United States District Court
Northern District of California

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

THOMAS DAVIDSON, et al.,

Plaintiffs,

v.

APPLE, INC.,

Defendant.

Case No. 16-CV-4942-LHK

ORDER GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS THE SELECTED CLAIMS IN PLAINTIFFS' THIRD AMENDED CLASS ACTION COMPLAINT

Re: Dkt. No. 87

Plaintiffs bring this putative class action against Defendant Apple, Inc. ("Apple" or "Defendant"), and allege violations of various state consumer fraud statutes, common law fraud, and breach of express and implied warranty. *See* ECF No. 86 (Third Amended Class Action Complaint, or "TACC"). Before the Court is Defendant's motion to dismiss the TACC. ECF No. 87 ("Mot."). Having considered the submissions of the parties, the relevant law, and the record in this case, the Court hereby GRANTS in part and DENIES in part Defendant's motion to dismiss.

I. BACKGROUND

A. Factual Background

Defendant is the designer, manufacturer, marketer, and seller of the iPhone smartphone.

TACC ¶ 25. The iPhone utilizes a touchscreen for users to interact with the device, and use of the touchscreen is required to send text messages, capture video, browse the internet, and access applications, among other functions. *Id.* ¶¶ 26, 28. Defendant released the iPhone 6 and iPhone 6 Plus on September 19, 2014. *Id.* ¶ 25. The iPhone 6 and 6 Plus both have a larger touchscreen than Defendant's prior iPhone models. *Id.* ¶ 30.

According to Plaintiffs, the iPhone 6 and 6 Plus "suffer from a material manufacturing defect that causes the touchscreen to become unresponsive to users' touch inputs" (hereinafter, the "touchscreen defect"). *Id.* ¶ 43. Plaintiffs allege that the touchscreen defect is caused by a defect in the iPhone's external casing. *Id.* ¶ 45. Specifically, "[t]he materials used in the iPhone's external casing are insufficient and inadequate to protect their internal parts in light of reasonable and foreseeable use by consumers." *Id.* Because of this, the internal components of the iPhones are exposed to "increased external stress and physical harm" when a user uses the iPhone. *Id.* ¶ 50. This increased external stress and physical harm causes the solder balls within the iPhone, which adhere the iPhone's touchscreen controller chips ("touch IC chips") to the iPhone's logic board, to "crack and start to lose contact with the logic board," which interrupts the electrical contact between the touch IC chips and the logic board. *Id.* ¶ 52–53. As a result, "the iPhones are incapable of recognizing when a user is touching the screen." *Id.*

Plaintiffs allege that the "weakness in the external casing of the iPhones" that causes the touchscreen defect also led to a different iPhone problem in which "numerous users were reporting that their iPhones were bending in the days immediately following the release of the iPhones." *Id.* ¶ 54. Plaintiffs refer to this "widely publicized" defect as "BendGate." *Id.* ¶ 54. Plaintiffs allege that the "iPhones do not need to be visibly bent for the touchscreen defect to occur because the decreased strength and durability in the external casing causes the soldering on the touch IC chips to fail even if the casing does not permanently bend or deform." *Id.* ¶ 55.

Plaintiffs state that previous versions of the iPhones "implemented other logic board designs that would mitigate, but not prevent, the Touchscreen Defect from occurring." *Id.* ¶ 59.

Specifically, previous iPhone 5 designs incorporated either a "metal shield" or an "underfill" that provided protection to the logic board. *Id.* ¶ 60–61. By contrast, the iPhone 6 and 6 Plus "do not incorporate underfill or a shield over the logic board." *Id.* ¶ 62.

Plaintiffs allege that Apple knew about the touchscreen defect at the time that Apple released the iPhone on September 19, 2014. According to Plaintiff, a consumer posted on Apple's website about "iPhone 6 touchscreen problems" on September 18, 2014," which is the day before the iPhone 6 and 6 Plus were released to the public. *Id.* ¶ 54. Similarly, on November 22, 2014, a user posted a thread on Apple's website that their iPhone was not registering their touches. *Id.* ¶ 66. Plaintiff alleges that other consumers responded to these threads and indicated that they experienced similar issues. *Id.* ¶¶ 66–67. Plaintiffs allege that "[t]here are hundreds, if not more, complaints regarding the Touchscreen Defect on Apple's website." *Id.* ¶ 68. Plaintiffs also allege that "[t]here are also numerous complaints on third-party websites detailing consumers' experience with the Touchscreen Defect and Apple's failure to remedy the Touchscreen Defect." *Id.* ¶ 69.

Moreover, Plaintiffs allege that "Apple conducts extensive pre-release durability testing," including "five methods of testing the iPhones" prior to release. *Id.* ¶ 71. Specifically, "Apple uses a [1] 'three-point bending test' to test the iPhone's ability to handle reasonable force;" [2] "a 'pressure-point cycling test' that expands substantial force on the iPhones' display and casing;" [3] "'torsion testing,' whereby an Apple engineer takes an iPhone and sits down thousands of times;" and [5] "real-life user studies." *Id.* ¶¶ 72–76. Plaintiffs allege that, "[t]hrough this extensive pre-release testing that specifically evaluated the iPhones' durability, Apple knew or should have known of the Touchscreen Defect." *Id.* ¶ 77. Plaintiffs also allege that Apple's "decision to forego protective casings and underfills on the iPhones would have immediately alerted [Apple] to the failure of the internal components of the iPhones, including the touch IC chips." *Id.* ¶ 77.

On September 25, 2014, shortly after the release of the iPhone 6 and 6 Plus, Apple issued a statement regarding the durability and performance of the iPhone 6 Plus. *Id.* ¶ 79. This statement

was in response to "BendGate." *Id.* ¶ 79. Specifically, Apple stated:

> Our iPhones are designed, engineered, and manufactured to be both beautiful and sturdy. iPhone 6 and iPhone 6 Plus feature a precision engineered unibody enclosure constructed from machining a custom grade of 6000 series anodized aluminum, which is tempered for extra strength. They also feature stainless steel and titanium inserts to reinforce high stress locations and use the strongest glass in the smartphone industry. We chose these high-quality materials and construction very carefully for their strength and durability. We also perform rigorous tests throughout the entire development cycle including 3-point bending, pressure point cycling, sit, torsion, and user studies. iPhone 6 and 6 Plus meet or exceed all of our high quality standards to endure everyday, real life use.
>
> With normal use a bend in iPhone is extremely rare and through our first six days of sale, a total of nine customers have contacted Apple with a bent iPhone 6 Plus. As with any Apple product, if you have questions please contact Apple.

Id. ¶ 79.

Plaintiffs allege that the above statement is false because the iPhones are not "sturdy" or durable. According to Plaintiffs, Apple could have alerted consumers about the touchscreen defect, but Apple failed to do so. *Id.* ¶¶ 98–105.

On November 18, 2016, Apple announced a customer service program related to the touchscreen defect called the "Multi-Touch Repair Program." *Id.* ¶ 119. Prior to the Multi-Touch Repair Program, Apple charged approximately $349 for a refurbished iPhone when a consumer complained of the touchscreen defect outside of Apple's warranty. *Id.* Through Apple's Multi-Touch Repair Program, Apple has offered to repair consumers' devices for $149 if the consumers' iPhone is otherwise working, and the screen is not broken. *Id.* Through the program, Apple also offers to reimburse consumers for amounts previously paid over $149. *Id.* ¶ 120. According to Plaintiffs, Apple's repair pursuant to the program is to "simply swap[] [the iPhone] out for refurbished phones," and the refurbished phones experience the same touchscreen defect. *Id.* ¶ 122.

B. Procedural History

On August 27, 2016, Plaintiffs Thomas Davison, Jun Bai, and Todd Cleary filed a putative

class action complaint against Defendant that alleged causes of action under (1) California's Consumer Legal Remedies Act ("CLRA"), Cal. Civ. Code § 1750; (2) Unfair Competition Law ("UCL"), Cal Bus. & Prof. Code § 17200; (3) False Advertisement Law ("FAL"), Cal. Bus. & Prof. Code § 17500; (4) common law fraud; (5) negligent misrepresentation; (6) unjust enrichment; (7) breach of implied warranty; (8) violation of the Magnusson-Moss Warranty Act ("Magnusson-Moss Act"), 15 U.S.C. § 2301; and (9) violation of the Song-Beverly Consumer Warranty Act ("Song-Beverly Act"), Cal. Civ. Code § 17290. *See* ECF No. 1.

On October 7, 2016, Plaintiffs filed a First Amended Class Action Complaint that added several named Plaintiffs and added causes of action under the consumer fraud statutes of Illinois, New Jersey, Florida, Connecticut, Texas, Colorado, Michigan, New York, and Washington. *See* ECF No. 20. On December 2, 2016, Plaintiffs filed a Second Amended Class Action Complaint ("SACC"), which added a Utah Plaintiff and a cause of action under Utah's consumer fraud statute. Plaintiffs sought to represent a Nationwide Class of "All persons or entities in the United States that purchased an Apple iPhone 6 or 6 Plus." Alternatively, Plaintiffs sought to represent state sub-classes. *Id.*

Given the breadth of the Plaintiffs' action, the parties agreed at the November 30, 2016 initial case management conference to each select 5 causes of action—for a total of 10 causes of action—to litigate for purposes of an initial round of motions to dismiss. *See* ECF No. 44. On December 5, 2016, the parties selected (1) New Jersey Consumer Fraud Act ("NJCFA"), N.J. Stat. Ann. § 56:8-1; (2) Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"), Fla. Stat. § 501.201; (3) Washington Consumer Protection Act ("WCPA"), Wash. Rev. Code § 19.86.010; (4) Illinois Consumer Fraud and Deceptive Trade Practices Act ("ICFDTPA"), Ill. Comp. Stat ¶ 505; (5) Texas Deceptive Trade Practices Act ("TDTPA"), Tex. Bus. & Com. Code ¶ 17.41; (6) Colorado Consumer Protection Act ("CCPA"), Colo. Rev. Stat. § 6-1-105; (7) common law fraud; (8) breach of express warranty; (9) breach of implied warranty; (10) Magnusson-Moss Act. *See* ECF No. 44, at 1–2. The parties did not select any California statutory claims. *See id.*

On January 6, 2017, Defendant filed a motion to dismiss the SACC. *See* ECF No. 54. On February 3, 2017, Plaintiffs filed an opposition. ECF No. 58. On February 17, 2017, Defendant filed a Reply. ECF No. 64.

On March 14, 2017, the Court dismissed all 10 of the selected claims with leave to amend. *See* ECF No. 84; *Davidson v. Apple, Inc.*, 2017 WL 976048 (N.D. Cal. Mar. 14, 2017). As an initial matter, the Court noted that the Court would defer the choice of law inquiry until a later state of the proceedings, when the choice of law issue had been properly briefed by the parties and when the facts of the case were more fully developed. *Id.* Nonetheless, the Court noted that the parties had selected common law claims to litigate for purposes of the motion to dismiss, but the parties failed to specify which states' common law applied to the selected common law claims, and the parties' motion to dismiss briefing failed to set forth the elements of the common law causes of action under the different states at issue. *Id.* at *4. Indeed, the parties largely relied on California common law—even though the parties did not select any California statutes to litigate—and the parties failed to address salient differences, if any, under the common law of the different states at issue. *Id.* Accordingly, the Court stated that, for purposes of resolving Defendant's motion to dismiss the selected claims in the SACC, the Court would respond to the arguments raised by the parties, but the Court would not "apply the common law of other states without briefing." *Id.* The Court ordered Plaintiffs to select one state's common law for purposes of litigating Plaintiffs' breach of express and implied warranty claims, and ordered Defendant to select one state's common law for purposes of litigating Plaintiffs' selected common law fraud claim. *Id.* [1]

The Court then turned to resolving Defendant's motion to dismiss the SACC. First, the Court held that Plaintiffs had adequately alleged Article III standing to bring claims for fraud. *Id.*

[1] Again, the Court recognizes that a choice of law analysis is required to apply a state's common law on a classwide basis, but the Court defers this inquiry. *See In re Sony Grand Wega KDF-EA10/A20 Series Repair Projection HDTV Television Litig.*, 758 F. Supp. 2d 1077, 1097 (S.D. Cal. Nov. 30, 2010) ("In a putative class action, the Court will not conduct a detailed choice-of-law analysis during the pleading stage").

at *5. However, the Court held that Plaintiffs had not adequately alleged Article III standing to seek an injunction because Plaintiffs failed to allege any intent to purchase an iPhone again. *Id.* at *6–7. Moreover, although Plaintiffs raised the existence of Apple's Multi-Touch Repair Program for the first time in their opposition, Plaintiffs did not allege in their SACC any intent to participate in Apple's Multi-Touch Repair program, and thus Plaintiffs failed to allege that participation in Apple's program conferred Article III standing on Plaintiffs to seek an injunction. *Id.* at *7. The Court thus granted Apple's motion to dismiss to the extent that Plaintiffs sought injunctive relief.

