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APPLE INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

THOMAS DAVIDSON, TODD CLEARY, ADAM BENELHACHEMI, MICHAEL PAJARO, JOHN BORZYMOWSKI, BROOKE CORBETT, TAYLOR BROWN, JUSTIN BAUER, HEIRLOOM ESTATE SERVICES, INC., KATHLEEN BAKER, MATT MUILENBURG, WILLIAM BON, and JASON PETTY, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

APPLE INC.,

Defendant.

Case No. 5:16-cv-04942-LHK

DEFENDANT APPLE INC.'S NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFFS' THIRD AMENDED CLASS ACTION COMPLAINT

Date: July 13, 2017
Time: 1:30 p.m
Dept.: Courtroom 8 – 4th Floor
Judge: Honorable Lucy H. Koh

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NOTICE OF MOTION AND MOTION TO DISMISS

TO PLAINTIFFS AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on July 13, 2017, at 1:30 p.m., or as soon thereafter as the matter may be heard, in the United States District Court, Northern District of California, San Jose Division, located at 280 South 1st Street, San Jose, CA 95113, Courtroom 8, before the Honorable Lucy H. Koh, Defendant Apple Inc. ("Apple") will and hereby does move to dismiss plaintiffs Thomas Davidson, Todd Cleary, Adam Benelhachemi, Michael Pajaro, John Borzymowski, Brooke Corbett, Taylor Brown, Justin Bauer, Heirloom Estate Services, Inc., Kathleen Baker, Matt Muilenburg, William Bon, and Jason Petty's (collectively, "Plaintiffs") Illinois Consumer Fraud and Deceptive Trade Practices Act (815 Ill. Comp. Stat. § 505) (Count 4), New Jersey Consumer Fraud Act (N.J. Stat. Ann. § 56:8-1) (Count 6), Florida Deceptive and Unfair Trade Practices Act (Fla. Stat. § 501.201, *et seq.*) (Count 7), Texas Deceptive Trade Practices Act (Tex. Bus. & Com. Code § 17.41, *et seq.*) (Count 9), Colorado Consumer Protection Act (Colo. Rev. Stat. § 6-1-105, *et seq.*) (Count 10), Washington Consumer Protection Act (Wash. Rev. Code § 19.86.010) (Count 14), Common Law Fraud (Count 15), Breach of Express Warranty (Count 18), Breach of Implied Warranty (Count 19), and Breach of Written Warranty under the Magnuson-Moss Warranty Act (15 U.S.C. § 2301, *et seq.*) (Count 20) claims (together the "Selected Claims") pursuant to Federal Rules of Civil Procedure 12(b)(1) for lack of standing and 12(b)(6) for failure to state a claim upon which relief can be granted.

This motion is based upon this Notice of Motion and Motion, the Memorandum of Points and Authorities in support thereof, the Request for Judicial Notice in Support of the Motion to Dismiss filed concurrently herewith, the Declaration of Tiffany Cheung in Support of the Motion to Dismiss filed concurrently herewith, all other pleadings and papers on file herewith, and such other argument and evidence as may be presented to the Court.

Dated: April 18, 2017

Respectfully submitted,

MORRISON & FOERSTER LLP
By: */s/ Arturo González*
Arturo J. González

Attorneys for Defendant
APPLE INC.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs' Selected Claims alleged in their Third Amended Class Action Complaint ("TACC") fail for the same reasons they did before. Despite the opportunity to replead, plaintiffs still do not allege the specific facts required to prove the required elements of any of their claims.

The Court dismissed the Fraud Claims[1] in plaintiffs' Second Amended Class Action Complaint ("SACC") because plaintiffs did not allege exposure to or reliance on any representation about the iPhone 6 or iPhone 6 Plus. In the TACC, plaintiffs offer identical or near-identical conclusory allegations that all or virtually all of them "reviewed" (and in one instance "relied on") the same representations: the Keynote presentation introducing the phones; two press releases; and three television commercials. But none of those alleged representations mentions the touchscreen, let alone touts its durability or reliability. Moreover, each of the alleged representations is either true (and plaintiffs offer no plausible allegation to the contrary), or subjective and non-actionable.

Further, notwithstanding plaintiffs' boilerplate allegations of near-uniform exposure to the representations, not a single named plaintiff offers any of the specifics required by Rule 9(b). Plaintiffs do not allege ***when*** or ***where*** any of them saw any of the alleged representations, nor do named plaintiffs allege ***how*** or ***why*** the alleged representations impacted their decision to purchase an iPhone 6 or 6 Plus. These same pleading failures also doom plaintiffs' omissions

[1] On November 30, 2016, the Court issued a Case Management Order indicating that the parties shall select and "litigate a total of ten causes of action in [Apple's] motion to dismiss." (ECF No. 41 at 1.) In the Order Granting Motion to Dismiss All 10 Claims with Leave to Amend, the Court ordered the parties to file an amended selection of claims designating one state's common law to apply for the selected common law claims. (Order ("Order") at 8, ECF No. 84.) On March 21, the parties filed their Amended Joint List of Causes of Action. (ECF No. 85.) Thus, the ten causes of action addressed in this motion to dismiss are: Illinois Consumer Fraud and Deceptive Trade Practices Act (815 Ill. Comp. Stat. § 505) (Count 4), New Jersey Consumer Fraud Act (N.J. Stat. Ann. § 56:8-1) (Count 6), Florida Deceptive and Unfair Trade Practices Act (Fla. Stat. § 501.201, *et seq.*) (Count 7), Texas Deceptive Trade Practices Act (Tex. Bus. & Com. Code § 17.41, *et seq.*) (Count 9), Colorado Consumer Protection Act (Colo. Rev. Stat. § 6-1-105, *et seq.*) (Count 10), Washington Consumer Protection Act (Wash. Rev. Code § 19.86.010) (Count 14), Common Law Fraud under Pennsylvania law (Count 15) (the "Fraud Claims"), Breach of Express Warranty and Breach of Implied Warranty under Illinois law (Counts 18 and 19), and Breach of Written Warranty under the Magnuson-Moss Warranty Act (15 U.S.C. § 2301, *et seq.*) (Count 20) (the "Warranty Claims," and together with the Fraud Claims, the "Selected Claims").

claims—Rule 9(b) requires more than these generic, conclusory allegations. Despite the benefit of a do-over, plaintiffs fail to allege a fraud claim under the laws of the Selected States.

Plaintiffs' TACC similarly fails to remedy the defects in the prior pleading of breach of express warranty. The Court granted plaintiffs leave to amend the warranty claims to allege a non-design based defect covered by Apple's "materials and workmanship" warranty, and plaintiffs have not even attempted to do so. Plaintiffs' breach of express warranty claim must be dismissed again for failure to allege a defect covered by Apple's Limited Warranty. This claim also again must be dismissed because alleged failures that arose beyond the one-year period are barred. The Court recognized that the terms of Apple's express warranty precluded plaintiffs' warranty claims, and plaintiffs have still not alleged any facts to avoid the fatal effect of these terms on their claims.

Plaintiffs' allegations of unconscionability are duplicative of arguments the Court has already rejected, and their selection of Illinois law does not change that result. Moreover, plaintiffs now admit that they all reviewed the warranty document included in the box with their new iPhones immediately after purchase, and they acknowledge the applicable 14-day return period. Having admitted that they received and reviewed the warranty, and having agreed to the warranty's terms by using, and not returning, their devices, plaintiffs cannot plausibly allege they were unaware of or surprised by the warranty's terms. Plaintiffs' failure to plausibly allege facts establishing unconscionability likewise is fatal to their implied warranty claims, because Apple expressly disclaimed all implied warranties.

The TACC demonstrates that plaintiffs cannot sufficiently plead their Fraud Claims or Warranty Claims. Accordingly, the TACC should be dismissed with prejudice.

