrate the requisite public benefit here because the attorney general has already intervened to correct the complained-of conduct and because the Assurance provides a remedy to consumers, namely by precluding any debt-collection activity against disputed debt where property owners do not have a written contract.

TruGreen's reliance on *Weigand* is misplaced. To begin, unpublished decisions of the Minnesota Court of Appeals are not precedential. Minn. Stat. § 480A.08, subd. 3 (2014). No published decision in Minnesota has concluded that an assurance can preclude enforcement of a private claim under Minn. Stat. § 8.31, subd. 3a in the absence of an express release of any such claim. *Cf. Curtis v. Altria Group, Inc.*, 813 N.W.2d 891, 904 (Minn. 2012) (concluding that assurance released future subdivision 3a claims, therefore "expressly determin[ing] the right of [the private plaintiffs] to bring those claims."). And the Assurance in this case does not release future claims: it expressly states that it is intended to cover claims brought up to and including the date of the signing of the Assurance, and no language in the Assurance evinces an intent to release any future claims.

Furthermore, *Weigand* is distinguishable. *Weigand* based its holding on the attorney general's correction of the complained-of activity and the assurance's provision of a remedy for consumers. *See Weigand*, 2006 WL 1529511 at *3. But the Assurance in this case does not provide a remedy for consumer claims that arose following the date of the Assurance's execution.

TruGreen presumes otherwise, arguing that consumers are provided a remedy by paragraphs 28 and 29, which restrict TruGreen's ability to collect debt from consumers without written contracts who dispute the debt.[7] Assurances are contracts, and courts examine the language of the agreement to determine the intent of the parties. *See Curtis*, 813 N.W.2d at 901 (evaluating the language of an assurance pursuant to rules of contract interpretation); *see also Metro Sports Facilities Comm'n v. General Mills*, 470 N.W.2d 118, 123 (Minn. 1991) (noting that where there is a written instrument, the intent of the parties is determined from the plain language of the instrument itself.) Words or phrases in the contract should not be read in isolation; rather the court should give effect to the parties' intent as expressed by the language the parties used in drafting the whole contract. *Art Goebel, Inc. v. North Suburban Agencies, Inc.*, 567 N.W.2d 511, 515 (Minn. 1997). "A contract must be interpreted in a way that gives all of its provisions meaning." *See Current Technology Concepts, Inc.*, 530 N.W.2d 539, 543 (Minn. 1995) (citation omitted); *see also Oster v. Medtronic, Inc.*, 428 N.W.2d 116, 119 (Minn. App. 1988) ("Each and every provision of a contract must be given effect if that can consistently and reasonably be done, and all clauses and provisions should be construed to harmonize with one another.").

Here, the language of the Assurance, when interpreted as a whole and with an aim toward giving all of its provisions meaning, demonstrates that Paragraphs 28 and 29 provide retroactive remedies for customers of TruGreen who had been the subject of TruGreen's alleged conduct at the time of the signing of the Assurance, not prospective remedies for future consumers. This is

[7] Plaintiffs take the opposite position, arguing that the Assurance only provides a remedy for TruGreen customers "as of the date of the Assurance," citing to the same paragraphs TruGreen cites. Plaintiff's Memo at 14.

because the parties demonstrated that they were capable of denoting when injunctive relief would continue into perpetuity. Paragraph 27 specifically provides that TruGreen is *permanently* enjoined from engaging in practices that violate the Landscape Act and the MCFA, and it lists those practices under Paragraph 27 in subsections (A) through (E). Paragraphs 28 and 29, which are not nested underneath paragraph 27, only state that TruGreen "shall be enjoined" from making further collection efforts against (1) property owners who "have not paid the balance due for services rendered" and do not have a contract that complies with the Landscape Act and (2) property owners who dispute debt owed to TruGreen and who do not have a contract that complies with the Landscape Act. Reading Paragraphs 28 and 29 as prospective remedies would render the parties' express invocation of a permanent injunction with respect to the conduct listed in Paragraph 27 meaningless.

Paragraph 26 of the Assurance further supports the Court's reading. Paragraph 26 provides that the Assurance is a full and final resolution "of all claims brought by the Attorney General for the alleged conduct described in this Assurance, up to and including the date of the signing of this Assurance . . . ." Thus, the parties expressly stated that they were contemplating a way to resolve claims for conduct up to the date of the Assurance, not for conduct that would occur after the Assurance was signed. Given that the parties knew how to denote when injunctive relief would be permanent, it would be incongruous to read in a remedy that applies to future conduct when the parties were expressly contemplating a resolution of claims for conduct up to the date of the Assurance.