The Court next addressed Plaintiffs' claims for fraud under the (1) NJCFA; (2) FDUTPA; (3) WCPA; (4) ICFDTPA; (5) TDTPA; (6) CCPA; and (7) common law. For all of these claims, Plaintiffs alleged both affirmative misrepresentation theories and fraudulent concealment theories. The Court held that, for all of Plaintiffs' claims for fraud, Plaintiffs had failed to meet Rule 9(b)'s heightened pleading requirements. First, with regards to Plaintiffs' claims premised on an affirmative misrepresentation theory, the Court noted that Plaintiffs' SACC referred to the content of only Defendant's September 25, 2014 statement regarding "BendGate." However, Plaintiffs failed to allege that *any* Plaintiffs were exposed to Defendant's September 25, 2014 statement. Thus, the Court held that Plaintiffs had failed to plead with particularity any fraud claim premised on affirmative misrepresentations because Plaintiffs did not allege *any* affirmative statement to which Plaintiffs were exposed or reviewed. *Id.*

Second, with regards to Plaintiffs' claims premised on a fraudulent omission theory, the Court held that Plaintiffs had failed to plead with particularity any fraud claim premised on fraudulent omissions because Plaintiffs had failed to plead "that they reviewed or were exposed to *any* information, advertisements, labeling, or packaging by Defendant," and thus Plaintiffs had failed to plead that they encountered or were exposed to *any* material through which Defendant could have made a fraudulent omission. *Id.* Accordingly, the Court granted Defendant's motion to dismiss Plaintiffs' claims for fraud under the NJCFA, FDUTPA, WCPA, ICFDTPA, TDTPA,

CCPA, and common law. *Id.* at *10.

Finally, the Court turned to Plaintiffs' warranty claims. The Court applied California law to Plaintiffs' warranty claims because the parties briefed only California law. *Id.* The Court held that, with regards to Plaintiffs' breach of express warranty claim, Plaintiffs had failed to state a claim because Plaintiffs alleged only a defect in the iPhone's design, and Apple's express warranty did not cover defects in design. *Id.* Moreover, the Court held that, for all but two Plaintiffs, Plaintiffs had failed to allege that the touchscreen defect manifested within Apple's one-year warranty period. *Id.* at *12. The Court rejected Plaintiffs' argument that Defendant's one-year duration provision was unconscionable. *Id.* For similar reasons, the Court rejected Plaintiffs' limited warranty claim under California law because the Court held that Defendant properly disclaimed limited warranties and because Defendant's limited warranty disclaimer was not unconscionable. *Id.* The Court also dismissed Plaintiffs' Magnusson-Moss Act claim, which was dependent on Plaintiffs' other warranty claims. *Id.*

Thus, the Court dismissed all 10 selected causes of action with leave to amend. *Id.*

On March 21, 2017, in response to this Court's order, the parties filed an amended joint list of causes of action to litigate for purposes of the second round motions to dismiss. ECF No. 85. Plaintiffs elected to litigate their common law breach of warranty claims under Illinois law. *Id.* at 2. Defendant elected to litigate its common law fraud claim under Pennsylvania law. *Id.*

On April 4, 2017, Plaintiffs filed the TACC. TACC ¶¶ 8–20. Plaintiffs alleged in the TACC that, prior to their purchase, Plaintiffs viewed a variety of information from Apple, such as Apple's press releases about the iPhone, Apple's key note address about the iPhone, and television commercials about the iPhone. *See id.* Immediately after their purchase—and within the time window for returning their iPhone free of charge—Plaintiffs reviewed the iPhone box and information within the box. *See id.* Further, either prior to their purchase or within the time window in which they could have returned their iPhones free of charge, all Plaintiffs viewed Apple's September 25, 2014 "BendGate" statement. *See id.*

At various points after Plaintiffs' purchase, each of the named Plaintiffs experienced the touchscreen defect at issue. *Id.* Below is a chart summarizing the relevant details of each of the named Plaintiffs:

Name	State	Date of Purchase	Date of Malfunction
Todd Cleary	California	October 25, 2014	January 2016
Thomas Davidson	Pennsylvania	December 2014	August 2016
Adam Benelhachemi	Illinois	June 2015	December 2015
Michael Pajaro	New Jersey	September 25, 2014	July 2016
John Borzymowski	Florida	September 19, 2014	February 2016
Brooke Corbett	Connecticut	February 2015	April 2016
Taylor Brown	Texas	November 2014	January 2016
Justin Bauer	Colorado	March 11, 2015	July 2015
Heirloom Estate Services	Michigan	November 28, 2014	December 2015
Kathleen Baker	New York	September 26, 2014	June 2016
Matt Muilenberg	Washington	February 28, 2015	May 2016
William Bon	Washington	January 10, 2015	August 2016
Jason Petty	Utah	October 14, 2014	March 2016

Apple provided each of the Plaintiffs and Class Members with an express warranty that warranted the iPhones "against defects in materials and workmanship when used normally in accordance with Apple's published guidelines for a period of ONE (1) YEAR from the date of original retail purchase by the end-user purchaser." *Id.* ¶ 106; *see also* ECF No. 55 (Request for Judicial Notice, or "RJN"), Ex. A ("Limited Warranty").[2] Plaintiffs allege that they were

[2] The Court took judicial notice of the Limited Warranty for purposes of Apple's first motion to dismiss, and the text of Apple's Limited Warranty is set forth in this Court's prior Order. *See Davidson*, 2017 WL 976048, at *3, 11–13.

"surprised to learn that Apple is using the terms of the express warranty to deny warranty claims related to the Touchscreen Defect." TACC ¶ 108.

On April 18, 2017, Apple moved to dismiss the TACC. *See* Mot. On May 16, 2017, Plaintiffs filed an opposition. ECF No. 93 ("Opp."). On June 6, 2017, Apple filed a reply. ECF No. 97 ("Reply").

II. LEGAL STANDARD

A. Rule 12(b)(6)

Rule 8(a)(2) of the Federal Rules of Civil Procedure requires a complaint to include "a short and plain statement of the claim showing that the pleader is entitled to relief." A complaint that fails to meet this standard may be dismissed pursuant to Rule 12(b)(6). Rule 8(a) requires a plaintiff to plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (internal quotation marks omitted). For purposes of ruling on a Rule 12(b)(6) motion, the Court "accept[s] factual allegations in the complaint as true and construe[s] the pleadings in the light most favorable to the nonmoving party." *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008).

The Court, however, need not accept as true allegations contradicted by judicially noticeable facts, *see Shwarz v. United States*, 234 F.3d 428, 435 (9th Cir. 2000), and it "may look beyond the plaintiff's complaint to matters of public record" without converting the Rule 12(b)(6) motion into a motion for summary judgment, *Shaw v. Hahn*, 56 F.3d 1128, 1129 n.1 (9th Cir. 1995). Nor must the Court "assume the truth of legal conclusions merely because they are cast in the form of factual allegations." *Fayer v. Vaughn*, 649 F.3d 1061, 1064 (9th Cir. 2011) (per curiam) (internal quotation marks omitted). Mere "conclusory allegations of law and unwarranted

inferences are insufficient to defeat a motion to dismiss." *Adams v. Johnson*, 355 F.3d 1179, 1183 (9th Cir. 2004).

B. Rule 9(b)

Claims sounding in fraud are subject to the heightened pleading requirements of Rule 9(b) of the Federal Rules of Civil Procedure, which requires that a plaintiff alleging fraud "must state with particularity the circumstances constituting fraud." Fed. R. Civ. P. 9(b); *see Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009). To satisfy the heightened standard under Rule 9(b), the allegations must be "specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong." *Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1985). Thus, claims sounding in fraud must allege "an account of the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentations." *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007) (per curiam) (internal quotation marks omitted); *see also Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) ("Averments of fraud must be accompanied by the who, what, when, where, and how of the misconduct charged." (internal quotation marks omitted)). The plaintiff must also set forth "what is false or misleading about a statement, and why it is false." *Ebeid ex rel. U.S. v. Lungwitz*, 616 F.3d 993, 998 (9th Cir. 2010) (internal quotation marks omitted).

C. Leave to Amend

If the Court determines that the complaint should be dismissed, it must then decide whether to grant leave to amend. Under Rule 15(a) of the Federal Rules of Civil Procedure, leave to amend "should be freely granted when justice so requires," bearing in mind that "the underlying purpose of Rule 15 . . . [is] to facilitate decision on the merits, rather than on the pleadings or technicalities." *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc) (internal quotation marks omitted). Nonetheless, a court "may exercise its discretion to deny leave to amend due to 'undue delay, bad faith or dilatory motive on part of the movant, repeated failure to cure

deficiencies by amendments previously allowed, undue prejudice to the opposing party . . . , [and] futility of amendment.'" *Carvalho v. Equifax Info. Servs., LLC*, 629 F. 3d 876, 892–93 (9th Cir. 2010) (alterations in original) (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)).

III. DISCUSSION

Defendant again moves to dismiss all 10 of the selected causes of action. Defendant asserts that (1) Plaintiffs lack Article III standing to seek injunctive relief; (2) Plaintiffs' claims for fraud fail because Plaintiffs have failed to plead fraud with particularity; and (3) Plaintiffs' claims for breach of express and implied warranty fail because Defendant did not breach the Limited Warranty and because Defendant disclaimed implied warranties. The Court considers each of these arguments in turn.

A. Article III Standing to Seek Injunctive Relief

The Court first addresses Defendant's argument that Plaintiffs lack standing to seek injunctive relief. Defendant contends that Plaintiffs lack Article III standing to seek an injunction because Plaintiffs have failed to allege a sufficient likelihood of future injury. Def. Mot. at 14–15.

Article III standing requires that "(1) the plaintiff suffered an injury in fact, i.e., one that is sufficiently 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical'; (2) the injury is 'fairly traceable' to the challenged conduct, and (3) the injury is 'likely' to be 'redressed by a favorable decision.'" *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) (quoting *Lujan v. Def. of Wildlife*, 504 U.S. 555, 560–61 (1992)). "The standing formulation for a plaintiff seeking prospective injunctive relief is simply one implementation of" the general standing requirements. *Id.* at 985 (internal quotation marks omitted). To establish standing for prospective injunctive relief, a plaintiff must demonstrate that he or she "has suffered or is threatened with a concrete and particularized legal harm, coupled with a sufficient likelihood that he will again be wronged in a similar way." *Id.* (internal citations and quotations omitted). "As to the second inquiry, [a plaintiff] must establish a 'real and immediate threat of repeated injury.'" *Id.* (quoting *O'Shea v. Littleton*, 414 U.S. 488, 496 (1974)). "[P]ast wrongs do not in

themselves amount to [a] real and immediate threat of injury necessary to make out a case or controversy." *City of Los Angeles v. Lyons*, 416 U.S. 95, 111 (1983).

In cases involving false or misleading product advertising, "where a plaintiff has no intention of purchasing the product in the future, a majority of district courts have held that the plaintiff has no standing to seek prospective injunctive relief." *Davidson v. Kimberly-Clark Corp.*, 76 F. Supp. 3d 964, 970 (N.D. Cal. 2014). "This Court has consistently adopted the majority position that a plaintiff must allege that he or she intends to purchase the products at issue in the future to establish standing for injunctive relief." *Romero v. HP, Inc.*, 2017 WL 386237, at *9 (N.D. Cal. Jan. 27, 2017) (internal quotations and alterations omitted); *see also Rahman v. Mott's LLP*, 2014 WL 325241, at *10 (N.D. Cal. Jan. 29, 2014) ("[T]he Court agrees with defendant that to establish standing, plaintiff must allege that he intends to purchase the products at issue in the future.").