II. FACTUAL BACKGROUND

A. Plaintiffs Identify No Representations Regarding the Touchscreen

Like the SACC, plaintiffs' TACC fails to point to a single misrepresentation with respect to the iPhone 6 or iPhone 6 Plus touchscreen. Ten plaintiffs allege that they "reviewed" Apple's September 9, 2014 Keynote Address regarding the iPhone 6 and iPhone 6 Plus (TACC ¶¶ 8, 11-19), seven plaintiffs allege that they "reviewed" an Apple Press Release dated September 9, 2014

announcing the release of the iPhone 6 and iPhone 6 Plus (*id.* ¶¶ 9, 11-14, 17, 19), and six plaintiffs allege that they "reviewed . . . three commercials regarding the iPhones" (*id.* ¶¶ 11-12, 14-15, 17-18). Finally, all 13 plaintiffs assert in only a single conclusory allegation that he or she "saw, and relied upon, Apple's press release issued in response to 'BendGate' in deciding" to purchase his or her iPhone (*id.* ¶¶ 8-10, 13-16, 18-20) or deciding not to return his or her device (*id.* ¶¶ 11-12, 17). None of these representations touts or even discusses the touchscreen.

B. Apple Offered a One-Year Limited Warranty and Expressly Disclaimed Any Implied Warranties

As this Court has recognized, Apple's iPhone 6 and iPhone 6 Plus came with a one-year Limited Warranty, which warrants "against defects in materials and workmanship" for a period of one year and expressly disclaims implied warranties. (Declaration of David R. Singh in Support of Apple Inc.'s Motion to Dismiss ("Singh Decl."), ¶ 3, ECF No. 54-1; Ex. A, ECF No. 54-2.)[2]

Plaintiffs admit that the iPhone 6 and 6 Plus boxes include a summary of the iPhones' warranty. (TACC ¶ 33.) All 13 named plaintiffs admit that they reviewed the documents contained in their iPhone boxes immediately after purchase. (*Id.* ¶¶ 8-20.) The in-the-box warranty summary referenced by plaintiffs begins:

> **Apple One-Year Limited Warranty Summary**
> Apple warrants the included hardware product and accessories against defects in materials and workmanship for one year from the date of original retail purchase. Apple does not warrant against normal wear and tear, nor damage caused by accident or abuse.

(Declaration of Tiffany Cheung in Support of Def. Apple Inc.'s Motion to Dismiss ("Cheung Decl."), ¶¶ 2-3, Exs. A, B.) The summary also states that a warranty claim is "[s]ubject to the full terms and detailed information on obtaining service available at www.apple.com/legal/warranty." (*Id.*)

Plaintiffs also now concede that they were given 14 days from purchase to return their devices. (TACC ¶¶ 36, 88.) The Limited Warranty provides for this return period if the

[2] In its March 14, 2017 Order, the Court granted Apple's request for judicial notice of Apple's One (1) Year Limited Warranty – iOS for Apple Branded Products ("Limited Warranty") because the SACC necessarily relies on the documents. (Order at 4 n.2.) The TACC also references the warranty, and all of the plaintiffs assert an express warranty claim under the Limited Warranty. (TACC ¶¶ 284-94.)

purchaser does not agree to the terms of the warranty. (Singh Decl. Ex. A at 1.)

III. LEGAL STANDARD

Under Federal Rule of Civil Procedure 12(b)(6), a motion to dismiss should be granted if the plaintiff is unable to articulate facts establishing a claim to relief which is "plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1022 (9th Cir. 2008). A pleading that offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555).

The complaint must allege facts which, when taken as true, raise more than a speculative right to relief. *Twombly*, 550 U.S. at 555. The facts must "nudge[] [the] claims across the line from conceivable to plausible." *Id*. at 570. The Court need not accept as true conclusory allegations or legal characterizations, nor need it accept unreasonable inferences or unwarranted deductions of fact. *See McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 810 (9th Cir. 1988); *Oestreicher v. Alienware Corp.*, 544 F. Supp. 2d 964, 968 (N.D. Cal. 2008), *aff'd*, 322 F. App'x 489 (9th Cir. 2009).

IV. ARGUMENT

A. Plaintiffs Lack Standing to Seek Injunctive Relief

Despite the additional opportunity to establish standing to pursue injunctive relief, plaintiffs' allegations still fall short. In the TACC, eight named plaintiffs[3] claim that they "intend to" or "may" participate in Apple's Multi-Touch Repair Program (the "Repair Program"). (TACC ¶¶ 8, 10-11, 14-17, 19.) However, the various caveats each plaintiff attaches to his or her potential participation in the program—each conditioned on a future contingency—guarantee that none is under a "real and immediate threat of repeated injury" as required to establish standing for Article III injunctive relief. *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) (quoting *O'Shea v. Littleton*, 414 U.S. 488, 496 (1974)). Plaintiffs cannot establish Article III standing to seek injunctive relief if their claims rest "upon contingent future events that may not

[3] Plaintiffs Cleary, Benelhachemi, Pajaro, Brown, Bauer, Heirloom, Baker, and Bon. (TACC ¶¶ 8, 10-11, 14-17, 19.)

occur as anticipated, or indeed may not occur at all." *Bova v. City of Medford*, 564 F.3d 1093, 1096 (9th Cir. 2009) (citation omitted). This is because "if the contingent events do not occur, the plaintiff likely will not have suffered an injury that is concrete and particularized enough to establish the first element of standing." *Id.*; *see also Gonzalez v. Comcast Corp.*, No. 10-cv-01010-LJO-BAM, 2012 WL 10621, at *16 (E.D. Cal. Jan. 3, 2012) (plaintiffs' claim that former customers may someday become future customers was "an attenuated interest" that was "entirely too speculative to confer any legitimate interest in injunctive relief").

Furthermore, of the eight plaintiffs who now claim a possible intention to participate in Apple's Repair Program, six condition their participation on future events that preclude them from pleading the requisite threat of concrete injury. Plaintiffs Cleary, Benelhachemi, Bauer, and Heirloom allege that they only intend to participate "if Apple indicates that the defect in his current iPhone is not present in the refurbished iPhone he will receive through the program." (TACC ¶¶ 8, 10, 15-16.) Plaintiff Pajaro claims that he "may participate" in the Repair Program "if this lawsuit is unsuccessful for the sole purpose of receiving a functional device to resell." (*Id.* ¶ 11.) Plaintiff Bon alleges he intends to participate "if the cost to participate is eliminated." (*Id.* ¶ 19.) Accordingly, by their own allegations, the contingencies identified by these six plaintiffs will ensure they are not exposed to the risk of a future defect and/or associated costs, and thus they fall short of establishing the likelihood of future injury required for Article III standing. *See Werdebaugh v. Blue Diamond Growers*, No. 12-CV-2724-LHK, 2014 WL 2191901, at *9 (N.D. Cal. May 23, 2014) (plaintiff lacked Article III standing to pursue injunctive relief because "there is no likelihood of future injury to Plaintiff that is redressable through injunctive relief").

The remaining two plaintiffs seeking injunctive relief, Brown and Baker, fail to establish standing for injunctive relief because their injunctive relief claims are thinly-disguised claims for monetary recovery. These plaintiffs claim that they intend to participate in the Repair Program and "intend[] to recoup any amounts paid under the program through this lawsuit."[4] (TACC ¶¶ 14, 17.) Courts in this jurisdiction have consistently held that claims that ultimately seek

[4] Plaintiffs Cleary, Benelhachemi, Bauer, and Heirloom also allege that they "intend[] to recoup any amounts paid under the program through this lawsuit." (TACC ¶¶ 8, 10, 15-16.)

monetary relief cannot support Article III injunctive relief standing. *See, e.g.*, *Lucas v. Breg, Inc.*, No. 15-cv-00258-BAS-NLS, 2016 WL 6125681, at *15 (S.D. Cal. Sept. 30, 2016). Plaintiffs fail to plead Article III standing to seek injunctive relief because their allegations regarding their intent to participate in the Repair Program are contingent on future events, rely on contingencies that eliminate their risk of future or ongoing harm, and/or convert their injunctive relief claims into monetary claims. Plaintiffs' demand for injunctive relief should be dismissed with prejudice.