The absence of a prospective consumer remedy distinguishes this case from *Weigand*. In *Weigand*, the consumer arbitration process did not distinguish between past and future complaints, suggesting that it was a perpetual claims process. *See Weigand*, 2006 WL 1529511 at *1, *3. Furthermore, even if it hadn't established a perpetual claims process, the fraudulent conduct alleged by the plaintiff in *Weigand*—unlike the conduct alleged by Plaintiffs here—occurred prior to entry of the consent order, making it clear that the arbitration procedure was available to the plaintiff in *Weigand*. Because Plaintiffs can obtain a remedy through this lawsuit that does not otherwise exist under the Assurance, the Assurance does not preclude Plaintiffs from establishing that their suit provides the public benefit necessary to proceeding under Minn. Stat. § 8.31, subd. 3a.

Additionally, the Court would conclude that the Assurance does not bar Plaintiffs' suit even if the remedies in Paragraphs 28 and 29 were available to Plaintiffs. Minn. Stat. § 8.31, subd. 3a expressly provides that a private civil action for damages is "[i]n addition to the remedies otherwise provided by law." Minn. Stat. § 8.31, subd. 3a; *see also Curtis v. Altria Group, Inc.*, 792 N.W.2d 836, 850 (Minn. App. 2010) (rejecting argument that assurance precluded plaintiffs from demonstrating public benefit because private-action remedy is in addition to remedies otherwise provided by law), *rev'd on other grounds*, 813 N.W.2d at 904.[8]

[8] TruGreen argues that any reliance on the court of appeals' reasoning in *Curtis* is "grossly misplaced" because the Minnesota Supreme Court reversed, concluding that "because the State AG acts as the attorney for the citizens of Minnesota with full authority to bring and settle claims on their behalf, the State AG also has authority to resolve a private litigants' past and future subdivision 3a claims." TruGreen Reply Memo at 12. TruGreen's citation to the Minnesota Supreme Court's decision in *Curtis* is misleading in this context. As noted earlier, the Minnesota Supreme Court concluded that the State AG has the authority to resolve private litigants' future subdivision 3a claims within the context of an express future release of claims. *See Curtis*, 813 N.W.2d at 904. The Minnesota

Holding that the availability of another remedy generated by an assurance of discontinuance entered into by the attorney general precludes private civil enforcement would neglect the Court's obligation to enforce the plain meaning of that legislative language. *Christianson v. Henke*, 831 N.W.2d 532, 537 (Minn. 2013) (stating that where statute is unambiguous the court's role is to enforce the language of the statute); Minn. Stat. § 8.31, subd. 2b (providing for attorney general to accept an assurance of discontinuance that stipulates to performance of any remedies allowable under Minn. Stat. § 8.31); Minn. Stat. § 8.31, subd. 3a (providing for private civil action for damages in addition to remedies otherwise provided by law). This comports with the Minnesota Supreme Court's previous treatment of the statute, which has conveyed an unwillingness to limit the plain meaning of the language of subdivision 3a. *See Group Health Plan, Inc.*, 621 N.W.2d at 9 (rejecting argument that actions under Minn. Stat. § 8.31, subd. 3a should be limited to consumers of the product claiming misrepresentation, stating that the court was unwilling to limit the plain meaning of the language of subdivision 3a).

Finally, the allegation here that the complained-of practices are continuing even after entry into the Assurance—accepted as true for purposes of this motion—further distinguishes this from *Weigand* and suggests that a public benefit could arise from Plaintiffs' private civil action. In *Weigand*, the plaintiff's allegations related to conduct that had occurred solely prior to entry into the assurance of discontinuance. Here, Plaintiffs' allegations relate to conduct that occurred years after the Assurance was executed—if true, those allegations suggest that the attorney general has not corrected the complained-of conduct, that the remedies provided by the Assurance have not had their intended effect, and that further public benefit could arise from a private civil suit.

For all of the foregoing reasons, the 2004 Assurance does not operate as a bar to Plaintiffs' statutory claims brought pursuant to Minn. Stat. § 8.31, subd. 3a.

B. Plaintiffs' Allegations Adequately Plead a Public Benefit

Even though the Court concludes that the Assurance does not operate as a bar to Plaintiffs' ability to demonstrate that their claims satisfy the public-benefit requirement, Plaintiffs must still demonstrate that their claims will provide a public benefit. Plaintiffs argue that they have satisfied this requirement by alleging that TruGreen misrepresented statutory requirements as well as the extent to which contracts renewed automatically in its marketing materials, service agreements, work orders, and verbal communications with "thousands of potential and current TruGreen customers across the State of Minnesota."