In the Court's prior order granting Defendant's motion to dismiss the SACC, the Court held that Plaintiff had failed to allege standing to seek prospective injunctive relief because the SACC "contain[ed] no allegations that any of the named Plaintiffs intend to purchase an iPhone 6 or 6 Plus in the future." *Davidson*, 2017 WL 976048 at *7. Further, although Plaintiffs raised for the first time in their opposition that Plaintiffs were eligible to participate in Apple's "Multi-Touch Repair Program," this Court held that "the SACC remains devoid of any allegations regarding Plaintiffs' *intent* to participate in the program," and thus Plaintiffs had failed to allege "'a real and immediate threat of injury.'" *Id.* (quoting *Lyons*, 416 U.S. at 111).

In Plaintiffs' TACC, as with Plaintiffs' SACC, Plaintiffs do not allege any intent to purchase an iPhone in the future. *See generally* TACC. However, several Plaintiffs allege an intent to participate in Apple's Multi-Touch Repair Program in the future. Through Apple's Multi-Touch Repair Program, which Apple announced on November 18, 2016, Apple has offered to "repair" an iPhone 6 Plus device for $149. *Id.* ¶ 199. Plaintiffs allege that Apple is not "repairing" iPhone 6 Plus devices under this program, but is rather "swapping them out for

refurbished phones" that experience the same touchscreen defect. *Id.* ¶ 122. Accordingly, Plaintiffs allege that the Multi-Touch Repair Program is essentially an offer from Apple to sell Plaintiffs a refurbished iPhone that may experience the same defect as Plaintiffs' original iPhone. *Id.*

Apple does not contest that an alleged intent to participate in the Multi-Touch Repair Program is sufficient to confer standing for prospective injunctive relief. *See* Mot. at 14–15. Apple contends, however, that Plaintiffs have nonetheless failed to adequately allege standing because Plaintiffs condition their participation in the Multi-Touch Repair Program on future circumstances that may not occur, and because Plaintiffs' request for injunctive relief is truly a request for monetary relief. *Id.* Accordingly, the Court turns to examine Plaintiffs' specific allegations, and whether these allegations are sufficient to allege Article III standing for injunctive relief.

As an initial matter, Plaintiffs Davidson, Borzymowski, Muilenburg, and Petty do not allege an intent to participate in the Multi-Touch Repair Program, and thus these Plaintiffs have not alleged a threat of future injury sufficient to confer standing. *See* TACC ¶¶ 9, 18, 10. Moreover, Plaintiff Corbett alleges that she *already* participated in the Multi-Touch Repair Program, and Corbett does not allege future intent to participate in the Program. *Id.* ¶ 13. Thus, Corbett has also not alleged a threat of future injury sufficient to confer standing. In addition, Plaintiffs state in their opposition that Plaintiff Bon is currently not pursuing his claim for injunctive relief at this time, and thus the Court finds that Plaintiff Bon also does not have standing to pursue injunctive relief. *See* Opp. at 3 n.1.

Finally, the Court finds that Plaintiff Pajaro has not alleged standing to seek injunctive relief. Pajaro alleges only that he "may participate in Apple's 'Multi-Touch Repair Program' [] *if this lawsuit is unsuccessful* for the sole purpose of receiving a functional device to resell." *Id.* ¶ 11 (emphasis added). This allegation is not sufficient to confer standing to seek an injunction. Pajaro has in effect alleged that he only intends to purchase a refurbished iPhone from Apple through the

Multi-Touch Repair Program if Pajaro *loses* this lawsuit. Pajaro does not allege any other intent to purchase an iPhone in the future. Thus, Pajaro has alleged that, if this lawsuit *is* successful, Pajaro does *not* have an intent to purchase any product from Apple in the future. However, the Court can only issue an injunction preventing future deceptive advertisement if this lawsuit is successful. If Pajaro intends to purchase a product from Apple in the future only if the Court does *not* issue an injunction at the conclusion of this lawsuit, then Pajaro cannot possibly have standing to seek prospective injunctive relief.

Accordingly, the Court GRANTS Defendant's motion to dismiss Plaintiffs' Davidson, Borzymowski, Muilenburg, Petty, Bon, Corbett, and Pajaro's requests for injunctive relief. The Court dismisses these Plaintiffs' request for injunctive relief with prejudice because the Court previously afforded Plaintiffs leave to amend to adequately allege standing to seek injunctive relief, and Plaintiffs have failed to do so. Thus, the Court finds that granting Plaintiffs an additional opportunity to amend the complaint would be futile, cause undue delay, and unduly prejudice Defendants by requiring Defendants to file repeated motions to dismiss. *See Leadsinger*, 512 F.3d at 532. The Court turns to the remaining Plaintiffs' allegations.

Unlike the Plaintiffs discussed above, Plaintiffs Brown and Baker allege intent to participate in the Multi-Touch Repair Program. TACC ¶¶ 14, 17. Further, Plaintiffs Cleary, Benelhachemi, Bauer, and Heirloom Estate Services allege that they intend to participate in the Multi-Touch Repair Program "if Apple indicates that the defect in [their] current iPhone[s] is not present in the refurbished iPhone [they] will receive through the program." *Id.* ¶¶ 8, 10, 15, 16. According to Defendant, Plaintiffs' Cleary, Benelhachemi, Bauer, and Heirloom Estate Services's allegations are insufficient to confer Article III standing because these Plaintiffs condition their participation in the Multi-Touch Repair Program on Apple providing Plaintiffs with a non-defective iPhone, which is a future event that may not occur. *See* Mot. at 14–16. Thus, Defendant argues, Plaintiffs have failed to allege "a real and immediate threat of injury." *Lyons*, 416 U.S. at 111. However, for the reasons discussed below, the Court finds that Plaintiffs' allegations are

sufficient to satisfy Article III.

In *Lilly v. Jamba Juice Company, et al.*, 2015 WL 1248027, at *5 (N.D. Cal. Mar. 18, 2015), the Court concluded that the plaintiffs' alleged "willingness to consider a future purchase" of defendant's smoothie product was sufficient to confer standing to enjoin defendant's allegedly deceptive labeling of the product. The Court reasoned that "[t]he harms Plaintiffs seek to avoid by bringing this litigation are not just the harms related to purchasing or consuming a mislabeled product, but also the harm of being a consumer in the marketplace who cannot rely on the representations made by [defendant] on [its] product labels." *Id.* Absent prospective injunctive relief, the plaintiffs "could never rely with confidence on product labeling when considering whether to purchase [defendant's] product," and thus the Court held that it was sufficient that plaintiffs alleged they "would consider spending [their] money to purchase [defendant's] products if [defendant's products] were labeled correctly in the future." *Id.*

Following *Lilly*, the Court in *Coe v. General Mills, Inc.*, 2017 WL 476407, at *2 (N.D. Cal. Feb. 6, 2017), found plaintiffs' allegations sufficient to allege Article III standing for injunctive relief where the plaintiffs alleged a willingness to *consider* purchasing Cheerios Protein in the future if Cheerios Protein "matched its labeling." The Court in *Coe* followed the reasoning in *Lilly* and held that the harm alleged by plaintiffs was that, "unless the manufacturer or seller [was] enjoined from making the same misrepresentation[s]" about Cheerios Protein again, Plaintiffs could not rely on defendant's representations about Cheerios Protein in considering whether to buy Cheerios Protein in the future. *Id.* at *2 (quoting *Lilly*, 2015 WL 1248027, at *4). Accordingly, the Court in *Coe* held that Plaintiffs adequately alleged Article III standing by alleging willingness to consider a future purchase of Cheerios Protein because an injunction preventing the defendant from future false labeling would address plaintiffs' harm, which was sufficiently imminent and certain to occur. *Id.*; *see also Anderson v. SeaWorld Parks & Ent'mt, Inc.*, 2016 WL 4076097, at *4 (N.D. Cal. Aug. 1, 2016) (finding plaintiffs adequately alleged standing for prospective injunctive relief where plaintiffs alleged she "may consider purchasing

tickets to SeaWorld San Diego again in the future if SeaWorld's practices were to evolve" and if SeaWorld were to be honest about its practices).

Under the reasoning of *Lilly* and *Coe*, the Court finds that Plaintiffs have adequately alleged Article III standing to enjoin Defendants' allegedly fraudulent representations and omissions about the iPhone. At present, Plaintiffs do not know "whether it makes sense to spend [their] money on" a refurbished iPhone through Apple's Multi-Touch Repair Program because, absent an injunction, Plaintiffs "suspect a continuing misrepresentation" from Defendant about the iPhone. *Lilly*, 2015 WL 1248027, at *4. An injunction preventing Defendant from future false representations and omissions about the touchscreen defect would redress Plaintiffs' ongoing injury. *See id.* ("Without injunctive relief, Lilly could never rely with confidence on [Defendant's] product labeling when considering whether to purchase Defendants' product."). Accordingly, the Court finds that the Plaintiffs who have alleged an intention to participate in Apple's Multi-Touch Repair Program, or a willingness to consider future participation in the Multi-Touch Repair Program, have alleged sufficient standing to seek injunctive relief. *Id.*

Apple further argues that Plaintiffs Brown, Baker, Cleary, Benelhachemi, Bauer, and Heirloom Estate Services do not have standing to seek injunctive relief because these Plaintiffs also allege that they "intend[] to recoup any amounts paid under the [Multi-Touch Repair Program] through this lawsuit." *See, e.g.*, TACC ¶10; *see* Mot. at 15–16. According to Apple, these allegations demonstrate that Plaintiffs' claims for injunctive relief "are thinly-disguised claims for monetary recovery" and thus Plaintiffs lack standing. *Id.* However, this allegation is not fatal to Plaintiffs' Article III standing to seek prospective relief. Plaintiffs do not allege that Plaintiffs' intent to participate in the Multi-Touch Repair Program is *contingent* on Plaintiffs' ability to recover money paid to Apple. *See, e.g.*, TAC ¶ 10. Accordingly, Plaintiffs' allegations do not impact the Article III analysis of whether Plaintiffs have alleged "a sufficient likelihood that [they] will again be wronged in a similar way." *Lyons*, 461 U.S. at 111.[3] Moreover, although

[3] Defendant's citation, *Lucas v. Breg, Inc.*, 212 F. Supp. 3d 950, 972 (S.D. Cal. 2016), does not

Plaintiffs' allegations that they "intend[] to recoup any amounts paid under the [Multi-Touch Repair Program] through this lawsuit" may show that Plaintiffs have an adequate remedy at law for certain *forms* of injunctive relief—such as an injunction that Defendant repair Plaintiffs' iPhones—that issue is not briefed by the parties and is not presently before the Court. As discussed above, under *Lilly* and *Coe*, the Court concludes that Plaintiffs have adequately alleged Article III standing to enjoin Defendant from future false representations and omissions. Thus, the Court DENIES Defendant's motion to dismiss insofar as Defendant moves to dismiss Plaintiffs' Brown, Baker, Cleary, Behelhachemi, Bauer, and Heirloom Estate Services requests for injunctive relief.

B. Fraud Claims

The Court next turns to address Plaintiffs' consumer fraud claims. As relevant to the instant motion to dismiss, Plaintiffs bring claims under the (1) NJCFA, N.J. Stat. Ann. § 56:8-1; (2) FDUTPA, Fla. Stat. § 501.201; (3) WCPA, Wash. Rev. Code § 19.86.010; (4) ICFDTPA, Ill. Comp. Stat. § 505; (5) TDTPA, Tex. Bus. & Com. Code § 17.41; (6) CCPA, Colo. Rev. Stat. § 6-1-105; and (7) common law fraud under Pennsylvania law.

As with the prior motion to dismiss, the parties largely do not address the different elements of these various fraud causes of action. Rather, Defendant argues generally that all of Plaintiffs' fraud claims fail because Plaintiffs have failed to meet Rule 9(b)'s heightened pleading requirements. Defendant makes arguments under specific elements of the causes of action at issue with regards to only two of Plaintiffs' claims: (1) the NJCFA and (2) common law fraud under Pennsylvania law.

Accordingly, in resolving the instant motion to dismiss, the Court first discusses Defendant's generalized arguments about Plaintiffs' fraud claims and whether Plaintiffs have met

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support Defendant's argument. The Court in *Breg* found that because Plaintiffs sought primarily monetary relief, as opposed to injunctive relief, class certification was improper under Rule 23(b)(2) of the Federal Rules of Civil Procedure. "Class certification under Rule 23(b)(2) is appropriate only where the primary relief sought is declaratory or injunctive." *Id.* That issue is not presently before the Court at this stage of the litigation.

