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4 UNITED STATES DISTRICT COURT
5 NORTHERN DISTRICT OF CALIFORNIA
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7 TONY DICKEY, et al.,
8 Plaintiffs,

9 v.

10 ADVANCED MICRO DEVICES, INC.,
11 Defendant.

Case No. [15-cv-04922-HSG](#)

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANT'S
MOTION TO DISMISS AND DENYING
PLAINTIFFS' MOTION TO STRIKE**

Re: Dkt. No. 78, 85

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13 Pending before the Court are two motions. Defendant Advanced Micro Devices, Inc.
14 moves to dismiss Plaintiffs Tony Dickey and Paul Parmer's second amended complaint for failure
15 to state a claim. Dkt. No. 78 ("Mot. to Dismiss SAC"). Plaintiffs also move to strike a portion of
16 Defendant's reply brief that it filed in support of the motion to dismiss. Dkt. No. 85. For the
17 reasons articulated below, the Court GRANTS IN PART and DENIES IN PART Defendant's
18 motion to dismiss and DENIES Plaintiffs' motion to strike.

19 **I. BACKGROUND**

20 Following the Court's previous order granting Defendants' motion to dismiss, Plaintiffs
21 filed a second amended class action complaint on January 6, 2017, alleging that Defendant
22 misrepresented the number of core processors in its "Bulldozer" line of central processing units
23 ("CPUs"). Dkt. No. 76 ("SAC"). On the basis of this alleged misrepresentation, Plaintiffs bring
24 six causes of action against Defendant: (1) California Consumer Legal Remedies Act ("CLRA"),
25 Cal. Civ. Code §§ 1750 et seq.; (2) California Unfair Competition Law ("UCL"), Cal. Bus. &
26 Profs. Code §§ 17200 et seq.; (3) California False Advertising Law ("FAL"), Cal. Bus. & Profs.
27 Code §§ 17500 et seq.; (4) fraud in the inducement; (5) breach of express warranty; and
28 (6) negligent misrepresentation. *Id.*

1 Plaintiffs argue in their complaint that Defendant’s Bulldozer products do not contain eight
2 “cores” as advertised. Id. ¶ 8. According to Plaintiffs, a “core” is able to operate (e.g., perform
3 calculations and execute instructions) independently from other cores positioned on a chip, which
4 leads, in turn, to improved performance. Id. ¶¶ 23–24. The Bulldozer CPUs, however, contain
5 eight “sub-processors” that share resources instead. Id. ¶ 38. Shared resources inhibit chips from
6 “operat[ing] and simultaneously multitask[ing],” which results in bottlenecks during data
7 processing. Id. ¶¶ 38, 41. Because the Bulldozer CPUs share resources between two “cores,” they
8 functionally only have four — rather than eight — cores. Id. ¶¶ 38–43. Therefore, Plaintiffs
9 claim the products that they purchased are inferior to the products that Defendant advertised. Id.
10 ¶ 39.

11 Both named Plaintiffs specify the representations upon which they relied. Plaintiff Tony
12 Dickey alleges that he visited Defendant’s website at AMD.com on March 10, 2015, where he saw
13 materials indicating that AMD’s FX-9590 Bulldozer chip was “the first native 8-core desktop
14 processor” and had “8 cores.” SAC ¶¶ 50, 52. Plaintiff Dickey alleges that he then went to online
15 retailer Newegg.com and purchased two FX-9590 Bulldozer processors for \$299.99. Id. ¶¶ 51–52.
16 Plaintiff Dickey also alleges that the Newegg.com website contained additional representations
17 created by AMD indicating the FX-9590 Bulldozer was the “first native 8-core desktop processor”
18 and “the industry’s first and only native 8-core desktop processor for unmatched multitasking and
19 pure core performance with ‘Bulldozer’ architecture.” Id. ¶ 51. Plaintiff Dickey further alleges
20 that the packaging for the FX-9590 processors indicated that the CPU was an “8-core” processor.
21 Id. ¶ 52.