Determination of whether private claimants' claims benefit the public as required under *Ly* involves the application of existing case law and is reviewed de novo by appellate courts. *See Collins v. Minn. Sch. of Bus., Inc.*, 655 N.W.2d 320, 329 (Minn. 2003). A cause of action does not benefit the public where it is based on "a single one-on-one transaction in which the fraudulent misrepresentation . . . was made only to [the injured party]." *Ly*, 615 N.W.2d at 313; *Jensen v. Duluth Area YMCA*, 688 N.W.2d 574, 578 (Minn. App. 2004) (concluding that

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Supreme Court's decision in *Curtis* does not provide support for the proposition urged by TruGreen—namely, that an assurance that does not contain a release of future subdivision 3a claims precludes future claims based on the attorney general's action to correct similar complained-of conduct.

plaintiff's claim did not benefit public where claim related to "a single one-on-one incident that affected only him."). But even if the group of injured persons is small, a successfully prosecuted claim under the private-attorney-general statute and the MCFA benefits the public if the misrepresentation was presented to the public at large." *Collins*, 655 N.W.2d at 329.

To understand proper application of the public-benefit requirement, a discussion of the seminal cases is helpful. *Ly* involved fraudulent misrepresentations made in connection with the sale of a restaurant. *Ly*, 615 N.W.2d at 304. During a phone call, the owner of the restaurant represented to a prospective buyer, the plaintiff, that the restaurant's monthly gross profits were between $25,000 and $30,000 a month and told the prospective buyer that it was a good business and that "she would not trick him because they were friends." *Id.* at 305. When the plaintiff visited the restaurant the following day, the restaurant was not busy, and plaintiff asked why there were so few patrons. *Id.* The owner replied that customers in Shakopee usually eat and go to sleep earlier because they commute to work. *Id.* When plaintiff's wife asked to see the restaurant's books, the owner claimed they were not there but that a lawyer did not need to review them because she would not lie to the plaintiff. *Id.* The plaintiff ended up purchasing the restaurant and never made a profit, with estimated monthly sales registering between $6,000 and $7,000. *Id.*

The plaintiff would later sue pursuant to the MCFA and Minn. Stat. § 8.31, subd. 3a. The Minnesota Supreme Court reaffirmed that the conduct alleged by the plaintiff fell within the contours of the MCFA. *Ly*, 615 N.W.2d at 310. However, the supreme court concluded that the plaintiff could not maintain his private enforcement claim because "successful prosecution of his fraud claim does not advance state interests and enforcement has no public benefit . . . ." *Id.* The supreme court reasoned that the plaintiff "was defrauded in a single one-on-one transaction in which the fraudulent misrepresentation, while evincing reprehensible conduct, was made only to [plaintiff]." *Id*; *see also Collins*, 655 N.W.2d at 330 (discussing *Ly* and stating that the court "emphasiz[ed] that the misrepresentations were made to only one person and that the fraudulent transaction was completed on a one-to-one basis[.]").

Three years later, the Minnesota Supreme Court was again asked to interpret the public-benefit requirement in *Collins*. In *Collins*, 18 former students of the Minnesota School of Business' ("MSB") Sports Medicine Technician program brought claims alleging that MSB made false, misleading, and confusing statements about its sports medicine program. *Collins*, 655 N.W.2d at 322. The supreme court reversed the district court's conclusion that the plaintiffs failed to demonstrate a public benefit because only a relatively small group of persons were injured by MSB's fraudulent activities; it held that the district court had misapplied *Ly* by ignoring the fact that the MSB had misrepresented the nature of its program to the public at large. *Id.* The supreme court noted that MSB offered its programs to the general public, had a total enrollment of over 1,200 students in all of its programs, and it made misrepresentations to the public at large by airing a television advertisement. *Id.* The supreme court also noted that MSB made numerous sales and information presentations and provided students with a "Career Opportunities" sheet, which students interpreted as a list of jobs for which they might qualify after completing the program. *Id.* The supreme court concluded that "[a]ll of these factors indicate that MSB presented its program to the public at large." *Id.*

Here, Plaintiffs' allegations, if proven, would support a finding that Plaintiffs' claims benefit the public. Plaintiffs allege that TruGreen includes misrepresentations in solicitations to current and potential customers regarding the nature of landscape-application contract renewal. Plaintiffs further allege that TruGreen, despite not having authorization to do so, performed lawn care services that were not ordered for a class of current and former TruGreen consumers that numbers in the thousands. Accordingly, if Plaintiffs' allegations are true, TruGreen misrepresented the nature of landscape-applications to the public at large through its solicitation and marketing materials to the thousands of current and potential customers of TruGreen in Minnesota, and TruGreen also engaged in a practice of unauthorized entry onto lawns of former and current customers where TruGreen would spray chemicals and leave bills for those unauthorized services. Pursuant to Plaintiffs' allegations, there were potentially thousands of consumers affected by TruGreen's practices and exposed to TruGreen's misrepresentations, distinguishing this from the scenario in *Ly* where the plaintiff was "defrauded in a single one-on-one transaction in which the fraudulent misrepresentation . . . was made only to [plaintiff]." *Ly*, 615 N.W.2d at 310.