Rule 9(b)'s heightened pleading requirements for pleading fraud. The Court then turns to address Defendant's arguments about the specific elements of the NJCFA and Pennsylvania common law.

1. Plaintiffs' Fraud Claims in General

First, the Court addresses Defendant's generalized arguments about Plaintiffs' fraud claims and whether Plaintiffs have satisfied Rule 9(b)'s heightened pleading requirements for pleading fraud. Plaintiffs do not dispute that each of their claims for fraud are subject to Rule 9(b)'s heightened pleading requirements. *See* Opp. at 13.

For each of Plaintiffs' consumer fraud claims, Plaintiffs assert that Defendant engaged in fraud by (1) "representing that the iPhones have characteristics, uses, benefits, and qualities which they do not have"; and (2) "conceal[ing] or not disclos[ing]" information that a "reasonable consumer would have considered [] to be important in deciding whether to purchase Apple's iPhones or pay a lesser price." *See* TACC ¶¶ 168–76 (ICFDPA); ¶¶ 185–94 (NJCFA); ¶¶ 195–17; ¶¶ 218–32 (TDTPA); ¶¶ 233– 40 (CCPA); ¶¶ 260–67 (WCPTA); ¶¶ 268–72 (common law fraud). Defendant argues that Plaintiffs claims must be dismissed because Plaintiffs have not adequately pled either their affirmative misrepresentation claims or their fraudulent omission claims. The Court addresses each below.

a. Affirmative Misrepresentations

Plaintiffs allege with respect to each of their fraud claims that Defendant committed fraud by making affirmative misrepresentations about the characteristics and qualities of the iPhones. *See, e.g.*, ¶ 189 ("Apple has engaged in unfair and deceptive trade practices, including representing that the iPhones have characteristics, uses, benefits, and qualities which they do not have."). In stating a claim for fraud premised on false representations, "[t]o satisfy Rule 9(b), Plaintiff[s] must allege the 'who, what, where, when, and how' and the 'specific content of the false representations.'" *Coleman-Anacleto v. Samsung Elecs. Am., Inc.*, 2016 WL 4729302, at *14 (N.D. Cal. Sept. 12, 2016) (quoting *Swartz*, 476 F.3d at 764).

This Court granted Defendant's motion to dismiss Plaintiffs' selected affirmative

misrepresentation claims in the SACC because Plaintiffs alleged the "specific content" of only one statement—the September 25, 2014 statement that Apple issued in response to "BendGate"—but Plaintiffs did not allege that *any* Plaintiff was exposed to the September 25, 2014 statement. *See Davidson*, 2017 WL 976048, at *7. The Court held that "[i]n the absence of any allegations that Plaintiffs encountered a representation made by Defendant—let alone what those representations were, when they were made, and why they were false—Plaintiffs ha[d] failed to plead with particularity any affirmative misrepresentation claim." *Id.* at *8. The Court did not reach the question of whether the September 25, 2014 statement contained actionable misrepresentations. *Id.*

In their TACC, Plaintiffs allege that *all* Plaintiffs reviewed Apple's September 25, 2014 statement. Plaintiffs state that they are pursuing their affirmative misrepresentation claims only with regards to the September 25, 2014 statement. *See* Opp. at 18 (stating that Plaintiffs are "pursuing [] misrepresentation claim[s] only for the September 25, 2014 BendGate press release"). Defendant moves to dismiss Plaintiffs' affirmative misrepresentation claims because, according to Defendant, Defendant's September 25, 2014 statement does not contain any actionable misrepresentations. *See* Mot. at 19. For the reasons discussed below, the Court agrees with Defendant. The Court first sets forth the text of Defendant's September 25, 2014 statement, and then turns to address whether Plaintiff has alleged with particularity that the September 25, 2014 statement contains actionable misrepresentations.

As stated above, Apple made the following statement on September 25, 2014, in response to widespread reports that the iPhone 6 was bending, which Plaintiffs label "BendGate":

> Our iPhones are designed, engineered, and manufactured to be both beautiful and sturdy. iPhone 6 and iPhone 6 Plus feature a precision engineered unibody enclosure constructed from machining a custom grade of 6000 series anodized aluminum, which is tempered for extra strength. They also feature stainless steel and titanium inserts to reinforce high stress locations and use the strongest glass in the smartphone industry. We chose these high-quality materials and construction very carefully for their strength and durability. We also perform rigorous tests throughout the entire development cycle including 3-point bending, pressure point

> cycling, sit, torsion, and user studies. iPhone 6 and 6 Plus meet or exceed all of our high quality standards to endure everyday, real life use.
>
> With normal use a bend in iPhone is extremely rare and through our first six days of sale, a total of nine customers have contacted Apple with a bent iPhone 6 Plus. As with any Apple product, if you have questions please contact Apple.

Id. ¶ 79.

Plaintiffs allege that this statement is false because the iPhone is not "sturdy," is not made with "high-quality" materials, and is not "durable." TACC ¶¶ 81–86. Further, Plaintiffs allege that this statement is false because Apple's "'stainless steel and titanium inserts [used] to reinforce high stress locations' failed to reinforce the high stress location near the" touch IC chips because the iPhones experience the touchscreen defect. *Id.* ¶ 82. Plaintiffs also contend that Apple's statement that it is "extremely rare" for an iPhone to bend is false because *all* iPhones bend, even if not visibly, and this bending places stress on the touch IC chips which causes the touchscreen defect. *Id.* ¶ 81. However, for the reasons discussed below, the Court agrees with Defendant that Plaintiffs have failed to allege that the September 25, 2014 statement contains an actionable misrepresentation.

First, most of the terms identified by Plaintiffs as "false" are "mere puffery, incapable of being labeled true or false." *Deburro v. Apple, Inc.*, 2013 WL 5917665, at *4 (W.D. Tex. Oct. 31, 2013). Under each of the selected fraud causes of action, courts have held that statements that are mere puffery are not actionable as misrepresentations. *See, e.g., id.* (dismissing claim under TDTPA because statements were mere puffery); *Glass v. BMW of N.A., LLC*, 2011 WL 6887721, at *6 (D.N.J. 2011) (NJCFA) (same); *Barbara's Sales, Inc. v. Intel Corp.*, 227 Ill. 2d 45, 73 (Ill. 2007) (ICFDTPA) (same); *Babb v. Regal Marine Indus., Inc.*, 2014 WL 690154 (Wash. Ct. App. 2014) (WCPA) (same); *Koch v. Kaz USA, Inc.*, 2011 WL 2610198, at *5 (D. Colo. 2011) (CCPA) (same).

Here, Plaintiffs allege that Defendant misrepresented that the iPhones are made with "high-quality" materials, and misrepresented that the iPhones are "durable," and "sturdy." TACC ¶¶ 81–86. Courts across the country have held that these terms or substantially similar terms are non-

actionable puffery. *See Vitt v. Apple Comp., Inc.*, 469 F. App'x 605, 607 (9th Cir. 2012) (finding "durable," "rugged," "built to withstand reasonable shock," and "high performance" to be non-actionable puffery); *Saltzman v. Pella Corp.*, 2007 WL 844883, at *4 (N.D. Ill. Mar. 20, 2007) (finding "durable" and "manufactured to high quality standards" to be puffery); *Anunziato v. eMachines, Inc.*, 402 F. Supp. 2d 1133, 1141 (C.D. Cal. Nov. 10, 2005) (finding term "high-quality" to be "non-actionable puffery"); *Intermountain Stroke Center, Inc. v. Intermountain Health Care, Inc.*, 2014 WL 1320281, at *5 (D. Utah Mar. 31, 2014) (describing term "high-quality" to be a "paradigmatic example[] of puffery"); *Koch*, 2011 WL 2610198, at *5 (finding "durable" and "quality construction for long lasting performance" to be puffery). Accordingly, Plaintiffs cannot base their fraudulent misrepresentation claims on Defendant's statements that the iPhones are made with "high-quality" materials, that they are "durable," or that they are "sturdy."

Second, to the extent that Apple made statements of fact about the iPhone in the September 25, 2014 statement—such as the fact that the iPhones are made with "stainless steel and titanium inserts" to reinforce "high stress locations"—Plaintiffs do not allege that the iPhones are *not* made with any of these specific materials or components. *See* TACC ¶¶ 81–86. Rather, Plaintiffs allege that Apple's September 25, 2014 statement is false because, according to Plaintiffs, the stainless steel and titanium inserts do not *sufficiently* reinforce the iPhone because the iPhones suffer from the touchscreen defect. *Id.* ¶ 82.[4] However, that some iPhones suffered from the touchscreen defect does not demonstrate that Apple made any misrepresentation of fact in stating that the iPhones were made with certain materials and components. "It would be false [for Apple] to represent the [iPhone] has [titanium inserts] when it does not have [titanium inserts]. It is not false to represent the [iPhone] has [titanium inserts] when it in fact has them," even if those titanium inserts may fail. *See Deburro*, 2013 WL 5917665, at *5. Thus, Plaintiffs have not sufficiently

[4] Similarly, Plaintiffs allege that the iPhone's enclosure is not actually tempered for "extra strength" because of the touchscreen defect. TACC ¶ 86. However, the crux of Plaintiffs' allegation is not that Apple does not, in fact, temper the enclosure for extra strength, but rather that the enclosure is not tempered for *sufficient* strength given the touchscreen defect. *See id.*

alleged that Apple made misrepresentations in the September 25, 2014 statement about the iPhone's materials and components.

Finally, to the extent that Plaintiffs allege that Apple misrepresented that it is "extremely rare" for an iPhone to bend, this is also not an actionable misrepresentation. According to Plaintiffs, Apple's statement that it is "extremely rare" for an iPhone to bend is a misrepresentation about the *touchscreen* defect because Plaintiffs allege that all iPhones are made with insufficient material and *all* iPhones bend, even if not visibly, which places stress on the touch IC chips and causes the touchscreen defect. *Id.* ¶¶ 81–86. However, for several reasons, Plaintiffs have not alleged an actionable misrepresentation based on Apple's statement that it is "extremely rare" for an iPhone to bend.

As an initial matter, Apple's statement that it was "extremely rare" for an iPhone to bend was made in the context of Apple's statement that "through [Apple's] first six days of sale, a total of nine customers have contacted Apple with a bent iPhone 6 Plus." *Id.* ¶ 79. Plaintiffs do not allege that Apple falsely represented that only nine customers contacted Apple in their first day of sale. *Id.* Moreover, Apple made the statement that it was "extremely rare" for an iPhone to bend in the context of the "BendGate" controversy in which consumers complained that iPhones *visibly* bent. *Id.* ¶¶ 54–55. Accordingly, Apple's September 25, 2014 statement was not addressing the circumstance alleged by Plaintiffs that all iPhones bend in subtle and *non-visible* ways that cause the touchscreen defect. *Id.* ¶ 55. Indeed, Apple made *no* representations about the touchscreen or the touchIC chips in its September 25, 2014 statement. "In order to be deceived" by a representation, "members of the public must have had an expectation or an assumption about the matter in question." *Punian v. Gillette Co.*, 2016 WL 1029607, at *15 (N.D. Cal. Mar. 15, 2016) (internal quotation marks omitted). Because Apple's September 25, 2014 statement did not mention the touchscreen or touchscreen components at all, no reasonable consumer reading Apple's September 25, 2014 statement would have had any expectations or assumptions about the iPhone's touchscreen. Accordingly, the Court concludes that Apple's statement that it is

"extremely rare" for an iPhone to bend is not an actionable misrepresentation in the context of this case. *Deburro*, 2013 WL 5917665 (dismissing claim because the representations that plaintiff pointed to did not make any representations about the allegedly defective component itself, even though it made generic comments about the product); *see also Tatum v. Chrysler Corp.*, 2011 WL 1253847, at *4 (D.N.J. 2011) (finding general representations about a car to be non-actionable in the context of a claim alleging false representations about the car's braking system).