B. Plaintiffs' Fraud Claims Fail As a Matter of law

1. Plaintiffs Once Again Fail to Satisfy Rule 9(b)'s Particularity Requirements

As this Court previously held in its Order dismissing plaintiffs' Fraud Claims, Rule 9(b) requires plaintiffs to provide the "who, what, when, where, and how" of any misrepresentations underlying their claims. *Cafasso v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1055 (9th Cir. 2011) (citation omitted). Critically, "plaintiff must set forth what is false or misleading about a statement, and why it is false." *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) (citation omitted). Conclusory allegations of fraud are not enough—plaintiffs must plead detailed and specific facts. *See Richardson v. Reliance Nat'l Indemn. Co.*, No. C 99-2952 CRB, 2000 WL 284211, at *4 (N.D. Cal. Mar. 9, 2000) ("Plaintiff may not simply set forth conclusory allegations of fraud punctuated by a handful of neutral facts." (quotations and citation omitted)). As set forth below, plaintiffs fall short of Rule 9(b)'s heightened standard because they fail to plead any actionable misrepresentation or omission.

a. Plaintiffs Again Fail to Plead an Actionable Misrepresentation or Omission

It is axiomatic that fraud requires some misrepresentation. Plaintiffs' failure to allege exposure to and reliance on any alleged misrepresentation in the SACC compelled the dismissal of all of their affirmative misrepresentation claims. In doing so, the Court held that plaintiffs failed to allege they were exposed to *any* representations relevant to the purported touchscreen defect, "let alone what those representations were, when they were made, and why they were false." (Order at 15:22-23.) Plaintiffs' failure to allege relevant and actionable misrepresentations persists in the TACC. Plaintiffs still point to ***not one*** representation—or even

a partial representation—about the touchscreen. Instead, in an attempt to avoid another dismissal of their claims, plaintiffs now purport to have "reviewed" (but in most cases not to have "relied on") a series of statements that make no reference to or representations about the touchscreen. Identifying representations unrelated to the touchscreen cannot support a claim for any misrepresentation or omission related to the alleged touchscreen defect.

(i) The September 9, 2014 Keynote

Ten plaintiffs allege that they "reviewed" Apple's Keynote Address at the Worldwide Developer Conference on September 9, 2014 announcing the release of the iPhone 6 and iPhone 6 Plus (the "September 9, 2014 Keynote").[5] (TACC ¶¶ 8, 11-19.) But each statement plaintiffs identify is unrelated to the iPhone 6 or iPhone 6 Plus touchscreen, and thus entirely irrelevant to plaintiffs' fraud claims about alleged touchscreen defects. Indeed, plaintiffs implicitly acknowledge these statements are irrelevant to their touchscreen claims by failing to allege that (1) any of these statements are false or misleading, or (2) any plaintiff was actually misled.

In any event, the statements plaintiffs identify in the September 9, 2014 Keynote do not support any allegation of fraud. Rather, they either are undisputedly true or are subjective statements that contain no actionable misrepresentations of material fact. Plaintiffs cannot plausibly claim that a statement in the September 9, 2014 Keynote regarding "the new Apple A8 chip that provides 'up to 25% faster CPU performance, [and] up to 50% faster graphics performance'" (*see* TACC ¶ 38) constitutes actionable fraud regarding the touchscreen. Not only is this statement completely irrelevant to the touchscreen, it is also factually accurate, and plaintiffs do not allege otherwise. The remaining statements plaintiffs identify in the September 9, 2014 Keynote are equally non-actionable because they are subjective descriptions relating to the quality of the iPhone 6 and 6 Plus. References to the iPhone 6 and iPhone 6 Plus as "without a doubt the best iPhones we've ever done," and "truly the most beautiful phone[s] you have ever seen" with a design that is "[i]ncredibly unique" (*id.*) cannot form the basis for fraud. These are classic non-actionable statements of unquantifiable opinion—not misrepresentations of material

[5] Plaintiffs Cleary, Pajaro, Borzymowski, Corbett, Brown, Bauer, Heirloom, Baker, Muilenburg, and Bon allege that they "reviewed" the September 9, 2014 Keynote. (TACC ¶¶ 8, 11-19.)

fact—that cannot support a claim for fraud under *any* of the laws of the Selected States.[6] Finally, a live demonstration by a third-party video game company with the presenter using the touchscreen is hardly an affirmative representation by Apple regarding the touchscreen.

(ii) The September 9, 2014 Press Release

Plaintiffs' next purported misrepresentation is an Apple press release announcing the iPhone 6 and iPhone 6 Plus, dated September 9, 2014 (the "September 9, 2014 Press Release"). Again, plaintiffs do not allege any of the statements in the September 9, 2014 Press Release are actually false or misleading, or that any plaintiff was in fact misled. Like the statements in the September 9, 2014 Keynote, these statements as a matter of law cannot support plaintiffs' affirmative misrepresentation or omission claims because the statements are immaterial to the alleged touchscreen defect, and do not refer even once to the touchscreen. As plaintiffs concede, while the September 9, 2014 Press Release does tout certain features of the iPhone 6 and iPhone 6 Plus, the touchscreen is not one of them. (TACC ¶ 40.) Instead, the statements plaintiffs identify refer to the "'innovative technologies' in the new iPhones," including their "all-new dramatically thin and seamless design" that will make the "most loved smartphone" "better in every way."

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[6] *See Muir v. Playtex Prods., LLC*, 983 F. Supp. 2d 980, 989 (N.D. Ill. 2013) (non-actionable misrepresentation "typically consists of 'subjective descriptions relating to quality,' such as 'high quality,' 'perfect,' and 'best'" (citation omitted)); *Saltzman v. Pella Corp.*, No. 06 C 4481, 2007 WL 844883, at *4 (N.D. Ill. Mar. 20, 2007) (statements that products were "durable," "manufactured to high quality standards" held puffery); *A.H. Lundberg Assoc., Inc. v. TSI, Inc.*, No. C14-1160JLR, 2014 WL 5365514, at *6 (W.D. Wash. Oct. 21, 2014) ("By contrast, an actionable misrepresentation of fact is 'quantifiable' and 'makes a claim as to the specific or absolute characteristics of the product.'" (citation omitted)); *Prudential Ins. Co. of Am. v. Jefferson Assocs., Ltd.*, 896 S.W.2d 156, 163 (Tex. 1995) (describing a good or service as "superb," "superfine," or "one of the finest" was mere puffing, not misrepresentation of material fact); *Mount Sinai Med. Ctr. of Greater Miami, Inc. v. Heidrick & Struggles, Inc.*, 188 F. App'x 966, 968-69 (11th Cir. 2006) (defendants' description of itself as "world's premier provider" was not a misrepresentation of material fact and could not be a basis for fraud); *Tatum v. Chrysler Grp. LLC*, No. 10-cv-4269 (DMC) (JAD), 2011 WL 1253847, at *4 (D.N.J. Mar. 28, 2011) ("advertisements" that "'regaled' consumers with 'the concept that the Journey is a reliable, durable car'" held puffery); *Rodio v. Smith*, 123 N.J. 345, 350 (1991) (slogan "[y]ou're in good hands" "is not a representation of fact," and therefore could not be a material representation of fact); *Koch v. Kaz USA, Inc.*, No. 09-cv-02976-LTB-BNB, 2011 WL 2610198, at *5 (D. Colo. July 1, 2011) ("I conclude that the use of statements 'Durable;' and 'Quality Construction for Long Last Performance,' viewed in context, likewise do not constitute unfair or deceptive trade practices as a matter of law."); *Castrol Inc. v. Pennzoil Co.*, 987 F.2d 939, 945 (3d Cir. 1993) ("Puffery is distinguishable from misdescriptions or false representations of specific characteristics of a product. As such, it is not actionable."); *Gidley v. Allstate Ins. Co.*, No. 09-3701, 2009 WL 4893567, at *4 (E.D. Pa. Dec. 17, 2009) ("A defendant's claim that amounts to mere puffery cannot establish a misrepresentation of a material fact.").

(*Id.*) These subjective statements are not representations of fact. Under the laws of all of the Selected States, even if these statements focused on or were related to the touchscreen (and they are not), these subjective opinions cannot support affirmative misrepresentation or omission claims. (*See* cases cited in n.6, above.)