TruGreen argues that the "essence of Plaintiffs' Complaint seeks only to remedy individual harm arising out of one-to-one transactions with TruGreen." In doing so, TruGreen neglects the applicable standard of review by narrowly framing Plaintiffs' claims in terms of an alleged failure by TruGreen to obtain verbal consent to individual landscape applications after the Plaintiffs' written contracts had expired. But Plaintiffs' theory and allegations are much broader: they allege that TruGreen engaged in a practice of unauthorized entry onto the lawns of thousands of current and former consumers, sprayed chemicals, and left bills for the unauthorized services. Plaintiffs also allege that TruGreen misrepresented the nature of landscape-application contract renewal, presumably in furtherance of TruGreen's alleged scheme to bill for future unauthorized services. At the motion to dismiss stage, the reviewing court "must consider only the facts alleged in the complaint, accepting those facts as true and must construe all reasonable inferences in favor of the non-moving party." *Bodah*, 663 N.W.2d at 553. Plaintiffs' allegations, accepted as true, demonstrate that Plaintiffs' claims provide a public benefit.

TruGreen also challenges the Plaintiffs' theory by arguing that "the class of plaintiffs under the private attorney general statute would be limitless if we assumed that the Plaintiffs' allegedly negative experience with TruGreen was necessarily duplicated for every other individual and on that basis treated personal claims as benefitting the public." TruGreen's Memo. at 12–13 (quoting *Davis v. Bancorp*, 383 F.3d 761, 768 (8th Cir. 2004)). TruGreen's reliance on *Davis*, however, is misplaced. First, *Davis* is a federal decision and is not precedential. *State ex rel. Hatch v. Employers Ins. Of Wausau*, 644 N.W.2d 820, 828 (Minn. App. 2002) ("[F]ederal court interpretations of state law are not binding on state courts.").[9] Second, the underlying circumstances of the case in *Davis* and the procedural posture of that case demonstrate that a blunt application of the *Davis* holding to this case would be inappropriate.

[9] Presumably due to the relative dearth of published cases in Minnesota addressing the public-benefit requirement, both parties cite to a large number of federal court decisions and unpublished decisions of the Minnesota Court of Appeals. The Court confines its analysis of these non-precedential cases to the ones most heavily relied upon by both sides.

In *Davis*, the plaintiff was a prospective homebuyer who sought mortgage financing through the defendant, U.S. Bank. *Davis*, 383 F.3d at 764. The plaintiff was originally approved for an FHA mortgage in the amount of $77,330, but the property she was interested in required more financing, so she sought to convert her FHA loan into a Minnesota Housing Finance Agency ("MHFA") conventional loan. *Id.* She sought pre-approval of financing for a specific property from U.S. Bank, and U.S Bank faxed a credit pre-approval letter that indicated that "[b]ased upon the information [Davis] has supplied . . . the borrower qualifies for an MHFA Conventional loan amount sufficient to purchase the property . . . ." *Id.* The plaintiff then successfully bid on the property and scheduled a closing. *Id.* Shortly thereafter, the processor and underwriter for the plaintiff's loan declined the conventional loan application, stating that the plaintiff was ineligible due to her involvement in a Consumer Credit Counseling Service (CCCS) payment plan, which U.S. Bank knew about. *Id.* Due to the confusion, the plaintiff had to cancel the purchase agreement and quickly search for a new apartment to rent. *Id.*

On appeal from the district court's grant of summary judgment to U.S. Bank, the eighth circuit affirmed and concluded that the plaintiff's suit did not provide a public benefit and could not be pursued under the private attorney general statute. *Id.* at 768. The plaintiff argued that her case was distinguishable from *Ly* because her experience with U.S. Bank "reflects its broad treatment of others." *Id.* The eighth circuit rejected that argument, noting that "[t]he class of plaintiffs under the private attorney general statute would be limitless if we assumed that one individual's negative experience with a company was necessarily duplicated for every other individual and on that basis treated personal claims as benefitting the public." *Id.* The *Davis* court reasoned that the plaintiff "had a private transaction with U.S. Bank in which poor communication and confusion on both sides resulted in the cancellation of a purchase agreement." *Id.* "But [the plaintiff] can complain only about her individual experience with U.S. Bank, and she has not presented evidence that misrepresentations were made to the public at large." *Id.*