22 Plaintiff Paul Parmer similarly alleges that he visited Defendant’s website at AMD.com
23 and saw materials indicating that the FX-8350 Black Edition 8-Core Bulldozer chip was “the first
24 native 8-core desktop processor” and “the industry’s only native 8-core desktop processor for
25 unmatched multitasking and pure core performance with ‘Bulldozer’ architecture.” Id. ¶ 60.
26 Relying on these representations, Plaintiff Parmer purchased the FX-8350 Black Edition 8-Core
27 Bulldozer processor online in June 2005 at Amazon.com for \$189.99. Id. ¶¶ 58, 62.

28 Both Plaintiffs allege that they relied on Defendant’s advertisements as well as their “own

1 understanding of the term ‘core’” in “believ[ing] that the . . . 8-Core Bulldozer processor would
2 contain 8 cores, such that each ‘core’ would be independent from all others (i.e., it would not share
3 resources with the other cores) and would be capable of performing independent calculations at
4 full speed.” Id. ¶¶ 54, 62. Plaintiffs allege that Defendant’s representations regarding the number
5 of cores on each Bulldozer chip were false. Id. ¶¶ 38–43. In their claims against the Defendant,
6 Plaintiffs seek both monetary and injunctive relief. Id. ¶¶ 56–65, 72.

7 **II. LEGAL STANDARD**

8 Under Federal Rule of Civil Procedure 12(b)(6), a defendant may move to dismiss a
9 complaint for failing to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6).
10 To survive a motion to dismiss, a plaintiff must demonstrate “enough facts to state a claim to relief
11 that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A plaintiff
12 must provide more than conclusory statements or “a formulaic recitation of the elements of a
13 cause of action” for the court to find a facially plausible claim. Id. at 555. Rather, the complaint
14 must present facts which allow “the reasonable inference” of a defendant’s liability for the alleged
15 misconduct. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In reviewing a motion to dismiss, the
16 court construes factual inferences in a light most favorable to the non-moving party. *Manzarek v.*
17 *St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008).

18 Federal Rule of Civil Procedure 8(a) requires that a complaint contain “a short and plain
19 statement of the claim showing that the pleader is entitled to relief[.]” Fed. R. Civ. P. 8(a). Rule
20 9(b) imposes a heightened pleading standard for claims that “sound in fraud.” Fed. R. Civ. P. 9(b)
21 (“In alleging fraud or mistake, a party must state with particularity the circumstances constituting
22 fraud or mistake.”). A plaintiff must identify “the who, what, when, where, and how” of the
23 alleged conduct, so as to provide defendants with sufficient information to defend against the
24 charge. *Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir. 1997).

25 **III. ANALYSIS**

26 **A. Motion to Dismiss**

27 Defendant argues that Plaintiffs’ Second Amended Complaint should be dismissed for
28 failure to state a claim. Although Defendant divides its arguments into fraud-based and non-fraud

1 based claims, its overarching point is the same for all six claims: Plaintiffs have failed to plead
2 sufficient facts to support their expectation that Defendant’s Bulldozer multi-core processors
3 would contain eight independent cores. Mot. to Dismiss SAC at 12–15. Defendant further argues
4 that Plaintiffs’ request for injunctive relief should be dismissed for lack of standing. Id. at 16.

5 **i. Misrepresentation Claims**

6 **a. Basis for Plaintiffs’ Expectations**

7 Defendant first argues that the Court should dismiss Plaintiffs’ claims because Plaintiffs do
8 not plead facts to support their expectation that a “core” will not share resources. Id. at 12–14.
9 Defendant maintains that Plaintiffs have failed to state sufficient facts to support the existence of
10 an accepted and well-established industry standard definition of the term “core” on which to base
11 their expectations. However, this misstates Plaintiffs’ amended complaint. See SAC at ¶ 29.
12 Plaintiffs’ expectations that a core would operate independently, without shared resources, was not
13 based on an industry standard. Id. Rather, Plaintiffs allege that their expectations are based on
14 Defendant’s advertisements for their “8-core” product and their own understanding of the term
15 “core.” Id.