(iii) The September 25, 2014 Statement

In the SACC, *none* of the 13 named plaintiffs alleged that they read or relied on Apple's September 25, 2014 statement (the "September 25, 2014 Statement") allegedly issued in response to reports that the iPhone 6 and iPhone 6 Plus bend. In the TACC, *all* plaintiffs allege in identical boilerplate that they read and relied on the statement. (TACC ¶¶ 8-20.) Plaintiffs, however, cannot establish that the September 25, 2014 Statement supports an actionable misrepresentation or omission claim about the alleged touchscreen defect; the statement does not mention the touchscreen. It does not state a single fact about the touchscreen, tout its quality or durability, or reference it at all. To state a claim for actionable misrepresentation under the laws of the Selected States, plaintiffs must identify the affirmative misrepresentation of material fact on which they relied.[7] That Apple released a statement allegedly relating to whether or not the iPhone 6 or iPhone 6 Plus bends does not state a claim for affirmative misrepresentation regarding the touchscreen. *See, e.g.*, *Deburro v. Apple, Inc.*, No. A-13-CA-784-SS, 2013 WL 5917665, at *5 (W.D. Tex. Oct. 31, 2013) (dismissing DTPA claim because "[t]he representations Plaintiffs do allege are either irrelevant, because they deal with aspects of the product not challenged in this suit (e.g., storage capacity), or are simple puffery (e.g., 'state of the art')").

(iv) Undated Commercial Advertisements

Finally, six plaintiffs claim that they "reviewed . . . three commercials regarding the

[7] *Lou Bachrodt Chevrolet, Inc. v. Savage*, 570 So. 2d 306, 308 (Fla. 4th Dist. Ct. App. 1990) (a plaintiff seeking to establish fraud in the inducement must prove, *inter alia*, "[a] misrepresentation of a material fact"); *Omni USA, Inc. v. Parker-Hannifin Corp.*, No. H-10-4728, 2012 WL 1038642, at *6 (S.D. Tex. Mar. 27, 2012) (same); *Reid v. Unilever U.S., Inc.*, 964 F. Supp. 2d 893, 908 (N.D. Ill. 2013) (same); *Nickerson v. Quaker Grp.*, No. A-6253-06T5, 2008 WL 2600720, at *9 (N.J. Super. July 3, 2008) (same); *Gidley*, 2009 WL 4893567, at *4 (same); *Sanchez v. Ford Motor Co.*, No. 13-cv-01924-RBJ, 2014 WL 2218278, at *5 (D. Colo. May 29, 2014) (same); *Robinson v. Avis Rent A Car Sys.*, 106 Wash. App. 104, 116 (2001) (same).

iPhones."[8] (TACC ¶¶ 11-12, 14-15, 17-18.) Plaintiffs do not allege when or where these commercials were released. Plaintiffs do not allege how or why the statements in the commercials are false or misleading, nor do they allege any plaintiff was actually misled by any of the three commercials. Nor could they. As plaintiffs' allegations make clear, the commercials they purport to have "reviewed" in no way make representations about the touchscreen. Plaintiffs seek to avoid this fatal flaw with the strained allegations that the first commercial shows two celebrities "navigating and discussing the iPhones' camera features, presentation software, health application, playing games, and shows them sending messages all using the touchscreen" and the second shows the same celebrities "navigating and discussing the features of the health application while using the touchscreen." (TACC ¶ 41.) These passing images of the iPhone 6 or iPhone 6 Plus do not come close to being affirmative misrepresentations regarding the touchscreen, much less regarding its durability. Plaintiffs do not even attempt to link the touchscreen to the third commercial, which simply shows a rotating image of the iPhone 6 or iPhone 6 Plus without commentary. (*Id.* ¶ 42.)

As with all of the other materials plaintiffs claim are "misrepresentations" of or show "omissions" regarding the iPhone 6 or 6 Plus touchscreen, *none of these commercials are actually about the touchscreen*. (*Id.* ¶ 41.) The commercials display the touchscreen—as any ad displaying the iPhone would inevitably do—but as plaintiffs concede, they do not make references to or representations about it. Instead, each addresses aspects of the iPhone 6 or 6 Plus completely immaterial to the alleged touchscreen defect: camera features, software, applications, and a silent display of the devices say nothing about the durability of the touchscreen. (*Id.* ¶¶ 41-42.)

b. Plaintiffs' Conclusory Allegations That They "Reviewed" or "Relied" on Certain Alleged Misrepresentations Are Insufficient Under Rule 9(b)

Even if plaintiffs had managed to allege a single actionable misrepresentation—and they have not—their Fraud Claims would still fail because plaintiffs have not sufficiently pled that they were exposed to or relied on any allegedly misleading statement. Each of the Fraud Claims

[8] Plaintiffs Pajaro, Borzymowski, Brown, Bauer, Baker, and Muilenburg claim they "reviewed . . . all three commercials." (TACC ¶¶ 11-12, 14-15, 17-18.)

requires that plaintiffs actually be exposed to and rely upon an alleged misrepresentation, or that the misrepresentation be a "proximate cause" of plaintiffs' damages.[9]

Even with the benefit of a second try, plaintiffs still fail to adequately plead exposure to any purported affirmative misrepresentation with sufficient particularity to satisfy Rule 9(b). Not a single named plaintiff explains *when* or *where* he or she saw any alleged misrepresentations. This is insufficient under Rule 9(b). *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009). Indeed, for the overwhelming majority of the alleged statements, plaintiffs do not even attempt to explain *how* the alleged misrepresentations are false. *T&M Solar & Air Conditioning, Inc. v. Lennox Int'l Inc.*, No. 14-cv-05318-JSC, 2015 WL 3638555, at *2 (N.D. Cal. June 11, 2015) (Under Rule 9(b), a plaintiff must "set forth what is false or misleading about a statement, and why it is false." (citation omitted)); *Herskowitz v. Apple Inc.*, 940 F. Supp. 2d 1131, 1147 (N.D. Cal. 2013) ("At the very least, to satisfy Rule 9(b)'s heightened pleading requirement, [plaintiff] must allege with more particularity why these statements are false.").

Plaintiffs' attempt to allege the specific circumstances of their reliance on Apple's purported misrepresentations also falls far short of Rule 9(b)'s requirements. Indeed, with respect to five of

[9] *See Avery v. State Farm Mut. Auto. Ins. Co.*, 216 Ill. 2d 100, 199 (2005) ("[I]n a cause of action for fraudulent misrepresentation brought under the [Illinois] Consumer Fraud Act, a plaintiff must prove that he or she was actually deceived by the misrepresentation in order to establish the element of proximate causation."); *Dist. 1199P Health & Welfare Plan v. Janssen, L.P.*, 784 F. Supp. 2d 508, 531 (D.N.J. 2011) (dismissing plaintiffs' NJCFA claim where plaintiffs failed to plead that they "received a misrepresentation of fact from Defendants and relied on that misrepresentation"); *Stevenson v. Mazda Motor of Am., Inc.*, No. 14-5250 (FLW) (DEA), 2015 WL 3487756, at *7 (D.N.J. June 2, 2015) ("[W]here a plaintiff makes an NJCFA claim based on a misrepresentation, the 'causal nexus' element may not be stated in 'general and conclusory terms.'" (citation omitted)); *Berenguer v. Warner-Lambert Co.*, No. 02-05242, 2003 WL 24299241, at *2 (Fla. Cir. Ct. July 31, 2003) (To state a cause of action under the Florida DUTPA, plaintiffs must plead "sufficient facts to show that [they have] been actually aggrieved by the unfair or deceptive act committed by the seller in the course of trade or commerce." (quoting *Shibata v. Lim*, 133 F. Supp. 2d 1311, 1317 (M.D. Fla. 2000))); *Brodsky v. Match.com, LLP*, No. 3-09-CV-2066-F-BD, 2010 WL 3895513, at *2 (N.D. Tex. Sept. 30, 2010) ("Reliance is also an essential element of . . . violations of the [Texas Deceptive Trade Practices Act]."); *Garcia v. Medved Chevrolet, Inc.*, 263 P.3d 92, 98 (Colo. 2011) ("Reliance often provides a key causal link between a consumer's injury and a defendant's deceptive practice [under the Colorado Consumer Protection Act]."); *Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*, 162 Wash. 2d 59, 84 (2007) (A plaintiff asserting causes of action under the Washington Consumer Protection Act must establish that, "but for the defendant's unfair or deceptive practice, the plaintiff would not have suffered an injury."); *Drapeau v. Joy Techs., Inc.*, 447 Pa. Super. 560, 574 (1996) ("In order to state a cause of action for common law fraud, plaintiff/appellant is required to establish he justifiably relied on the omission or misrepresentation.").