The circumscribed and particularized nature of the conduct at issue in *Davis* readily distinguishes that case from the circumstances alleged here. First, *Davis* did not involve misrepresentations made to the public at large, unlike the allegations made by the Plaintiffs here. Second, the *Davis* plaintiff's experience was highly particularized—as the eighth circuit noted, the evidence presented by plaintiff only provided plaintiff with a basis to complain about her individual experience with U.S. Bank. Here, Plaintiffs have alleged that the fraudulent practices in this case have been duplicated as a result of TruGreen's business practices; in other words, Plaintiffs allege that TruGreen has a practice of operating under "perpetual oral contracts" that enable TruGreen to furnish unauthorized landscape applications to thousands of current and former Minnesota consumers. Plaintiffs have not asserted that their treatment by TruGreen "reflects [TruGreen's] broad treatment of other," as in *Davis*; rather, Plaintiffs assert that their specific treatment is identical to the treatment of potentially thousands of Minnesota consumers. On a motion to dismiss, Plaintiffs' allegations are accepted as true, which further distinguishes this case from *Davis*, where the plaintiff apparently did not produce evidence that her specific experience had been duplicated elsewhere and was instead relegated to arguing that her

experience reflected U.S. Bank's broad treatment of others—an insufficient basis for avoiding summary judgment with respect to her Minn. Stat. § 8.31, subd. 3a claim.[10]

TruGreen's other case citations do not provide a basis for concluding that claims asserted in Plaintiffs' complaint would benefit the public if proven. In *Baker v. Best Buy Stores, LP*, 812 N.W.2d 177, 183 (Minn. App. 2012), the plaintiff's complaint was "devoid of any allegations that the complaint was brought for the 'public benefit' or how their action benefits the public," unlike here, where Plaintiffs expressly allege that their claims will benefit the public. Compl. ¶ 67. TruGreen also cites to *Behrens v. United Vaccines, Inc.*, 228 F.Supp.2d 965 (D.Minn. 2002) for the proposition that the mere possibility of public benefit is insufficient to demonstrate that a suit would have a public benefit. But in *Behrens*, the product that was the source of false representations was removed from the market by the USDA prior to the lawsuit being filed, meaning that a successful claim would not have any effect on the defendant's ability to represent the efficacy of that product and would only redress the plaintiff's personal business damages. *See Behrens*, 228 F.Supp.2d at 972. The allegations in this case assert that TruGreen's practices have not been obviated by any regulatory intervention.

In summary, Plaintiffs' allegations—accepted as true—support the conclusion that Plaintiffs' claims would benefit the public.

V. Plaintiffs' Trespass to Chattels Claim (Count V)

Count V of Plaintiffs' complaint alleges trespass to chattels, claiming that TruGreen's allegedly unauthorized access to Plaintiffs' lawn and grass "dispossessed Plaintiffs and the other members of Class of unencumbered access to their lawn and grass." TruGreen argues that Plaintiffs' claim fails because they (1) fail to plead a property right to a chattel because neither lawn nor grass can constitute a chattel and (2) fail to plead that TruGreen's actions affected their property rights for a substantial period of time.

"A trespass to a chattel may be committed by intentionally (a) dispossessing another of the chattel, or (b) using or intermeddling with a chattel in the possession of another." Restatement (Second) of Torts § 217 (1965). "Liability arises if the defendant dispossess the possessor of the chattel, impairs its condition, quality, or value, or deprives the possessor of the chattel's use for a substantial period of time." *Id.* § 218 (1965).

Plaintiffs' trespass to chattels claim fails because they cannot plead a property right to a chattel because neither lawn nor grass can constitute a chattel. A trespass to chattels claim necessarily requires pleading of a property right to a chattel. *See* Restatement (Second) of Torts § 217 (defining trespass to chattel as committed by dispossession of the chattel or intermeddling with a chattel). A "chattel" is defined as "movable or transferable property; personal property; esp. a physical object capable of manual delivery and not the subject matter of real property." *Black's Law Dictionary* 286 (10th ed.2014). Minnesota law recognizes grass growing on land as

[10] In concluding that the circumstances alleged here are distinguishable from *Davis*, the Court is holding only that Plaintiffs may be able to demonstrate that their claims benefit the public by producing evidence consistent with their allegations. TruGreen's theory regarding the individualized nature of Plaintiffs' experience with TruGreen may still be ultimately borne out by discovery.