16 Contrary to Defendant’s urging, more detail about the basis for Plaintiffs’ understanding is
17 not needed to survive the motion to dismiss, even under Rule 9(b)’s heightened pleading standard.
18 See, e.g., *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) (“The plaintiff must
19 set forth what is false or misleading about a statement, and why it is false.”). Indeed the Court has
20 already rejected a similar argument. In its previous order granting the Defendant’s motion to
21 dismiss, the Court explained that it “is not convinced that [Plaintiffs] were required to identify a
22 particular statement by AMD or anyone else representing AMD’s cores as completely independent
23 so long as plaintiffs alleged a particular, plausible understanding of the term ‘core’ as independent
24 such that AMD’s use of the term would be misleading.” Dkt. No. 71 at 13. Plaintiffs have done
25 so here. See, e.g., SAC ¶¶ 54, 62.

26 **b. Reasonable Consumer Test**

27 To the extent that Defendant also argues that Plaintiffs’ understanding is unreasonable, the
28 Court is not persuaded. To prevail on their claims, Plaintiffs must establish that Defendant’s

1 representations are likely to deceive a reasonable consumer. *Williams v. Gerber Prod. Co.*, 552
2 F.3d 934, 938 (9th Cir. 2008). The reasonable consumer test assesses not whether it is possible
3 that an advertisement will deceive consumers, but rather whether “it is probable that a significant
4 portion of the general consuming public or of targeted consumers, acting reasonably in the
5 circumstances could be misled.” *Lavie v. Procter & Gamble Co.*, 105 Cal. App. 4th 496, 508
6 (2003). Whether a misrepresentation would mislead a reasonable consumer is generally a question
7 of fact not suited for resolution on a motion to dismiss. *Williams*, 552 F.3d at 939. Only in rare
8 cases have courts concluded that consumers’ stated expectations were unreasonable as a matter of
9 law. See, e.g., *Werbel ex rel. v. Pepsico, Inc.*, No. C 09–04456 SBA, 2010 WL 2673860, at *3
10 (N.D. Cal. July 2, 2010); *McKinnis, et al. v. Kellogg USA*, No. CV 07-2611 ABC, 2007 WL
11 4766060, at *5 (Sept. 19, 2007).

12 In *Werbel*, for example, the court granted a motion to dismiss where the plaintiffs alleged
13 that they were misled into believing that “Cap’n Crunch’s Crunch Berries” cereal derived some of
14 its nutritional value from real fruit. The court held that no reasonable consumer could believe that
15 “cereal balls with a rough, textured surface in hues of deep purple, teal, chartreuse green and
16 bright red” derived nutrition from real fruit. *Werbel*, 2010 WL 2673860, at *3. The court further
17 noted that the packaging clearly states the product is “SWEETENED CORN & OAT CEREAL.”
18 *Id.*; see also *McKinnis, et al. v. Kellogg USA*, No. CV 07-2611 ABC, 2007 WL 4766060, at *4–*5
19 (N.D. Cal. Sept. 19, 2007) (concluding that no reasonable consumer would believe from
20 defendant’s brand name “Froot Loops,” the bright colors and ring-shape of the cereal, or the
21 banner on the box stating “natural fruit flavors,” that the product contained natural fruit).