the six alleged misrepresentations, plaintiffs do not even attempt to allege reliance at all. As for the sole remaining representation, plaintiffs rely only on a single, conclusory, and unsupported assertion of reliance. In the SACC, *not a single plaintiff* alleged that he or she saw or relied on the September 25, 2014 Statement. Now, in the TACC, *every plaintiff* repeats the same identical allegation that he or she "saw, and relied upon, Apple's press release issued in response to 'BendGate' in deciding" to purchase his or her iPhone 6 or iPhone 6 Plus (TACC ¶¶ 8-10, 13-16, 18-20) or deciding not to return his or her device (*id.* ¶¶ 11-12, 17). Plaintiffs' rote repetition of the same conclusory allegation is insufficient under Rule 9(b).[10] *See Herskowitz*, 940 F. Supp. 2d at 1148 (Conclusory allegation that plaintiff "did reasonably rely on those misrepresentations . . . is not sufficient, in and of itself, to satisfy the heightened requirements of Rule 9(b)."). Because plaintiffs rely only on a single unsupported allegation, they fail to explain *how* or *why* each plaintiff justifiably relied on the alleged misrepresentations. *Wayne Merritt Motor Co. v. N.H. Ins. Co.*, No. 11-CV-01762-LHK, 2011 WL 5025142, at *12 (N.D. Cal. Oct. 21, 2011) (plaintiff must plead with particularity how he relied on a misrepresentation, and why that reliance was reasonable). Plaintiffs thus allege no facts to show *where*, *when*, *why*, or *how* they relied. Plaintiffs simply cannot establish reliance on any alleged affirmative misrepresentation, much less with the specificity required by Rule 9(b). Plaintiffs' failure to allege the specifics—the "when, where, why, and how" of their exposure to and reliance on the alleged statements—similarly dooms their omissions claims. Plaintiffs allege nothing to explain why their purported reliance on alleged representations that were unrelated to the iPhone 6 or iPhone 6 Plus touchscreen could be the basis for an omissions claim regarding the touchscreen.

2. Plaintiffs' Pennsylvania Common Law Fraud Claim (Count 15) Also Fails Because Apple Owed No Duty to Disclose the Alleged Defect, and the Claim Is Barred by the Economic Loss Doctrine

Under Pennsylvania law, to state a common law fraud omissions claim, plaintiffs must allege that Apple had a duty to disclose the alleged touchscreen issue. *Slippery Rock Area Sch. Dist. v. Tremco, Inc.*, No. 15-1030, 2016 WL 3198122, at *8 (W.D. Pa. June 9, 2016) ("With

[10] Indeed, such conclusory and repetitive allegations cannot even meet Rule 8's requirements, let alone Rule 9(b)'s far stricter requirements. *Iqbal*, 556 U.S. at 679.

respect to an omission, a plaintiff must also prove the defendant had a duty to speak," which arises only if the parties have a fiduciary or confidential relationship.). Plaintiffs have not alleged a fiduciary or confidential relationship with Apple, nor could they. *See Jeter v. Brown & Williamson Tobacco Corp.*, 113 F. App'x 465, 469 (3d Cir. 2004) (finding no confidential or fiduciary relationship existed between product manufacturer and consumer). Where there is no such relationship, a product manufacturer has no duty to disclose an alleged defect that arises after the express warranty elapses unless it is a safety-related defect. *Zwiercan v. Gen. Motors Corp.*, No. 3235, 2003 WL 1848571, at *2 (Pa. Com. Pl. Mar. 18, 2003) (limiting duty to disclose an omission to "serious and life threatening latent defects"). Because almost all of plaintiffs' purported issues with their iPhone 6 or 6 Plus have arisen post-warranty, and because none allege a safety-related defect with their device, plaintiffs cannot state a claim for common law fraud based on a purported "omission."

Plaintiffs' common law fraud claim is also separately and independently barred by Pennsylvania's economic loss doctrine, which "prohibits plaintiffs from recovering in tort economic losses to which their entitlement flows only from a contract." *Duquesne Light Co. v. Westinghouse Elec. Corp.*, 66 F.3d 604, 618 (3d Cir. 1995). Where a "plaintiff's only alleged damage is a diminution in the value of a product plaintiff has purchased, Pennsylvania law says that plaintiff's redress comes from the law of contract, not the law of tort." *Martin v. Ford Motor Co.*, 765 F. Supp. 2d 673, 684 (E.D. Pa. 2011) (citation omitted). Plaintiffs do not allege any personal injury or damage to other property (other than the diminution in value of their iPhones). Plaintiffs' damages flow exclusively from an alleged economic loss from the purchase of their iPhone 6 or iPhone 6 Plus. (TACC ¶ 271.) The economic loss rule applies in precisely such circumstances. *Werwinski v. Ford Motor Co.*, 286 F.3d 661, 681 (3d Cir. 2002) ("[T]he district court correctly applied the economic loss doctrine to appellants' fraudulent concealment claims" related to defective consumer products.); *In re Takata Airbag Prods. Liab. Litig.*, No. 14-24009-CV, 2016 WL 5848843, at *6 (S.D. Fla. Sept. 21, 2016) ("Pennsylvania's economic loss rule bars [Plaintiffs'] claims for fraudulent concealment."); *Martin*, 765 F. Supp. 2d at 684 (dismissing plaintiffs' common law fraud claim because "the economic loss doctrine applies to bar tort claims

for purely economic loss even where plaintiff alleges an intentional tort such as fraud, if the misrepresentation relates to the quality of the good sold").

3. Plaintiffs' New Jersey Consumer Fraud Act Claim (Count 6) Fails for the Additional Reason That Apple Owed No Duty to Disclose an Alleged Defect Manifesting Outside the Warranty Period

Plaintiffs' New Jersey Consumer Fraud Act claim fails for the additional reason that plaintiffs have failed to allege a duty to disclose the purported touchscreen issue. The sole New Jersey plaintiff, Michael Pajaro, alleges he purchased his iPhone 6 Plus on September 25, 2014, and claims that the alleged touchscreen issue manifested ten months *after* his warranty expired, in July 2016. This time around, Pajaro adds the conclusory allegation that Apple had a "duty to disclose" (TACC ¶¶ 187, 190), but offers no facts whatsoever to explain *how* or *why* any such duty arose. This is insufficient as a matter of New Jersey law, which "will not imply a duty to disclose, unless such disclosure is necessary to make a previous statement true or the parties share a 'special relationship.'" *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1185 (3d Cir. 1993) (citation omitted). Plaintiffs have failed to allege either. Plaintiffs have not offered a whole or partial representation by Apple touting or even specifically referring to the iPhone 6 or 6 Plus touchscreen, let alone a partial statement that would create a duty to disclose. Nor do plaintiffs allege a special relationship between Pajaro and Apple. Plaintiffs cannot allege such a relationship, as New Jersey has held that none exists between individual consumers and manufacturers. *See Majdipour v. Jaguar Land Rover N. Am., LLC*, No. 12-07849 (WHW)(CLW), 2015 WL 1270958, at *8 (D.N.J. Mar. 18, 2015).

The fact that Pajaro's alleged touchscreen issue manifested ten months *after* his warranty expired further dooms plaintiffs' New Jersey claim. New Jersey courts have expressly held that a defendant is under no duty to disclose a latent defect that occurs outside the warranty period, unless at the time of sale, Apple "*knew with certainty* that the product at issue or one of its components *would* fail." *Alban v. BMW of N. Am.*, No. 09-5398 (DRD), 2010 WL 3636253, at *10 (D.N.J. Sept. 8, 2010). Plaintiffs cannot clear this hurdle. Instead, plaintiffs rely on complaints made on Apple's website about the alleged touchscreen defect by a single individual a few days before Pajaro's September 25, 2014 purchase (TACC ¶ 65), and speculate without a single

supporting fact that Apple's pre-release testing "should have alerted it" to the issue (*id.* ¶ 77). Pure speculation and one individual's posted complaints fall far short of the requisite certainty, and require dismissal of plaintiffs' New Jersey fraud claim. *Arcand v. Brother Int'l Corp.*, 673 F. Supp. 2d 282, 297 (D.N.J. 2009) ("Obviously, there can be no fraud, or reliance for that matter, if the defendant was under no obligation to disclose the information in the first place.").