Thus, because Plaintiffs have failed to identify an actionable misrepresentation in the September 25, 2014 statement—and because this statement is the only statement that forms the basis of Plaintiffs' affirmative misrepresentation claims—the Court GRANTS Defendant's motion to dismiss the selected fraud causes of action to the extent that Plaintiffs base those causes of action on Defendant's alleged affirmative misrepresentations. The Court dismisses these claims with prejudice because the statements on which Plaintiffs base this claim are, as a matter of law, not actionable misrepresentations. *See Punian*, 2016 WL 1029607, at *17 (granting motion to dismiss with prejudice where the court concluded the statements were, as a matter of law, "either not likely to mislead a reasonable consumer or [] nonactionable puffery"). In addition, this Court previously dismissed with leave to amend Plaintiffs' affirmative misrepresentations claims in the SACC, and Plaintiffs have again failed to sufficiently allege affirmative misrepresentation claims in Plaintiffs' TACC. Thus, the Court finds that granting Plaintiffs an additional opportunity to amend the complaint would be futile, cause undue delay, and unduly prejudice Defendants by requiring Defendants to file repeated motions to dismiss. *See Leadsinger*, 512 F.3d at 532. The Court next addresses Plaintiffs' claims for fraudulent omissions.

b. Fraudulent Omissions

Plaintiffs also allege that Defendant committed fraud by "conceal[ing] or not disclos[ing]" that the iPhone's touchscreens were defective. *See, e.g.*, TACC ¶ 172. According to Plaintiffs, a "reasonable consumer would have considered [the touchscreen defect] to be important in deciding whether to purchase Apple's iPhones or pay a lesser price," and thus Defendant's failure to

disclose the defect is actionable fraud. *See, e.g.*, TACC ¶ 172.

This Court dismissed Plaintiff's fraudulent omission claims in its prior Order because the Court found that Plaintiffs failed to meet the heightened pleading requirements of Rule 9(b). The Court disagreed with Defendant that Rule 9(b) required Plaintiffs to specifically "identify 'where the omitted information should or could have been revealed' or "'provide representative samples of advertisements, offers, or other representations'" that contained omitted information. *Davidson*, 2017 WL 976048, at *9 (quoting *Marolda v. Symantec Corp.*, 672 F. Supp. 2d 992, 1002 (N.D. Cal. 2009)). Nonetheless, the Court held, Plaintiffs had failed to plead with particularity their fraudulent omission claims because Plaintiffs' SACC failed to allege that Plaintiffs "reviewed or were exposed to *any* information, advertisements, labeling, or packaging by Defendant" prior to purchasing their iPhones. *Id.* Accordingly, because Plaintiffs failed to allege that they encountered *any* representation of Defendant that omitted information about the touchscreen defect, Plaintiffs had failed to "provide Defendants with the 'who, what, when, and where' of Defendant's allegedly fraudulent omissions, as required by Rule 9(b)." *Id.* (quoting *Kearns*, 567 F.3d at 1127).

In the TACC, unlike the SACC, Plaintiffs allege that, either prior to purchase or immediately after their purchase and within the 14-day window in which Plaintiffs could have returned their iPhone for a full refund, Plaintiffs reviewed iPhone advertisements, iPhone packaging and information inside of that packaging, and Apple's press releases about the iPhone. *Id.* ¶¶ 8–34. In addition, Plaintiffs also allege that, immediately after purchase and within the 14-day window in which Plaintiffs could have returned their iPhone for a full refund, Plaintiffs each performed the initial set-up process on their iPhones, and this set-up process exposed Plaintiffs to further information about the iPhone. *Id.* ¶ 35. According to Plaintiffs, none of these sources of information from Defendant contained information about the touchscreen defect, even though these sources contained other disclosures about the iPhone. *Id.* ¶¶ 31–32 (describing how Apple disclosed on its iPhone packaging that the iPhone's battery may eventually need replacement and

that the iPhone's formatted storage capacity is less than the storage capacity stated on the packaging). Further, Plaintiffs allege that, although Defendant regularly made software and other updates available to consumers through the iPhone interface, Defendant never disclosed to Plaintiffs information about the touchscreen defect in any of these updates. *Id.* ¶¶ 98–102.

The Court finds that these allegations are sufficient to cure the deficiencies identified by the Court in its prior order. Unlike the TACC, Plaintiffs have sufficiently alleged the information about the iPhone to which Plaintiffs were exposed either prior to their purchase or immediately after their purchase and within the time window in which they could have returned their iPhone for a full refund. Plaintiffs allege that none of these sources contained relevant information about the touchscreen defect, even though Apple disclosed through these sources other limitations about the iPhone. This Court has found similar allegations sufficient to allege the "who, what, when, and where" of a Defendant's fraudulent omission, as required by Rule 9(b). *See Phillips v. Ford*, 2015 WL 4111448, at *12 (N.D. Cal. July 7, 2015) (*Philips II*) (finding Plaintiffs had alleged fraudulent omission claim with particularity where the "Plaintiffs allege that Ford's 'television advertisements concerning the vehicles,' 'material concerning the Fusion on Ford's website,' 'window sticker[s],' and 'brochure concerning the Fusion' did not include relevant information about the EPAS system and its possible failures.'"). Specifically, Plaintiffs have alleged the "who" (Apple); the "what" (knowing about yet failing to disclose to customers, at the point of sale or otherwise, that the iPhone's touchscreen was defective); the "when" (from the time of sale of the first iPhone through the present day); and the "where" (the various channels through which Apple sold and advertised the iPhone, and the channels through which Apple communicated to consumers through the iPhone immediately after Plaintiffs' purchase and within the 14-day window in which Plaintiffs could have returned their iPhone for a full refund). *See Velasco v. Chrysler Grp., LLC*, 2014 WL 4187796, at *5 (C.D. Cal. Aug. 22, 2014) ("Plaintiff has identified the 'who' (Chrysler); the 'what' (knowing about yet failing to disclose to consumers, at the point of sale or otherwise, [the defect]); the 'when'(from the time of sale of the first Class Vehicle until

the present day); and the 'where' (the various channels through which Chrysler sold the vehicles, including the authorized dealers where Plaintiffs' purchased their vehicles)" (internal citations omitted)).

Defendant's arguments to the contrary are not persuasive. Defendant contends that the information that Plaintiffs allegedly reviewed did not contain any information about the *touchscreen* specifically, and thus cannot form the basis of Plaintiff's fraudulent omission claim. *See, e.g.*, Mot. at 18–19. However, Plaintiffs allege that they reviewed materials from Apple that described the features of the iPhone 6, illustrated the touchscreen, and demonstrated how to use the touchscreen to operate the iPhone. *See, e.g.*, TACC ¶¶ 37–42. Plaintiffs allege that none of these materials disclosed the touchscreen defect and that, had the touchscreen defect been disclosed to Plaintiffs, Plaintiffs would not have bought an iPhone or would have paid less for their iPhone. *Id.* ¶ 97. The case law discussed above does not suggest that Rule 9(b) requires any further specificity to state a fraudulent omission claim. *See MacDonald v. Ford Motor Co.*, 37 F. Supp. 3d 1087, 1096 (N.D. Cal. 2014) ("Plaintiffs adequately allege the 'who what when and how,' given the inherent limitations of an omission claim. In short, the ''who' is Ford, the 'what' is its knowledge of a defect, the 'when' is prior to the sale of Class Vehicles, and the 'where' is the various channels of information through which Ford sold Class Vehicles.").[5]

Defendant also alleges that Plaintiffs cannot state a fraudulent omission claim because Plaintiffs fail to allege that Defendant had knowledge of the touchscreen defect such that Defendant was required to disclose the touchscreen defect. *See* Reply at 10. Defendant's argument is not well taken. Defendant did not raise this argument in its original motion to dismiss

[5] Defendant also contends that several Plaintiffs allege that they did not encounter materials from Defendant—such as their iPhone box or Apple's September 25, 2014 statement—until after Plaintiffs' purchase. However, Plaintiffs allege that they reviewed this material immediately after their purchase and within the 14-day window in which they could have returned the iPhone for a full refund. *See, e.g.*, TAC ¶12. Plaintiffs allege that they did not return their iPhone during the 14-day return period because of the materials that they reviewed. *Id.* Indeed, Defendant itself relies on Plaintiffs' ability to return their iPhones for a refund with regards to Plaintiffs' breach of warranty claims, discussed further below.

the SACC, and Defendant did not raise this argument in its opening brief in support of its motion to dismiss the TACC. *See* Mot. Defendant raises this argument for the first time in its Reply, and thus the Court is not required to consider it. *See Ind. Towers of Wash. v. Wash.*, 350 F.3d 925, at 929 (9th Cir. 2003) (explaining that the Ninth Circuit has "held firm against considering arguments that are not briefed" in a party's opening brief).

Nonetheless, even if this Court were to consider Defendant's argument that it lacked knowledge of the touchscreen defect at the time of Plaintiffs' purchases, the Court is not persuaded. Plaintiffs allege that Defendant performs "pre-release durability testing" on its iPhones prior to releasing them to the public. TACC ¶ 71. Plaintiffs describe the details of this pre-release testing, and Plaintiffs explain how this testing would have alerted Apple to the defect in this case. Specifically, Plaintiffs allege that Apple performs bending and pressure-point cycling tests, that Apple uses "torsion testing," and that Apple uses "sit tests" and "real-life user studies." *Id.* ¶¶ 72–76. Plaintiffs allege that these methods are designed to test the durability of the iPhone in real-life user scenarios, and Plaintiffs allege that these tests would have alerted Apple to the fact that the iPhone's external casing was not strong enough to protect the touch IC chips. *Id.* ¶ 77. Plaintiffs further allege that consumers began reporting problems with the touchscreen on Apple's website beginning on September 18, 2016—the day before the iPhone 6 was released to the public—and that consumers continued to complain to Apple and on third-party forums about this problem soon after the release. *Id.* ¶¶ 65, 67. Plaintiffs also allege that Apple's decision to forego using a "metal shield" or an "underfill" on the iPhone 6—which Apple used in prior versions of the iPhone—should have alerted Apple to the fact that the external casing of the iPhone 6 was insufficiently durable to protect the touch IC chips. *Id.* ¶ 77.

District courts across the country have found similar allegations sufficient to adequately allege a Defendant's knowledge of a defect. *See, e.g., In re Porsche Cars N. Am., Inc.*, 880 F. Supp. 2d 801, 816 (S.D. Ohio 2012) (finding, in multi-district litigation involving thirty-two claims—including claims under the consumer fraud statutes of Florida, Illinois, Texas, Colorado,

and Washington—that plaintiffs had adequately alleged knowledge of the defect where plaintiffs alleged that Porsche received complaints from owners, had access to data from dealers, had access to pre-release testing data, and that Porsche made decisions in designing the vehicle that would have alerted Porsche to the defect); *see also Kowalsky v. Hewlett-Packard Co.*, 2011 WL 3501715, at *4–5 (N.D. Cal. Aug. 10, 2011) (finding plaintiff adequately alleged knowledge of defect where plaintiff alleged that HP used "certain testing procedures on [its printer] that would have uncovered the alleged defect and that consumers complained of the defect").

Accordingly, the Court finds that Plaintiffs have satisfied Rule 9(b) with regards to Plaintiffs' selected fraud causes of action to the extent that Plaintiffs base those causes of action on Defendant's alleged fraudulent omissions. Thus, the Court DENIES Defendant's motion to dismiss those claims for failure to satisfy Rule 9(b). However, Defendant also raises independent reasons to dismiss Plaintiffs' causes of action under the NJCFA and Pennsylvania common law fraud. Thus, the Court next addresses those claims.

2. New Jersey Consumer Fraud Act

Defendant contends that Plaintiffs have failed to state a claim under the NJCFA because the only New Jersey Plaintiff, Pajaro, alleges that the touchscreen defect manifested on his iPhone approximately 22 months after Pajaro purchased his iPhone. Apple's Limited Warranty warrants "against defects in materials and workmanship when used normally in accordance with Apple's published guidelines for a period of ONE (1) YEAR from the date of original retail purchase by the end-user purchaser." *See* Limited Warranty 1. According to Defendant, because Pajaro experienced the defect well after the 1-year Limited Warranty period expired, Pajaro cannot state a NJCFA claim under New Jersey law. For the reasons discussed below, the Court agrees with Defendant.