the subject matter of real property. *See Kirkeby v. Erickson*, 86 N.W. 705, 705–06 (Minn. 1903) ("At common law, grasses growing from perennial roots are regarded as fructus naturales, and, while unsevered from the soil, are considered as pertaining to realty." (citation omitted)). Accordingly, because Plaintiffs' allegations pertain to grass growing on their property, the Plaintiffs' grass constitutes real property and falls outside the definition of a chattel, as Minnesota has previously recognized. *See Kirkeby*, 86 N.W. at 705–06; *see also Black's Law Dictionary* 1412 (10th ed.2014) (defining real property as "land *and anything growing on, attached to, or erected on it*, excluding anything that could be severed without injury to the land." (emphasis added)).

Plaintiffs cite two cases—one from the U.S. Supreme Court and one from the Vermont Supreme Court—in support of its argument that it can proceed on its trespass to chattels claim. These cases are not precedential. *See In re Welfare of Child of E.A.C.*, 812 N.W.2d 165, 174 (Minn. App. 2012) ("Though opinions from courts of other states are not binding on Minnesota courts, they may have persuasive value."); *State ex rel. Hatch*, 644 N.W.2d at 828 (Minn. App. 2002) ("[F]ederal court interpretations of state law are not binding on state courts."). They are also distinguishable from Plaintiffs' allegations in this case and are therefore not persuasive.

Plaintiffs' first citation is to *Barton Sav. Bank & Trust Co. v. Hamblett*, 107 Vt. 311 (1935). In *Hamblett*, the plaintiff held a chattel mortgage covering "all the maple products of every kind and description" produced on a farm during the 1933 harvest season. *See Hamblett*, 107 Vt. at 311. The *Hamblett* court discussed a prior case that had dealt with a chattel mortgage over all grass, oats, and corn growing upon a farm and noted the principle that "although growing grass may be realty, the owner of it and of the land on which it grows may mortgage it as a chattel and that such mortgage is valid between the parties[.]" *Id* (citation omitted and internal quotation marks omitted). Thus, *Hamblett* stands for the proposition that a property owner can mortgage natural products growing on land as a chattel and that such a mortgage gives creditors the right to attach that growing property pursuant to the chattel mortgage. Under this arrangement, such a mortgage "operates a severance in law so as to change the grass from real to personal property." *Id.* But under *Hamblett*'s holding, only the creditor holding the chattel mortgage can assert a right to the growing property as a chattel pursuant to the chattel mortgage. *See id* (holding that the recorded chattel mortgage constituted a valid lien as against property owner for syrup produced on the farm). Accordingly, under *Hamblett*'s rule, the only party that could conceivably bring a trespass to chattels claim would be the chattel-mortgage holder, not the landowner. Thus, even if *Hamblett*'s rule were binding, it would not support Plaintiffs' trespass to chattels claim under these circumstances.[11]

Plaintiffs' second citation is to *U.S. v. Loughrey*, 172 U.S. 206 (1898). In *Loughrey*, the U.S. Supreme Court dealt with a conversion claim brought by the U.S. government seeking to recover the value of timber that was cut and sold by alleged trespassers from lands granted to the state of Michigan. *Loughrey*, 172 U.S. at 208–09. The Supreme Court recognized a line of previous cases holding that owners of land continue to have property interest in timber on the

[11] Moreover, Plaintiffs fail to allege that any of the landowners involved here have executed a chattel mortgage covering their lawn or grass. Because the execution of the chattel mortgage was the triggering event in *Hamblett* for conversion of the grass to personal property in the limited context described by the Court, the absence of that triggering mechanism is further grounds for distinguishing these circumstances from *Hamblett*.

land even though timber was converted to personal property by virtue of a trespasser's severance of the timber from the land. *Id.* at 210–12. *Loughrey*'s holding, however, was simply that the U.S. government could not recover because they had failed to show title to the underlying land at the time of the trespass. *Id.* at 218–20. Accordingly, *Loughrey* merely recognizes a line of cases holding that natural resources that are severed from land cease constituting real property—it does not stand for the proposition that grass growing on property is not real property. Here, Plaintiffs' theory does not encompass severance of their lawn or grass from their properties, and *Loughrey* does not support Plaintiffs' claim to a property right in a chattel under these circumstances.

Pursuant to the foregoing, Plaintiffs' trespass to chattels claim fails because they have not plead a property right in a chattel, and Count V is accordingly dismissed with prejudice.