C. Plaintiffs' Warranty Claims Fail As a Matter of Law

Plaintiffs have failed to remedy the fatal flaws in their express and implied warranty claims as well. As in their previous complaint, plaintiffs' express warranty claims still do not allege a manufacturing defect that is covered by Apple's "materials and workmanship" warranty. These claims independently fail to the extent that plaintiffs allege issues that arose after the expiration of the warranty period, and because plaintiffs do not allege they complied with the warranty's terms. Plaintiffs also cannot allege facts showing that Apple's express warranty is unconscionable under Illinois law. Plaintiffs' implied warranty claims once again must be dismissed because Apple properly disclaimed implied warranties, and, in any event, limited any implied warranties not disclaimed to one year. Finally, plaintiffs' Magnuson-Moss Warranty Act claim fails because their underlying Illinois state warranty claims fail.

1. Plaintiffs' Express Warranty Claims Fail (Count 18)

"To state a breach of express warranty claim, a plaintiff must allege the terms of the warranty, the failure of some warranted part, a demand upon the defendant to perform under the warranty's terms, a failure by the defendant to do so, compliance with the terms of the warranty by the plaintiff, and damages measured by the terms of the warranty." *Disher v. Tamko Bldg. Prods., Inc.*, No. 14-cv-740-SMY-SCW, 2015 WL 4609980, at *3 (S.D. Ill. July 31, 2015) (citation omitted). "Under Illinois law, because express warranties are contractual in nature, the language of the warranty itself is what controls and dictates the obligations and rights of the various parties." *Publ'ns Int'l Ltd. v. Mindtree Ltd.*, No. 13 C 05532, 2014 WL 3687316, at *3 (N.D. Ill. July 24, 2014) (citation omitted).

a. Plaintiffs Still Do Not Allege a Manufacturing Defect Covered by Apple's Warranty

The Court found that plaintiffs' SACC, "at bottom, alleges a defect in Defendant's design of the iPhone 6 and 6 Plus." (Order at 21:3-4.) The Court granted plaintiffs another opportunity to allege a non-design based defect (*id*. at 22:7-10), but plaintiffs have failed to do so. Even under plaintiffs' selection of Illinois law, their express warranty claims must be dismissed again because they cannot allege a manufacturing defect covered by Apple's express warranty.

"Under Illinois law, to prove that Defendant breached the Limited Warranty, the Plaintiff must first show that the [product] had a defect that is covered by the warranty." *Voelker v. Porsche Cars N. Am.*, No. 02 C 4798, 2004 WL 2211603, at *5 (N.D. Ill. Sept. 29, 2004). Plaintiffs still allege a design defect that is not covered by Apple's "materials and workmanship" warranty. A plaintiff who asserts a design defect fails to state a claim for breach of an express warranty that covers "materials and workmanship." *See Voelker v. Porsche Cars N. Am., Inc.*, 353 F.3d 516, 520, 527 (7th Cir. 2003) (dismissing a claim for breach of express warranty under Illinois law because the warranty at issue covered only "defect[s] in material and workmanship," not plaintiffs' alleged design defect).

Under Illinois law, "[a] manufacturing defect occurs when one unit in a product line is defective, whereas a design defect occurs when the specific unit conforms to the intended design but the intended design itself renders the product unreasonably dangerous. . . . Generally speaking, manufacturing defects result from qualities of a product not intended by the manufacturer." *Cappellano v. Wright Med. Grp., Inc.*, 838 F. Supp. 2d 816, 825-26 (C.D. Ill. 2012). The scant additional details plaintiffs have added to their TACC only confirm that plaintiffs allege solely a design defect. Plaintiffs' allegations that "the decreased strength and durability in the external casing causes the soldering on the touch IC chips to fail" (TACC ¶ 55) constitute an alleged design defect, just as in the SACC. Paragraphs 59 to 62 of the TACC continue to allege that the iPhone 6 and iPhone 6 Plus should have been designed differently. Nowhere do plaintiffs allege that the iPhone 6 or 6 Plus deviated from Apple's intended design. *Cappellano*, 838 F. Supp. 2d at 826 (Plaintiff failed to establish a manufacturing defect where it

did "not come forward with any evidence that the hip prosthesis deviated in any way from Defendants' intended design.").

Plaintiffs also have not narrowed their putative class. (*See* TACC ¶ 128.) As the Court recognized, the fact that plaintiffs seek to represent a class of *all* purchasers of the iPhone 6 and 6 Plus "suggests that Plaintiffs are alleging an inherent defect in the iPhone's design." (Order at 21:23-24.) Because plaintiffs have failed to add *any* allegations regarding a non-design based defect, they have failed to cure the deficiencies in the SACC. Plaintiffs do not allege any defect covered by Apple's Limited Warranty and fail to state a claim for breach of express warranty.

b. The One-Year Warranty Period Bars Claims for Alleged Issues That Arose After the Warranty Expired

"Illinois law holds that express warranties of limited duration cover only defects that become apparent during the warranty period." *Evitts v. DaimlerChrysler Motors Corp.*, 359 Ill. App. 3d 504, 511 (2005); *see also Tokar v. Crestwood Imports, Inc.*, 177 Ill. App. 3d 422, 432 (1988) ("[P]laintiff cannot base an action for breach of express . . . warrant[y] limited to one year after purchase on defects manifesting themselves after that period."). This is true even if the plaintiff alleges a "latent defect[]." *See id*. at 431 (concluding that "plaintiff could not recover for allegedly latent defects in his auto which manifested themselves after Subaru's warranty period").

The Court previously dismissed plaintiffs' breach of express warranty claim for the independent reason that for all but two plaintiffs, their alleged touchscreen issues arose outside of the one-year Limited Warranty. (Order at 25.) Plaintiffs' TACC does not change that fact. Plaintiffs have added dates of purchase and dates of the alleged manifestation of issues for plaintiffs Muilenburg and Bon, but like most of the other plaintiffs, both of their alleged issues arose after the one-year warranty period had expired.[11] (TACC ¶¶ 18, 19.)

[11] With respect to the two plaintiffs Benelhachemi and Bauer, their allegations nonetheless fail to establish a breach of express warranty. With respect to Benelhachemi, Apple satisfied its warranty obligations. (*See infra* n.12.) As for Bauer, Bauer's allegations *suggest*—but do not specifically allege—that he may have contacted Apple about an alleged touchscreen issue within the warranty period. Bauer alleges that he contacted Apple "in or about November 2015," but does not say why he contacted Apple at that time. In a separate sentence, he alleges, "After requesting that Apple fix the Touchscreen Defect, Apple informed Mr. Bauer that Apple could not fix his iPhone . . . ." (TACC ¶ 15.) He does not allege when Apple informed him that it could not fix his iPhone. Particularly given that other plaintiffs specifically allege the dates or months

Plaintiffs' labeling of the alleged touchscreen issue as a "latent defect[]" (*id.* ¶ 89) cannot change the fact that their alleged issues arose *after* the expiration of Apple's express warranty. Illinois law is clear that a plaintiff cannot recover for even allegedly latent defects manifesting outside the warranty period. *See Tokar*, 177 Ill. App. 3d at 432. "To allow a customer to seek damages for breach of an express warranty beyond the limits specified in that warranty would in effect compel the manufacturer to insure all latent defects for the entire life of the product and would place a burden on the manufacturer for which it did not contract." *Evitts*, 359 Ill. App. 3d at 511; *see also Karpowicz v. Gen. Motors Corp.*, No. 97 C 1390, 1998 WL 142417, at *4 (N.D. Ill. Mar. 26, 1998) ("Case law uniformly holds that time-limited warranties do not protect buyers against defects that existed before but are not discovered until after the expiration of the warranty period.").

Plaintiffs' TACC makes the new argument that Apple "prevented purchasers from making warranty claims to Apple during the period of the limited warranty" by issuing an alleged misrepresentation in the September 25, 2014 Statement. (TACC ¶ 89.) This argument overlooks the critical fact that the majority of the plaintiffs, by their own allegations, did not experience a failure of their iPhone within the warranty period. Without a "failure of some warranted part," they did not have a warranty claim to make. *Disher*, 2015 WL 4609980, at *3. Apple could not have "prevented" plaintiffs from making a claim they did not have. Moreover, two of the plaintiffs, Benelhachemi and Bauer, in fact claim that they *did* make warranty claims within the warranty period, undermining any argument that Apple "prevented" plaintiffs from making claims. (TACC ¶¶ 10, 15.)