22 Here, in contrast, the Plaintiffs allege that the statements (1) “8-core”; (2) “first native 8-
23 core desktop processor”; and (3) “the industry’s only native 8-core desktop processor for
24 unmatched multitasking and pure core performance with ‘Bulldozer’ architecture” led the
25 Plaintiffs to believe that each core in Defendant’s 8-Core Bulldozer chips would be fully
26 independent, without sharing resources, and capable of performing tasks simultaneously. SAC
27 ¶ 38. Defendants have not explained why Plaintiffs’ understanding is unreasonable as a matter of
28 law. Viewing the facts in the light most favorable to Plaintiffs, *Manzarek*, 519 F.3d at 1031, the

1 Court is unable to find as a matter of law that no reasonable consumer of Defendant’s product
2 would interpret Defendant’s advertisements to mean that the “cores” would each operate
3 independently. See Williams, 552 F.3d at 939 (reversing district court decision granting motion to
4 dismiss because representations on product packaging could mislead a reasonable consumer).

5 **ii. Injunctive Relief**

6 Defendant finally argues that the Court should dismiss Plaintiffs’ request for injunctive
7 relief because Plaintiffs lack standing to seek such relief. Mot. to Dismiss SAC at 16. To have
8 standing to seek injunctive relief, a plaintiff must “demonstrate a ‘real and immediate threat of
9 repeated injury’ in the future.” Chapman v. Pier 1 Imports (U.S.) Inc., 631 F.3d 939, 946 (9th Cir.
10 2011) (quoting Fortynone v. Am. Multi-Cinema, Inc., 364 F.3d 1075, 1081 (9th Cir. 2004)).
11 Classwide injunctive relief is not available “[u]nless the named plaintiffs are themselves entitled to
12 seek injunctive relief.” Hodger-Durgin v. de la Vina, 199 F.3d 1037, 1045 (9th Cir. 1999). The
13 majority of district courts hold that in false advertising cases, plaintiffs have no standing to seek
14 prospective injunctive relief if they do not intend to purchase the product again in the future.
15 Davidson v. Kimberly-Clark Corp., 76 F. Supp. 3d 964, 970 (N.D. Cal. 2014). The Court agrees
16 with this analysis. See, e.g., Gershman v. Bayer HealthCare LLC, No. 14-CV-05332-HSG, 2015
17 WL 2170214, at *8 (N.D. Cal. May 8, 2015) (analyzing standing in false advertising case).

18 Plaintiffs contend that they “are likely to consider purchasing” Defendant’s products again
19 because Defendant is one of only two major companies that sell such processors. SAC ¶¶ 57, 65.
20 However, Plaintiffs also inconsistently state that had they known Bulldozer processors share
21 resources, they would not have purchased or would have paid less for them. Id. ¶¶ 55, 63.
22 Regardless, it is implausible that Plaintiffs risk being harmed by the same product again now that
23 they are aware of how it works. During the hearing, held on March 17, 2017, Plaintiffs indicated
24 that they simply wish to preserve this argument for appeal. The Court finds that the Plaintiffs
25 have not alleged a real threat of future injury and therefore do not have standing to seek injunctive
26 relief.

27 **B. Motion to Strike**

28 Defendant has filed a request for judicial notice of certain evidence in support of its

1 Motion to Dismiss. See Dkt. No. 79. Because the Court does not rely upon any of the proffered
2 documents in its analysis, the Court DENIES as moot the request for judicial notice. Accordingly,
3 Plaintiffs' motion to strike is also moot. See Dkt. No. 85.

4 **IV. CONCLUSION**

5 The Court GRANTS Defendant's motion to dismiss Plaintiffs' claims for injunctive relief
6 for lack of standing. The Court otherwise DENIES the motion. The Court also DENIES
7 Plaintiffs' motion to strike as moot. Defendant shall have 21 days from the date of this Order to
8 respond to the complaint. The Court further sets a Case Management Conference for August 1,
9 2017, at 2:00 p.m. in Courtroom 2, 4th Floor, Oakland, CA.

10 **IT IS SO ORDERED.**

11 Dated: 6/14/2017

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13 HAYWOOD S. GILLIAM, JR.
14 United States District Judge

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