VI. Plaintiffs' Nuisance Claim (Count VII)

Count VII of Plaintiffs' complaint alleges that "TruGreen's unauthorized application of chemicals . . . materially and substantially obstructs and interferes with Plaintiffs' . . . use and enjoyment of [their] property by preventing children and animals from enjoying the lawn and from endangering occupants of the lawn . . ." TruGreen argues that Plaintiffs' nuisance claim should be dismissed because (1) Plaintiffs' conclusory allegations are insufficient to state a claim for nuisance and (2) Plaintiffs' fail to allege that the nuisance was "recurring or continuous" as required by Minnesota law.

Under Minnesota law, nuisance is defined as "[a]nything which is injurious to health, or indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property." Minn. Stat. § 561.01 (2014); *see also Schmidt v. Village of Mapleview*, 196 N.W.2d 626, 628 (Minn. 1972) ("It is elementary that the term 'nuisance' denotes an infringement or interference with the free use of property or the comfortable enjoyment of life, and thus it necessarily follows that an unlawful denial of reasonable access to property may constitute a nuisance."). An action in nuisance "may be brought by any person whose property is injuriously affected or whose personal enjoyment is lessened by the nuisance." *Id.* "The statute defines a nuisance in terms of the resultant harm rather than in terms of the kind of conduct by a defendant which causes the harm." *See Highview North Apartments v. Ramsey County*, 323 N.W.2d 65, 70 (Minn. 1982). "For an interference with the enjoyment of life or property to constitute a nuisance, it must be material and substantial." *Citizens for a Safe Grant v. Lone Oak Sportsmen's Club, Inc.*, 624 N.W.2d 796, 803 (Minn. App. 2001) (citation omitted).

TruGreen argues that Plaintiffs do "little more than assert the unsupported legal conclusion that TruGreen's unauthorized application of chemicals . . . materially and substantially obstructs and interferes" with Plaintiffs' and the alleged class' use and enjoyment of their lawns. TruGreen further argues that Plaintiffs' conclusory allegations "are inconsistent with their factual allegations that they *wanted* TruGreen's services, and at various points, contracted for them." Both arguments neglect the applicable standard of review. On a motion to dismiss, the reviewing court "accept[s] as true all factual allegations in a complaint, even broad ones." *Walsh*, 851 N.W.2d at 607. And the reviewing court "must consider only the facts alleged in the complaint, accepting those facts as true and must construe all reasonable

inferences in favor of the non-moving party." *Bodah*, 663 N.W.2d at 553. Plaintiffs' allegation that TruGreen's unauthorized application of chemicals materially and substantially obstructs and interferes with Plaintiffs' use and enjoyment of their lawns can express a legal conclusion but also has a non-legal, factual meaning. *See Walsh*, 851 N.W.2d at 607 n. 3 (noting that "serve" has a non-legal, factual meaning and that it was possible that complaint was invoking the non-legal factual dimension of "serve"). In other words, Plaintiffs' allegation is an assertion—an admittedly broad one—regarding a factual state of affairs, namely that TruGreen's practices materially interfered with Plaintiffs' use and enjoyment of their lawns. Given the applicable standard of review, that allegation sufficiently alleges that TruGreen materially interfered with Plaintiffs' use and enjoyment of their lawns by spraying chemicals on their lawns without authorization.

Furthermore, the fact that Plaintiffs at one point contracted for TruGreen's services does not demonstrate that later, unauthorized provision of those services cannot be a nuisance. *See Jedneak v. Minneapolis Gen. Elec. Co.*, 4 N.W.2d 326, 328 (Minn. 1942) ("Industrial nuisances are usually right things in wrong places, or improperly operated things."); *Brede v. Minnesota Crushed Stone Co.*, 173 N.W. 805, 808 (Minn. 1919) (holding business may be liable for a nuisance even though the nuisance is a product of the "ordinary incidents of such a business when properly conducted").

TruGreen also argues that Plaintiffs' nuisance claim fails because it does not allege a recurring or continuing nuisance. In support of this argument, TruGreen cites *Soo Line R. Co. v. Werner Enterprises*, 8 F.Supp.3d 1130, 1141 (D. Minn. 2014), which held that an actionable nuisance must be of a recurring or continuing nature, noting that Minnesota courts generally observe this requirement in dicta. *Soo Line*, however, is at most persuasive authority. *See Moreno v. Crookston Times Printing Co.*, 610 N.W.2d 321, 330 (Minn. 2000) ("While a federal court's interpretation of a lacuna in Minnesota law may be persuasive, we are not bound to follow it."). And the Minnesota cases relied upon by *Soo Line* to reach its holding do not persuade the Court that *Soo Line*'s categorical rule is a correct interpretation of Minnesota law.