Plaintiffs' breach of express warranty claims based on alleged issues that arose after the expiration of the one-year warranty must be dismissed.[12]

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in which they made a warranty claim that was denied, Bauer's evasive allegations cannot pass muster.

[12] Even though plaintiff Benelhachemi alleges his issue first arose within a year, he exercised his claim under the Limited Warranty and received a replacement phone from Apple. (TACC ¶ 10.) Apple thus satisfied its obligation under the warranty. The replacement phone's warranty period was either the remaining period of the one-year warranty on the original device or 90 days, whichever was longer. (*See* Singh Decl. Ex. A at 2.) Plaintiffs' allegation in the TACC ¶ 125 is therefore misleading. When Benelhachemi attempted to make a warranty claim on his replacement phone, it was outside the warranty period. (TACC ¶ 10.)

c. Plaintiffs Fail to Allege That Apple's One-Year Limited Warranty Is Unconscionable

Plaintiffs again attempt to avoid the terms of the express warranty by alleging that it is unconscionable. (TACC ¶¶ 106-18.) To support this contention in the SACC, plaintiffs alleged that the terms are non-negotiable, that consumers expect a smartphone to last two years, and that Apple concealed the alleged touchscreen defect. Plaintiffs also argued in opposition to Apple's motion to dismiss, though they did not allege, that the warranty was only provided after purchase. The Court found that these allegations and arguments were insufficient to establish that Apple's warranty was unconscionable. The TACC fails to remedy this defect. Plaintiffs now all concede that they read the warranty in the box and were aware that they could return the product if they did not agree to the warranty. Plaintiffs' sole new argument appears to be that they were deterred from returning their devices within the return period because of their reliance on Apple's September 25, 2014 Statement. This argument is meritless. The return right allows consumers the opportunity to consider the warranty's terms and return the product if they do not agree to these terms; the September 25, 2014 Statement has nothing to do with the terms of the warranty.

In Illinois, "[a] finding of unconscionability may be based on either procedural or substantive unconscionability, or a combination of both." *Kinkel v. Cingular Wireless LLC*, 223 Ill. 2d 1, 21 (2006). The Court previously found that plaintiffs failed to plead either substantive or procedural unconscionability in the SACC. (Order at 23-25.) Plaintiffs still fail to plead either prong of unconscionability in the TACC.

(i) Plaintiffs Fail to Allege Procedural Unconscionability

"Procedural unconscionability refers to both a situation where a term is so difficult for a plaintiff to find or understand that he cannot have been aware he was agreeing to it and also to a plaintiff's lack of bargaining power or lack of meaningful choice." *Darne v. Ford Motor Co.*, No. 13 C 03594, 2015 WL 9259455, at *7 (N.D. Ill. Dec. 18, 2015).

Plaintiffs allege that Apple's Limited Warranty is unconscionable because "[c]onsumers did not have the ability to negotiate the terms or length of the express warranty." (TACC ¶ 118.) But "Illinois law does not void contracts where parties have unequal bargaining power, even if a

contract is a so-called 'take-it-or-leave-it' deal . . . ." *Koveleskie v. SBC Capital Markets, Inc.*, 167 F.3d 361, 367 (7th Cir. 1999). Plaintiffs never allege that the Limited Warranty's terms were "so difficult . . . to find or understand" that they were not aware they were agreeing to them. *Darne*, 2015 WL 9259455, at *7. Plaintiffs also cannot allege that they lacked meaningful choice. Plaintiffs had the options of purchasing a smartphone from a third party or purchasing an extended service plan to extend the duration of the one-year warranty. Such choices defeat any claim of procedural unconscionability. *See id*. at *8 ("If the plaintiffs wanted additional coverage beyond the 'shorter period' of the warranty, they had the option to purchase an extended warranty; this provided the meaningful choice that is unavailable in a procedurally unconscionable contract."); *id*. ("no procedural unconscionability where plaintiff 'was presented with a meaningful choice, not just the option of purchasing a different vehicle from a different manufacturer, but also the option of purchasing a different warranty with an extended durational limit from Ford'" (quoting *Smith v. Ford Motor Co.*, 462 F. App'x 660, 663-64 (9th Cir. 2011))).

Plaintiffs also had the option of returning their devices within 14 days if they did not agree to the terms of the warranty. The Limited Warranty provides, in all capital letters at the top of the first page: "IF YOU DO NOT AGREE TO THE TERMS OF THE WARRANTY, DO NOT USE THE PRODUCT AND RETURN IT WITHIN THE RETURN PERIOD STATED IN APPLE'S RETURN POLICY." (Singh Decl. Ex. A at 1.) Plaintiffs themselves acknowledge the return period. (TACC ¶ 36.) Illinois law will enforce contract terms provided after purchase as long as the customer had an opportunity to read and reject them by returning the product. *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1150 (7th Cir. 1997) ("[A] vendor may propose that a contract of sale be formed, not in the store (or over the phone) with the payment of money or a general 'send me the product,' but after the customer has had a chance to inspect both the item and the terms."). In *Hill*, the Seventh Circuit enforced an arbitration clause in a statement of terms included inside the box with a computer where the statement said the terms governed unless the customer returned the computer within 30 days. *Id*. at 1148. Because the plaintiffs kept their computer beyond the return period, the court found they accepted the terms, reasoning that "[p]ractical considerations support allowing vendors to enclose the full legal terms with their

products." *Id*. at 1149, 1150. Plaintiffs all admit they reviewed the in-the-box warranty terms immediately following their purchases; there is no procedural unconscionability in plaintiffs' acceptance of the warranty terms by choosing to keep their devices beyond the return period. *See Bess v. DirecTV, Inc.*, 381 Ill. App. 3d 229, 237-39 (2008) (satellite TV subscriber bound by terms not received until after purchase because agreement permitted customer to cancel service if she did not accept terms); *Crawford v. Talk Am., Inc.*, No. 05-CV-0180-DRH, 2005 WL 2465909, at *5 (S.D. Ill. Oct. 6, 2005) ("A vendor, as master of the offer, may invite acceptance by conduct, and may propose limitations on the kind of conduct that constitutes acceptance. A buyer may accept by performing the acts the vendor proposes to treat as acceptance." (quoting *ProCD v. Zeidenberg*, 86 F.3d 1447, 1452 (7th Cir. 1996))).

Moreover, as in the SACC, plaintiffs never allege that they did not receive pre-sale notice of the warranty or that they could not access it online prior to or at the time of their purchase. (Order at 23.) One of the plaintiffs, Benelhachemi, exercised his rights under the express warranty, demonstrating that he was aware of the warranty and its terms. (TACC ¶ 10 (alleging that Mr. Benelhachemi contacted Apple and received a replacement iPhone 6 Plus).) A party who accepts the benefits of a contract cannot deny its validity. *See In re Estate of Boyar*, 2013 IL 113655, ¶ 40 (2013) ("[T]here is a general principle of equity which holds that once one accepts some benefit, one cannot then challenge the validity of the thing by which the benefit was conferred.").

Plaintiffs now appear to allege that they did not return their iPhones within the return period "in reliance on" Apple's September 25, 2014 Statement. (TACC ¶ 88.) This argument misses the point. Apple's Limited Warranty expressly provides for a return if the consumer does not agree to "*the terms of the warranty*." (Singh Decl. Ex. A at 1 (emphasis added).) The point of the return right is that purchasers can return their device if they do not agree to the warranty's terms. The review and return provision says nothing about whether the product will or may fail at some later point. Plaintiffs admit they reviewed the one-year warranty's terms and kept their devices. Plaintiffs do not, and cannot, allege that their review of the September 25, 2014 Statement in any

way affected their ability to understand the terms of Apple's Limited Warranty. Plaintiffs are bound by the terms of the warranty. *Hill*, 105 F.3d 1147.

(ii) Plaintiffs Fail to Allege Substantive Unconscionability

Under Illinois law, substantive unconscionability "examines the relative fairness of the obligations assumed. . . . Indicative of substantive unconscionability are contract terms so one-sided as to oppress or unfairly surprise an innocent party, an overall imbalance in the obligations and rights imposed by the bargain, and significant cost-price disparity." *Jackson v. Payday Fin., LLC*, 764 F.3d 765, 778 (7th Cir. 2014) (citation omitted). As in the SACC, plaintiffs allege unconscionability of the one-year term. The Court found that plaintiffs failed to show the one-year duration created substantive unconscionability. The TACC adds no allegations that would alter that conclusion.