In order to state a claim under the NJCFA, "a plaintiff must allege three elements: (1) unlawful conduct"; (2) "an ascertainable loss"; and (3) "a causal relationship between the defendant's unlawful conduct and the plaintiffs' ascertainable loss." *Int'l Union of Operating*

Eng. Local No. 68 Welfare Fund v. Merck & Co., Inc., 929 A.2d 1076, 1086 (N.J. 2007) (internal quotation marks omitted). In evaluating claims brought pursuant to the NJCFA, "[s]everal courts have held that a manufacturer's alleged failure to inform a consumer of a defect that becomes apparent after the life of a warranty issued by the manufacturer cannot be the basis for an NJCFA omissions-based claim against the manufacturer." *Velasco*, 2014 WL 4187796, at *11. This is because "a plaintiff cannot demonstrate 'ascertainable loss' under the NJCFA where the allegedly defective [] component outperforms its warranty period." *In re Porsche Cars N.A., Inc.*, 880 F. Supp. 2d at 857 (applying New Jersey law).[6]

This rule derives from the New Jersey Court of Appeal's decision in *Perkins v. DaimlerChrysler Corp.*, which held that "[a] defendant cannot be found to have violated the CFA when it provided a part—alleged to be substandard—that outperforms the warranty provided." 890 A.2d 997, 1004 (N.J. App. Div. 2006). The Court in *Perkins* stated that "the failure of a manufacturer or seller to advise a purchaser that a part of a vehicle may breakdown or require repair after the expiration of the warranty period cannot constitute a violation of the [NJ]CFA." *Id.* Accordingly, district courts evaluating NJCFA claims have applied *Perkins* to dismiss claims where the product "continued to perform beyond" the express warranty. *Duffy v. Samsung Elecs. Am., Inc.*, 2007 WL 703197, at *8 (D.N.J. Mar. 2, 2007) ("[B]ecause Plaintiff's microwave continued to perform beyond the period in which Samsung was contractually bound to repair or replace any defective part, Plaintiff cannot maintain a [NJ]CFA claim. To recognize Plaintiff's

[6] Defendant argues that the manifestation of the defect after the warranty period goes to Defendant's duty to disclose the defect, and thus the "unlawful conduct" element, as opposed to the "ascertainable loss" element. *See* Mot. at 24. Although Defendant's duty-to-disclose analysis has some support in the case law, *see Alban v. BMW of N.Am.*, 2010 WL 3636253, at *10 (D.N.J. Sept. 8, 2010), other cases applying New Jersey law persuasively explain that a defect manifesting outside of the warranty period is relevant to the "ascertainable loss" element, and the Court follows these cases. *See, e.g., In re Porsche Cars N.A., Inc.*, 880 F. Supp. 3d at 857–58 (distinguishing the "unlawful conduct" element from the "ascertainable loss" element in the context of defendant's argument that plaintiff could not state a claim because the defect manifested outside of the warranty period); *see also Chiarelli v. Nissan N.A., Inc.*, 2015 WL 5686507, at *16 (same). Although the fact that the defect manifested outside of the warranty period may also affect Defendant's duty to disclose the defect, the Court need not address the "unlawful conduct" element to dismiss Plaintiffs' NJCFA claim.

claim would essentially extend the warranty period beyond that to which the parties agreed."); *Grodzitsky v. Am. Honda Motor Co., Inc.*, 2013 WL 2631326, at *9 (C.D. Cal. June 12, 2013) ("Plaintiffs do not, and cannot, allege that the Window Regulatory Defect occurred during the warranty period; thus, they cannot state a claim under New Jersey's CFA.").

Plaintiffs argue that the instant case is distinguishable from *Perkins* because Plaintiffs are alleging that Defendant *knew* of the Touchscreen Defect but failed to disclose this information. Pl. Opp. at 26–28. According to Plaintiffs, "[c]ourts around the country have permitted consumer fraud claims to proceed under similar allegations." *Id.* at 28 (quoting *BK Trucking Co. v. Paccar, Inc.*, 2016 WL 3566723, at *9 (D.N.J. June 30, 2016)). However, the case relied upon by Plaintiffs for this proposition does not discuss *Perkins* or the "ascertainable loss" requirement. *See BK Trucking Co.*, 2016 WL 3566723, at *9 (discussing a defendant's duty to disclose but not discussing or addressing the "ascertainable loss" element and how it applies outside of the warranty period). Contrary to Plaintiffs' assertion, district courts applying *Perkins* have rejected the argument "that the *Perkins* rule does not apply where the defendant concealed defects." *In re Porsche*, 880 F. Supp. 2d at 857 (surveying New Jersey cases and finding plaintiffs' argument "that the *Perkins* rule does not apply where the defendant concealed defects" to be "against the weight of authority"); *Chiarelli v. Nissan N.A., Inc.*, 2015 WL 5686507, at *16 (E.D.N.Y. Sept. 25 2015) ("[P]erform[ing] a careful review of *Perkins* and the relevant case law" and concluding that "an allegation that a defendant concealed or knew about a latent defect may go toward whether the defendant engaged in an unlawful act (i.e., a materially misleading omission), but does not affect whether the plaintiff has adequately alleged an ascertainable loss").

Accordingly, based on the discussion in *Perkins* concerning the NJCFA's 'ascertainable loss' element," Plaintiffs cannot state a claim under the NJCFA because the only New Jersey Plaintiff experienced the touchscreen defect after the expiration of the 1-year Limited Warranty period. *Chiarelli*, 2015 WL 5686507, at *16. Thus, the Court GRANTS Defendant's motion to dismiss Plaintiffs' NJCFA claim. The Court grants Defendant's motion to dismiss with prejudice

because, since Pajaro's defect manifested outside of the warranty period, leave to amend the NJCFA claim would be futile. *Grozitsky*, 2013 WL 2631326, at *9 (dismissing NJCFA claim with prejudice because "Plaintiffs do not, and cannot, allege that the [defect] occurred during the warranty period."); *see also Chiarelli*, 2015 WL 5686507, at *16 n.16 (dismissing NJCFA claim with prejudice because defect manifested outside of the warranty period, which "render[ed] amendment futile").

In addition, the Court also grants Defendant's motion to dismiss with prejudice because Defendant raised this same NJCFA argument in its motion to dismiss the SACC. *See* ECF No. 54, at 19–20. Thus, at the time that Plaintiffs filed the TACC, Plaintiffs were on notice of Defendant's NJCFA argument, and yet Plaintiffs kept the same New Jersey plaintiff and asserted the same NJCFA allegations in the TACC. Accordingly, the Court finds that granting Plaintiffs leave to amend the NJCFA claim in a *fourth* amended class action complaint would be futile, cause undue delay, and unduly prejudice Defendant. *See Leadsinger*, 512 F.3d at 532 ("[L]eave to amend may be denied if the moving party has acted in bad faith, or if allowing amendment would unduly prejudice the opposing party, cause undue delay, or be futile.").

3. Pennsylvania Common Law Fraud

Defendant next moves to dismiss Plaintiffs' claim for common law fraud under Pennsylvania law. According to Defendant, this claim must be dismissed because Defendant had no duty to disclose the alleged defect, and because Plaintiffs' claim is barred by the economic loss doctrine. The Court need not discuss whether Defendant had a duty to disclose the defect because the Court finds that, under Pennsylvania law, Plaintiffs' Pennsylvania common law claim is barred by the economic loss doctrine.

"The economic loss doctrine 'prohibits plaintiffs from recovering in tort economic losses to which their entitlement flows only from a contract.'" *Werwinski v. Ford Motor Co.*, 286 F.3d 661, 670 (3d Cir. 2002) (quoting *Duquesne Light Co. v. Westinghouse Elec. Corp.*, 66 F.3d 604, 618 (3d Cir. 1995)). "The economic loss doctrine originated in the products liability context and

rests on the notion that 'the need for a remedy in tort is reduced when the only injury is to the product itself and the product has not met the customer's expectations, or, in other words, that the customer has received insufficient product value." *Whitaker v. Herr Foods, Inc.*, 198 F. Supp. 3d 476, 487 (E.D. Pa. 2016) (internal quotation marks omitted). "Where the customer's injury is based upon and flows from the purchaser's loss of the benefit of his bargain and his disappointed expectations as to the product he purchased, the harm sought to be redressed is precisely that which a warranty action does address." *Id.* (internal quotations and alterations omitted).

In *Werwinski v. Ford Motor Company*, 285 F.3d 661, 670 (3d Cir. 2002), the Third Circuit considered the question of whether Pennsylvania's economic loss doctrine barred actions for intentional fraud under either Pennsylvania common law or Pennsylvania's Unfair Trade Practices and Consumer Protection Law ("UTPCPL"). The Third Circuit recognized that the Supreme Court of Pennsylvania and Pennsylvania appellate courts had yet to resolve the issue in a published opinion. *Id.* Predicting how the Supreme Court of Pennsylvania would rule on the issue, the Third Circuit in *Werwinski* found that the economic loss doctrine applied to bar both plaintiffs' common law fraudulent concealment claim and plaintiffs' statutory claim under the UTPCPL. *Id.*

The Third Circuit's decision in *Werwinski*, however, has generated some "controversy." *See Montanez v. HSBC Mortg. Corp.*, 876 F. Supp. 2d 504, 518 n. 16 (E.D. Pa. 2012). After *Werwinski* was decided, the Pennsylvania Superior Court in *Knight v. Springfield Hyundai* held that the economic loss doctrine did not bar the plaintiff's statutory UTPCPL claim. 81 A.3d 940, 952 (Penn. Supp. Ct. 2013) ("[T]he economic loss doctrine is inapplicable and does not operate as a bar to Knight's UTPCPL claims"); *Dixon v. Nw. Mutual*, 146 A.3d 780, 790 (Penn. Supp. Ct. 2016) ("Dixon's UTPCPL claim is not barred by the economic loss doctrine"); *see also Zwiercan v. Gen. Motors Co.*, 2002 WL 31053838 (Penn. Ct. Com. Pl. 2002) (reasoning that the purpose of the UTPCPL was "to be liberally construed to prevent unfair or deceptive practices," and thus the economic loss doctrine did not apply to bar statutory claims). In light of the Pennsylvania

Superior Court's decision in *Knight*, federal courts applying Pennsylvania law have divided over whether *Werwinski* remains controlling or persuasive authority with regards to the application of Pennsylvania's economic loss doctrine. *Compare Whitaker*, 198 F. Supp. 3d at 489 (following the Third Circuit's *Werwinski* opinion and holding that the economic loss doctrine barred the UTPCPL claim); *Doll v. Ford Motor Co.*, 814 F. Supp. 2d 526, 551 (D. Md. 2011) ("While this Court recognizes the considerable debate over the validity of the Third Circuit's decision [in *Werwinski*], the Court cannot ignore [*Werwinski*'s] pronouncement of Pennsylvania law."), *with Kantor v. Hiko Energy, LLC*, 100 F. Supp. 3d 421, 427–28 (E.D. Pa. 2015) (holding that *Werwinski* no longer had "vitality" after the Pennsylvania Superior Court's decision in *Knight*).

However, although it may be a close question whether the economic loss doctrine applies to bar *statutory* fraud claims under the UTPCPL in light of *Knight*, the instant issue is whether the economic loss doctrine applies to bar Plaintiffs' *common law* fraud claim under Pennsylvania law. In *Knight*, the Pennsylvania Superior Court explicitly recognized that "[t]he claims at issue in this case are *statutory* claims brought pursuant to the UTPCPL." *Knight*, 81 A.3d at 952 (emphasis added). Similarly, in *Zwiercan*, the Pennsylvania Court of Common Pleas held that the economic loss rule did not apply to bar the plaintiffs' UTPCPL claim because "[t]o apply the economic loss doctrine to bar the Plaintiffs' statutory claim here would frustrate the intent of the *UTPCPL*." *Zwiercan*, 2002 WL 31053838, at *7 (emphasis added). Indeed, the federal district courts that have departed from *Werwinski* have largely done so only with regards to UTPCPL claims. *See, e.g.*, *Landau v. Viridian Energy PA LLC*, 223 F. Supp. 3d 401, 414 (E.D. Pa. Nov. 30, 2016) (departing from *Werwinski* and holding the economic loss doctrine did not bar UTPCPL claim because "the uniform practice of the Pennsylvania courts ha[s] been to ignore the economic loss doctrine *in their application of the UTPCPL*" (emphasis added)); *O'Keefe v. Mercedes-Benz, USA, LLC*, 214 F.R.D. 266, 275 (E.D. Pa. 2003) (holding the economic loss doctrine did not bar UTPCPL claims). These federal courts have emphasized that the Pennsylvania legislature enacted the UTPCPL with a remedial purpose in mind, and that the UTPCPL was a statute "in derogation

of common law." *O'Keefe*, 214 F.R.D. at 275. These rationales do not apply to claims for common law fraud.