Soo Line's first citation is *Dorman v. Ames*, 12 Minn. 4651, 455 (1867), which stated the following in the context of discussing the measure of damages for nuisance:

> The reason of this rule is, that every continuance of a nuisance, is a fresh nuisance, for which an action may be maintained, and if a plaintiff were permitted to recover prospective damages, it would be for a substantive cause of action arising subsequent to the commencement of his suit; in this it differs from trespass, which is a single act.

Dorman merely compared nuisance and trespass in dicta and did so in the context of a discussion about the measure of damages, not with respect to the prerequisites for maintaining a nuisance action. Furthermore, even if *Dorman* were discussing the prerequisites for maintaining a nuisance action, its emphasis on specific acts has been implicitly repudiated by later decisions of the Minnesota Supreme Court, which recognize that nuisance is defined in terms of the resultant harm rather than in terms of the conduct by which a defendant causes the harm. *See Highview North Apts.*, 323 N.W.2d at 70. This conceptualization of nuisance as a type of harm further

comports with the Minnesota Court of Appeals' distinction between nuisance and trespass, which emphasizes that each tort remedies a different type of property-right infringement. *See Wendinger v. Forest Farms, Inc.*, 662 N.W.2d 546, 550 (Minn. App. 2003) ("[T]he distinction now accepted is that trespass is an invasion of the plaintiff's right to exercise exclusive possession of the land and nuisance is an interference with the plaintiff's use and enjoyment of the land.").

Soo Line's second case citation is similarly unpersuasive authority for the proposition that a nuisance categorically must be recurring or continuous. In *Wendinger*, the court of appeals held that summary judgment was inappropriate when the "defendant intentionally maintains a condition that is injurious to health, indecent or offensive to the senses, or which obstructs the free use of property." *Wendinger*, 662 N.W.2d at 552. But *Wendinger's* statement was made in the context of the facts presented, where the nuisance was indisputably ongoing. *Id.* The court of appeals' statement was not an articulation of a rule that nuisance must be continuously maintained to be actionable; rather, it was holding that the particular nuisance in that case constituted an actionable claim in nuisance notwithstanding the lack of evidence showing that the defendant caused the nuisance harm by an independent wrongful act. *Id* (stating that "we believe that a plaintiff who presents evidence that the defendant intentionally maintains a condition that is injurious to health . . . states an actionable claim in nuisance."). In light of the issues presented in that case, *Wendinger*'s language does not support *Soo Line*'s categorical rule. *See Skelly Oil Co.*, 131 N.W.2d at 645 (stating that "language used in an opinion must be read in the light of the issues presented.").

The Court is also persuaded by comment g of the Restatement (Second) of Torts § 821F,[12] which specifically addresses and rejects a categorical requirement that a nuisance must be continuous or recurring to be actionable:

> *Duration or frequency of invasion*. It is often said by the courts and commentators that in order to constitute a nuisance the interference must continue or recur over some period of time. These statements usually are true for the particular facts or issue giving rise to them. Significant harm is necessary for a private nuisance or to a private action for a public nuisance and continuance or recurrence of the interference is often necessary to make the harm significant.
>
> . . .
>
> The decisions do not, however, support a categoric requirement of continuance or recurrence in all cases as an established rule of law. If the defendant's interference with the public right or with the use and enjoyment of land causes significant harm and his conduct is otherwise sufficient to subject him to liability for a nuisance, liability will result, however brief in duration the interference or the harm may be.

[12] Restatements, although not binding unless specifically adopted in Minnesota, can be persuasive. *See Williamson v. Guentzel*, 584 N.W.2d 20, 24 (Minn. App. 1998) ("Restatement of the law are persuasive authority only and are not binding unless specifically adopted in Minnesota by statute or case law.").

The Restatement's characterization of the state of the law is persuasive and comports with the broad language in Minnesota's statutory definition of nuisance, which defines nuisance as "*anything* which is injurious to health, or indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property." Minn. Stat. § 561.01. The fact that a defendant's interference with another's use and enjoyment of land occurred over a discrete period of time may speak to the significance of the harm, but it should not in and of itself categorically preclude liability if the other prerequisites for nuisance liability are met. Accordingly, the Court rejects the categorical rule urged by TruGreen.

In sum, TruGreen's arguments do not provide a basis for dismissing Plaintiffs' nuisance claim at the motion to dismiss stage.

Conclusion

For the foregoing reasons, TruGreen's motion to dismiss is granted with respect to Count V of Plaintiffs' Complaint. The motion is denied as to all other counts.

R.L.A.