In Illinois, as is in California, a durational limit on a warranty is not, by itself, unconscionable. *Darne*, 2015 WL 9259455, at *7 ("Illinois . . . enforce[s] durational limits in express warranties."). Like the SACC, the TACC alleges that consumers expect the iPhone to "remain operable for at least two years." (TACC ¶ 114.) Plaintiffs now allege various new reasons why consumers have this expectation. (*Id.* ¶¶ 115-17.) These arguments are unavailing. The contractual terms of the Limited Warranty govern, *Mindtree Ltd.*, 2014 WL 3687316, at *3, and consumer expectations do not. Illinois courts have recognized that "the rules of warranty serve to limit the potentially far-reaching consequences that might otherwise result from imposing tort liability for disappointed commercial or consumer expectations." *2314 Lincoln Park W. Condo. Ass'n v. Mann, Gin, Ebel & Frazier, Ltd.*, 136 Ill. 2d 302, 308 (1990) (citing *Moorman Mfg. Co. v. Nat'l Tank Co.*, 91 Ill. 2d 69, 78-80 (1982)). In any event, plaintiffs' allegations regarding consumer expectations are unpersuasive. Third-party financing plans and buy-back options offered by carriers cannot negate the terms of the express warranty offered by Apple and accepted by plaintiffs. It is also not clear how an allegation that only 25% of consumers purchased smartphones with financing plans could establish the expectations of all purchasers.[13]

[13] In addition, Apple's European warranty term is irrelevant, particularly as plaintiffs have not alleged that they were aware of that warranty term.

At bottom, plaintiffs' allegations are a misplaced attempt to avoid the terms of Apple's express written warranty, which all plaintiffs admit they received and reviewed. Plaintiffs' allegations about the duration of cellular telephone service plans or financing options cannot change the clearly stated one-year warranty that has always applied to Apple's iPhones.

Moreover, plaintiffs allege no factual allegations that the duration of Apple's Limited Warranty itself is "so one-sided as to oppress or unfairly surprise." *Jackson*, 764 F.3d at 778 (citation omitted). *See Darne*, 2015 WL 9259455, at *8 ("As to substantive unconscionability, the Amended Complaint does not include any facts supporting that the warranty is inordinately one-sided in [Ford's] favor. . . . There are no factual allegations that the time period or mile duration was unreasonably short, other than the plaintiffs' conclusory assertion [that] Ford knew that the [engine] was defective and would fail repeatedly beyond the warranty period." (quotations and citations omitted)). Indeed, as in the SACC, plaintiffs' allegations in the TACC regarding Apple's alleged "conceal[ment of] the Touchscreen Defect" cannot create substantive unconscionability as a matter of law. (TACC ¶ 118.) *See Schiesser v. Ford Motor Co.*, No. 16-cv-00730, 2016 WL 6395457, at *3 (N.D. Ill. Oct. 28, 2016) (three-year warranty provision not unconscionable despite allegations that Ford "had knowledge of the Defect since at least 2011 based on customer complaints posted on a message Board on the Ford website" but "never notified Plaintiff of the Defect"); *Darne*, 2015 WL 9259455, at *8 (five-year, 100,000-mile warranty not unconscionable despite plaintiffs' allegations that Ford knew engine was defective).

Plaintiffs have added a new allegation that they "were all surprised to learn that Apple is using the terms of the express warranty to deny warranty claims related to the Touchscreen Defect." (TACC ¶ 108.) Plaintiffs cannot plausibly allege they were "surprised" by the one-year term of Apple's Limited Warranty when they *all* allege that they reviewed the documents contained in their iPhone boxes immediately after purchase (*id.* ¶¶ 8-20) and that the box included an insert with the bolded words "**Apple One-Year Limited Warranty Summary**" (Cheung Decl. ¶¶ 2-3, Exs. A, B). Plaintiffs cannot plausibly argue that they were unaware of, and therefore surprised by, the warranty.

d. Plaintiffs' Express Warranty Claims Fail for the Additional Reason That Plaintiffs Do Not Plead Compliance with the Warranty

To establish a claim for Illinois breach of express warranty, plaintiffs must allege compliance with the terms of the warranty. *Disher*, 2015 WL 4609980, at *3. As in the SACC, plaintiffs fail to allege that their alleged touchscreen issues arose when the iPhone was "used normally in accordance with Apple's published guidelines." (*See* Singh Decl. Ex. A at 1.) This is a requirement to be covered by Apple's Limited Warranty. For this additional reason, plaintiffs fail to plead a breach of express warranty under Illinois law.

2. Plaintiffs' Implied Warranty Claims Fail (Count 19)

Plaintiffs' implied warranty claims fail because Apple expressly disclaimed all implied warranties. "Illinois law allows a party to disclaim the implied warranty of merchantability in writing if the disclaimer is conspicuous and . . . mentions the term 'merchantability . . . .'" *Semitekol v. Monaco Coach Corp.*, 582 F. Supp. 2d 1009, 1026 (N.D. Ill. 2008). Applying the same standard under California law, the Court found that Apple's disclaimer of implied warranties was sufficiently conspicuous. (Order at 26-28.)

Apple's warranty mentions the warranty of merchantability and is conspicuous. As the Court noted, the disclaimer is located in the second paragraph of the first page of the warranty, preceded by a heading, and in all capital letters, in contrast to the subsequent text. (Order at 27; Singh Decl. Ex. A at 1.) "Illinois courts have ruled that disclaimers printed in capital letters and set off from the surrounding text are conspicuous." *Great W. Cas. Co. v. Volvo Trucks N. Am., Inc.*, No. 08-CV-2872, 2009 WL 588432, at *3 (N.D. Ill. Feb. 13, 2009).

To the extent plaintiffs intend to argue that Apple's disclaimer of implied warranties was unconscionable, those arguments fail for the same reasons their unconscionability arguments regarding the express warranty fail. Moreover, the Court noted that the SACC "contains no allegations that Plaintiffs did not see or understand the Limited Warranty's implied warranty disclaimer, or that Plaintiffs were surprised by the disclaimer's terms." (Order at 28:18-20.) The TACC is likewise devoid of such allegations.

Finally, Apple's Limited Warranty limits any implied warranties not disclaimed to the one-year period of the express warranty. (Singh Decl. Ex. A at 1.) Durational limits on implied warranties are enforceable in Illinois. *Tokar*, 177 Ill. App. 3d at 432 ("[P]laintiff cannot base an action for breach of . . . implied warrant[y] limited to one year after purchase on defects manifesting themselves after that period."). As discussed above, plaintiffs do not allege at all (or do not adequately allege) that Apple failed to honor a warranty claim during the one-year warranty period. (*See supra* n.11.)

Therefore, because Apple properly disclaimed all implied warranties, plaintiffs' implied warranty claim must again be dismissed.

3. Plaintiffs' Magnuson-Moss Warranty Claim Also Fails (Count 20)

Plaintiffs' federal Magnuson-Moss claim fails for the same reasons that their Illinois warranty claims fail. The Magnuson-Moss Warranty Act provides a federal private right of action for state law warranty claims (15 U.S.C. § 2310(d)(1)), but does not expand those state law rights. "The ability to sustain a cause of action under the Magnuson-Moss Act is dependent on the existence of an underlying viable state-law warranty claim." *Schiesser*, 2016 WL 6395457, at *4; *see also Hasek v. DaimlerChrysler Corp.*, 319 Ill. App. 3d 780, 794 (2001) ("[T]he elements necessary to prove a cause of action under the [Illinois] UCC for breach of express warranty are, in essence, the same under the Act."); *Semitekol*, 582 F. Supp. 2d at 1024 (applying Illinois law to Magnuson-Moss Warranty Act claim where Illinois law applied to underlying implied warranty claim). Because plaintiffs' Illinois state law express and implied warranty claims fail, their Magnuson-Moss claim fails as well.

V. CONCLUSION

For the foregoing reasons, Apple respectfully requests that the Court dismiss plaintiffs' Third Amended Class Action Complaint in its entirety with prejudice.

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Respectfully submitted,

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