Moreover, to the extent that Pennsylvania state law remains unclear as to whether the economic loss doctrine bars claims for common law fraud, a federal court sitting in diversity "should opt for the interpretation that restricts liability, rather than expands it, until the Supreme Court of Pennsylvania decides differently." *Werwinski*, 286 F.3d at 680; *see also Home Valu, Inc. v. Pep Boys*, 213 F.3d 960, 965 (7th Cir. 2000) (holding that where the Court is "faced with two equally plausible interpretations of state law," the Court "generally choose[s] the narrow interpretation which restricts liability, rather than the more expansive interpretation which creates substantially more liability"). Accordingly, the Court agrees with Defendant that Pennsylvania's economic loss doctrine applies to Plaintiffs' claim for common law fraud.

Nonetheless, Plaintiffs contend, even if the economic loss doctrine does apply, Plaintiffs argue that their claim for common law fraud falls under an exception to the economic loss doctrine. *See* Opp. at 24. Specifically, in *Werwinski*, the Third Circuit recognized an exception to the economic loss doctrine for a fraud claim "where the [fraud claim] arise[s] independently of the underlying contract." *Werwinski*, 286 F.3d at 676. Specifically, "a claim for fraudulent misrepresentation remains viable" despite the economic loss rule "when a party makes a representation extraneous to the contract." *Whitaker*, 198 F. Supp. 3d at 490 (internal quotation marks and alterations omitted). According to Plaintiffs, their fraud claim is "extraneous" to Defendant's warranty about the iPhone because Plaintiffs allege that Defendant made misrepresentations about the iPhone which induced Plaintiffs' purchase. *See* Opp. at 24.

However, Plaintiffs allege that Apple made material misrepresentations and omissions "regarding the quality, durability, and other material characteristics" of the iPhone. TACC ¶ 97. Courts applying Pennsylvania law have recognized that fraudulent representations and omissions that "concern the specific subject matter of the contract or warranty, such as the *quality or characteristics of the goods sold*" are intrinsic, rather than extrinsic, to the contract or warranty

and the economic loss rule applies. *Whitaker*, 198 F. Supp. 3d at 490; *see also Werwinski*, 286 F.3d at 678 (finding fraud claim to be "clearly . . . not 'extraneous' to, [Plaintiffs'] breach of warranty claims" because Plaintiffs' fraud claim "relate[d] to the quality or character of the goods sold"). Plaintiffs' claimed economic losses "flow from [Plaintiffs] loss of the benefit of [Plaintiffs'] bargain and [Plaintiffs'] disappointed expectations as to the products [Plaintiffs] purchased." *Whitaker*, 198 F. Supp. 3d at 490. Thus, under Pennsylvania law, the economic loss doctrine applies to bar Plaintiffs' Pennsylvania common law claim for fraud. *Werwinski*, 286 F.3d at 678 (finding economic loss rule applied to bar claim that Ford concealed information about allegedly defective transmission components); *Whitaker*, 198 F. Supp. 3d at 490 (holding economic loss rule applied to bar Pennsylvania common law fraud claim that Defendant falsely represented qualities of food products, which induced Plaintiffs to buy the goods).

Accordingly, the Court GRANTS Defendant's motion to dismiss Plaintiff's common law claim for fraud under Pennsylvania law. Because the economic loss doctrine bars Plaintiffs' claims as a matter of law, the Court dismisses this claim with prejudice. *Berkery v. Verizon Comm'ns Inc.*, 658 F. App's 172, 174 (3d Cir. 2016) (noting that, because the economic loss doctrine applied, "the District Court was correct to dismiss [the claim] with prejudice").

C. Warranty Claims

The Court next turns to Plaintiffs' warranty claims. For purposes of the instant motion to dismiss, Plaintiffs bring claims for (1) breach of express warranty under Illinois law; (2) breach of implied warranty under Illinois law; and (3) violation of the Magnusson-Moss Act. The Court addresses each below.

1. Illinois Breach of Express Warranty

First, Defendant moves to dismiss Plaintiffs' claim for breach of express warranty under Illinois law. To state a claim for breach of express warranty under Illinois law, 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." *Schiesser v. Ford Motor Co.*, 2017 WL 1283499, at *2 (N.D. Ill. Apr. 6, 2017) (internal quotation marks omitted).

The express warranty at issue is Defendant's Limited Warranty, which provides: "Apple warrants the Apple-branded iPhone . . . against defects in **materials and workmanship** when used normally in accordance with Apple's published guidelines **for a period of ONE (1) YEAR** from the date of original retail purchase by the end-user purchaser." Limited Warranty, at 1 (bold emphasis added).

In the Court's prior order dismissing Plaintiffs' claims in the SACC, the Court dismissed Plaintiffs' claim for breach of express warranty because the Court held that Plaintiffs had failed to allege that Defendant breached a term of the Limited Warranty. *Davidson*, 2017 WL 976048, at *11. Applying California law—which was the only law briefed by the parties—the Court held that Defendant's Limited Warranty covered only defects in "material and workmanship," and not defects in design. *Id.* The Court held that the touchscreen defect, as alleged by Plaintiffs in the SACC, was a design defect. *Id.* Moreover, the Court found that all but two Plaintiffs experienced the Touchscreen Defect after the 1-year time limitation in Defendant's Limited Warranty expired, and Plaintiffs who experienced the touchscreen defect after the expiration of the Limited Warranty could not bring a breach of express warranty claim. *Id.* at *12. The Court rejected Plaintiff's argument that the 1-year time limitation in Defendant's Limited Warranty was unconscionable. *Id.* Specifically, the Court held that a time limit was not, by itself, unconscionable, and that Plaintiffs did not adequately allege that the Limited Warranty was procedurally or substantively unconscionable. *Id.*at *13.

Defendant moves to dismiss Plaintiffs' breach of express warranty claim under Illinois law on the same grounds that Defendant moved to dismiss Plaintiffs' breach of express warranty claim in the SACC. *See* Mot. at 26–27. Specifically, Defendant argues that Plaintiffs have failed to allege that Defendant failed to perform under the warranty because the Limited Warranty does not

cover design defects, and Plaintiffs have alleged only a design defect. *Id.* at 26–27. Further, Defendant argues that, for all but two Plaintiffs, Plaintiffs' breach of express warranty claim is barred because Plaintiffs did not experience the touchscreen defect within the 1-year Limited Warranty period. *Id.* at 27. Plaintiffs contend, however, that they have adequately alleged a manufacturing defect, not a design defect. *See* Opp. at 30. Moreover, Plaintiffs argue, even if the warranty limitations apply to bar Plaintiffs' breach of express warranty claim, Plaintiffs can nonetheless assert a breach of warranty claim because the limitations in Defendant's Limited Warranty are unconscionable. *Id.* at 30–34. The Court first addresses Defendant's argument that Plaintiffs have failed to allege that Defendant did not perform under the warranty. The Court then addresses Plaintiffs' argument that the warranty limitations in Defendant's Limited Warranty are unconscionable.

a. Whether Defendant Failed to Perform Under the Limited Warranty

Defendant argues that it did not breach the Limited Warranty because Defendant had no obligation under the terms of the warranty to fix the touchscreen defect. Specifically, Defendant argues that the alleged touchscreen defect is not covered by the terms of the Limited Warranty. Defendant also argues that, for all but two Plaintiffs, the touchscreen defect manifested outside of the 1-year Limited Warranty period, and Plaintiffs cannot state a breach of express warranty claim if the touchscreen defect manifested outside of the limited warranty period.

As an initial matter, the Court agrees with Defendant that, for all but two Plaintiffs, Defendant had no obligation under the Limited Warranty to fix the touchscreen defect because all Plaintiffs except for Plaintiffs Benelhachemi and Bon allege that the touchscreen defect manifested outside of the 1-year Limited Warranty period. Under Illinois law, "[b]ecause express warranties are contractual in nature, the language of the warranty itself controls and dictates the rights and obligations of the parties to it." *Evitts v. DaimlerChrysler Motors Corp.*, 834 N.E.2d 942, 949 (Ill. App. Ct. 2005). "Illinois law holds that express warranties of limited duration cover only defects that become apparent during the warranty period." *Id.* "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." *Id.* Accordingly, Illinois "enforce[s] durational limits in express warranties." *Darne v. Ford Motor Co.*, 2015 WL 9259455, at *7 (N.D. Ill. Dec. 18, 2015).

Here, the Limited Warranty warrants against defects in materials and workmanship "for a period of ONE (1) YEAR from the date of the original retail purchase by the end-user purchaser." Limited Warranty, at 1. Plaintiffs do not contest that only Benelhachemi and Bon allege that the touchscreen defect manifested in their iPhone within the 1-year warranty period. *Id.* Accordingly, for all Plaintiffs except Benelhachemi and Bon, the language of the Limited Warranty bars Plaintiffs' claims for breach of express warranty.

Nonetheless, Plaintiffs contend that although the Limited Warranty's 1-year period applies to bar the claims of all Plaintiffs except Benelhachemi and Bon, the Limited Warranty's 1-year durational limitation does not apply because the entire Limited Warranty is unconscionable. Prior to addressing Plaintiffs' unconscionability argument, the Court first addresses Defendant's additional argument that the breach of warranty claims of *all* Plaintiffs, including Plaintiffs Benelhachemi and Bon, are barred because the Limited Warranty does not cover the touchscreen defect because it is a defect in design.

As set forth above, Defendant's Limited Warranty states that Defendants warrant "against defects in materials and workmanship." Limited Warranty, at 1. Applying Illinois law, courts have recognized that an express warranty covering defects in "material or workmanship" does not cover defects in design. *See Voelker v. Porsche Cars N.A., Inc.*, 353 F.3d 516, 520, 526–27 (7th Cir. 2003) (applying Illinois law and finding that, although the warranty covered defects in "material or workmanship," there was no indication that the warranty covered "defective design" and thus plaintiffs could not allege a breach of warranty claim). This is substantially identical to California law, which the Court applied in its prior order dismissing Plaintiffs' breach of express

warranty claim under California law. *Davidson*, 2017 WL 976048, at *11 (citing California law for the proposition that "[a]n express warranty covering 'materials and workmanship' does not include design defects'" (quoting *Clark v. LG Elecs. USA, Inc.*, 2013 WL 5816410, at *7 (S.D. Cal. Oct. 29, 2013)). In the Court's prior order, the Court recognized that a "plaintiff's chosen language is not dispositive in determining whether the alleged defect is a defect in design or a defect in 'materials and workmanship.'" *Id.* (citing *Troup v. Toyota Motor Corp.*, 545 F. App'x 668, 66–69 (9th Cir. 2014)). Analyzing Plaintiffs' allegations, this Court concluded that Plaintiffs had alleged, at bottom, that the touchscreen defect was the result of a design defect, not a manufacturing defect. *Id.* This Court granted Plaintiffs leave to amend to allege facts suggesting that the touchscreen defect was the result of a manufacturing defect. For the reasons discussed below, the Court finds that Plaintiffs still allege a design defect, not a manufacturing defect.

Plaintiffs allege in the TACC that "[t]he materials used in the iPhone's external casing are insufficient and inadequate to protect their internal parts," and that "the external casing of the iPhones is not sturdy, strong, or durable." TACC ¶¶ 45, 47. Plaintiffs allege that, because the material used in the external casing is not sturdy or durable, the touch IC chips are exposed to "external stress and physical harm" when a user uses an iPhone. *Id.* ¶¶ 49–52. Because the touch IC chips are exposed to external stress through everyday use, Plaintiffs allege that "the solder balls" inside of the iPhone, which adhere the touch IC chips to the iPhone's logic board, "crack and start to lose contact with the logic board." *Id.* ¶ 52. Plaintiffs allege that this causes the touch IC chips to be "unable to recognize the user's touches on the touchscreen because there is no electrical contact between the touch IC chips and the logic board." *Id.* ¶ 53. Plaintiffs allege that previous iPhones incorporated either a "metal shield" or an "underfill" in the logic board's design to provide protection to the logic board in the event of structural stress. *Id.* ¶¶ 60–62. According to Plaintiffs, these earlier designs mitigated against defects in the iPhones' external casing. *Id.* ¶¶ 60–62. By contrast, the iPhone 6 and 6 Plus do not incorporate either a metal shield or an underfill. *Id.* ¶ 62.

The Court agrees with Defendant that the TACC, at bottom, alleges a defect in Defendant's *design* of the iPhone 6 and 6 Plus. "'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'" is defective. *Cappellano v. Wright Med. Grp., Inc.*, 838 F. Supp. 2d 816, 825 (C.D. Ill. Jan. 23, 2012) (quoting *Salerno v. Innovate Surveillance Tech., Inc.*, 932 N.E.2d 101, 108 (Ill. 2010)). "Generally speaking, manufacturing defects result from qualities of a product not intended by the manufacturer." *Id.* (internal quotation marks omitted). The crux of Plaintiffs' allegations in the TACC, as with Plaintiffs' allegations in the SACC, is that the iPhone 6 and 6 Plus "conform[ed] to [Apple's] intended design" of the iPhone, but that Apple's chosen materials for constructing the iPhone are insufficient to protect the iPhone's internal components. *Cappellano*, 838 F. Supp. 2d at 825; *see* TAC ¶¶ 45, 47 ("The materials used in the iPhone's external casing are insufficient and inadequate to protect their internal parts."). As numerous courts have recognized, a manufacturer's choice of certain material to construct a product is a "design decision," not a defect in "materials and workmanship." *See, e.g.*, *Troup*, 545 F. App'x at 668–69 (finding that the "gravamen" of plaintiff's complaint alleged only a "design defect" because the plaintiff alleged that "the Prius's defect resulted from the use of resin to construct the gas tanks, which is a design decision"); *Bruce Martin Const., Inc. v. CTB, Inc.*, 735 F.3d 750, 754 (8th Cir. 2013) (finding plaintiff alleged a design defect, which was not covered by warranty for "materials and workmanship," where plaintiff alleged that the defendant's design called for the use of insufficient materials); *Nelson v. Nissan N.A., Inc.*, 2014 WL 7331075, at *3 (D.N.J. Dec. 19, 2014) (using materials that "were particularly susceptible to high heat is a design defect, not a manufacturing defect"); *Coba v. Ford Motor Co.*, 2016 WL 5746361, at *10 (D.N.J. Sept. 30, 2016) (finding plaintiff asserted a design flaw, not a manufacturing flaw, where plaintiff stated that a vehicle's fuel tanks coating was inadequate to withstand acid exposure).

Plaintiffs contend that the TACC alleges a manufacturing defect, and not a design defect, because Plaintiffs allege that the TACC alleges that the iPhone has "unintended qualities"—

"screens that do not respond to touch commands." Opp. at 22. However, the difference between a manufacturing defect and a design defect is not whether the Defendant intended the *defect* itself. Presumably, a manufacturer never intentionally designs a product to malfunction. Rather, as the case law discussed above makes clear, a design defect is alleged where "the specific unit conforms to the intended *design* but the intended design itself'" is inherently defective. *Cappellano*, 838 F. Supp. 2d at 825 (emphasis added). Plaintiffs' TACC does not contain any allegations that suggest that the materials used in the iPhone are different from the materials that Defendant *intended* to use in constructing the iPhone. Although Plaintiffs allege that the materials chosen by Defendant are insufficient, Defendant's choice to use those materials is still a design decision. *See, e.g.*, *Troup*, 545 F. App'x at 668–69 (finding plaintiff alleged a "design defect" because the plaintiff alleged that "the Prius's defect resulted from the use of resin to construct the gas tanks, which is a design decision"); *Bruce Martin Const., Inc.*, 735 F.3d at 754 (finding plaintiff alleged a design defect where plaintiff alleged that the defendant's *design* called for the use of insufficient materials).

In sum, the Court agrees with Defendant that the Limited Warranty does not cover the touchscreen defect because the Limited Warranty applies to only defects in materials and workmanship, and the touchscreen defect, as alleged by Plaintiffs, is a defect in design. This applies to bar the express warranty claims of *all* Plaintiffs. In addition, as discussed above, for all but Plaintiffs Benelhachemi and Bauer, Plaintiffs' express warranty claims are barred for the additional reason that the touchscreen defect manifested outside of the Limited Warranty's 1-year durational period. Nonetheless, Plaintiffs argue, Plaintiffs may still bring a breach of express warranty claim because the limitations contained within Defendant's Limited Warranty are unconscionable. The Court addresses this argument below.

b. Whether the Limited Warranty is Unconscionable

Plaintiffs argue that, even if the touchscreen defect is a design decision not covered by the Limited Warranty, and even though all but two Plaintiffs experienced the defect outside of the

Limited Warranty's 1-year durational period, Plaintiffs can nonetheless state a breach of warranty claim under Illinois law because the Limited Warranty's warranty limitations are unconscionable.

Under Illinois law, "[a] court can invalidate a contract if it is either procedurally or substantively unconscionable." *Schiesser v. Ford Motor Co.*, 2016 WL 6395457, at *3 (N.D. Ill. Oct. 28, 2016). "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." *Id.* (internal quotation marks omitted). "Substantive unconscionability refers to those terms which are inordinately one-sided in one party's favor." *Razor v. Hyundai Motor Am.*, 854 N.E. 2d 607, 622 (Ill. 2006).

As an initial matter, Plaintiffs argue that because they have raised the issue of unconscionability in their TACC, "Illinois law *mandates* that" the Court hold a hearing on unconscionability so that Plaintiffs can present evidence. Opp. at 31 (emphasis added). According to Plaintiffs, Illinois law provides that "[w]hen it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination." 810 Ill. Comp. Stat. Ann. 5/2-302(2) (emphasis added). Plaintiffs thus argue that the Court *must* give Plaintiffs an opportunity to "present evidence" as to the Limited Warranty's "commercial setting, purpose and effect." *See* Opp. at 31–32.

However, contrary to Plaintiffs' argument, federal courts have recognized that this provision of Illinois law does not supersede federal pleading requirements, which require plaintiffs to adequately allege a plausible claim for relief. *See Darne v. Ford Motor Co.*, 2015 WL 9259455, at 7 n. 9 (N.D. Ill. 2015) (rejecting argument that, under Illinois law, it was "premature to decide the unconscionability question on a motion to dismiss" and addressing the "adequacy of the allegations of unconscionability"); *see also Stravropoulos v. Hewlett-Packard Co.*, 2014 WL 2609431, at *3 (N.D. Ill. June 9, 2014) (assessing whether the plaintiff "passed the pleadings

threshold for unconscionability"); *Al Maha Trading & Contracting Holding Co. v. W.S. Darley & Co.*, 936 F. Supp. 2d 933, 943 (N.D. Ill. 2013) (granting motion to dismiss because plaintiff failed to adequately allege unconscionability under Illinois law). Accordingly, the Court addresses whether Plaintiffs have adequately alleged that the Limited Warranty is unconscionable.

Plaintiffs seek to hold the warranty limitations in Defendant's Limited Warranty unconscionable because Defendants "knowingly sold a defective product without informing consumers about the defect." TACC ¶ 291. However, although some district courts applying Illinois law have found this allegation alone sufficient to allege unconscionability, *see, e.g.*, *Stravropoulos*, 2014 WL 2609431, at *3, other cases applying Illinois law suggest that a defendant's alleged knowledge of a defect is but one factor to consider in determining whether limitations in a warranty provision are unconscionable. *See, e.g.*, *Darne*, 2015 WL 9259455, at *5 (rejecting unconscionability argument even though plaintiff alleged that Ford knew the engine had major defects); *McCabe v. Daimler AG*, 948 F. Supp. 2d 1347, 1358 (N.D. Ga. 2013) (applying Illinois law and finding no support for the proposition "that a warranty's time and mileage limitations may be rendered unconscionable simply because a manufacturer knowingly sells a defective product"); *see also Am. Licorice Co. v. Total Sweeteners, Inc.*, 2014 WL 5396214, at *11 (N.D. Cal. Oct. 22, 2014) (applying Illinois law and refusing to find substantive unconscionability merely because defects were latent because "[t]he breadth of such a holding would be sweeping"). The Court finds this latter line of cases more persuasive, and thus considers Plaintiffs' allegations of Defendant's knowledge of the defect together with Plaintiffs' additional allegations.

Here, although Plaintiffs allege that Defendant knew about the touchscreen defect at the time of sale, this factor does not weigh heavily in favor of finding substantive unconscionability in this case. Defendant's Limited Warranty "acknowledg[es] the possibility of latent defects" because the Limited Warranty covers defects in materials and workmanship for a period of only one year. *Schiesser*, 2017 WL 1283499, at *3 (N.D. Ill. Apr. 6, 2017); *Darne*, 2015 WL 9259455,

at *8 (noting that, in providing a limited warranty, "Ford expressly acknowledged that parts of its vehicles might be defective"). Plaintiffs do not allege that Defendant made any changes to its usual Limited Warranty *because* of the touchscreen defect. *See Skeen v. BMW of N.A., LLC*, 2014 WL 283628, at *14 (D.N.J. 2014) (finding plaintiff adequately alleged substantive unconscionability under Illinois law because, in addition to alleging knowledge, the plaintiff alleged the defendant "*manipulated* the warranty terms to avoid paying for" the defect (emphasis added); *Schiesser*, 2017 WL 1283499, at *3 (finding lack of substantive unconscionability where there was no allegation that the durational limitations in the warranty were made "too short to discover the Defect"). Accordingly, even though Plaintiffs allege that Defendant knew of the defect, this alone does not weigh heavily in favor of finding that the Limited Warranty is "inordinately one-sided" in favor of Defendant such that the Limited Warranty is substantively unconscionable. *Razor*, 854 N.E. 2d at 622.

Plaintiffs also argue that the Limited Warranty is substantively unconscionable because "[c]onsumers reasonably expect that smartphones will remain operable for at least two years when not subject to abuse or neglect because the overwhelming majority of smartphone users are required to sign service contracts with *cellular carriers* for two-year periods." TACC ¶ 144 (emphasis added). However, this also does not show that Apple's Limited Warranty is substantively unconscionable. At bottom, Plaintiffs allege only that Plaintiffs believe that *Apple's* 1-year warranty is unfair because Plaintiffs have developed expectations based on *cellular service contracts* that Plaintiffs have entered into with separate cellular carriers. Courts have repeatedly emphasized that it is not appropriate for courts to rewrite the express terms of a warranty simply because of a consumer's unilateral expectations about a product. *See Sw. Eng'g, Inc. v. Yeomans Chicago Corp.*, 2009 WL 3720374 (S.D. Cal. Nov. 3, 2009) (applying Illinois law and declining to find substantive unconscionability merely because the Plaintiff was "unhappy with the terms it agreed to at the outset," noting that the Court should not "upset[] the parties' allocation of risk and loss"); *Seifi v. Mercedes-Benz USA, LLC*, 2013 WL 5568449, at *5 (N.D. Cal. Oct. 9, 2013) ("A

theory that would allow unilateral consumer expectations based on the practices of other car manufacturers to unwind the express terms of the durational limits here would render substantive unconscionability analysis unworkable."). To hold Apple's Limited Warranty substantively unconscionable simply because Plaintiffs expect their iPhones to last the length of their cellular service contracts "would place a burden on [Apple] for which it did not contract." *Evitts*, 834 N.E. 2d at 950. In sum, the Court disagrees with Plaintiffs that their expectations based on Plaintiffs' separate cellular service contracts render Apple's Limited Warranty substantively unconscionable.

The Court also finds that Plaintiffs have failed to allege that Apple's Limited Warranty is procedurally unconscionable. Plaintiffs allege that the Limited Warranty is procedurally unconscionable because Plaintiffs were "provided with a link to [Apple's] warranty" in the iPhone box after sale. *Id.* ¶ 107. Plaintiffs rely on the Supreme Court of Illinois's opinion in *Razor v. Hyundai Motor America*, 222 Ill. 2d 75 (Ill. 2006), in which the Supreme Court of Illinois found limitations in a vehicle warranty to be procedurally unconscionable because the warranty was "contained in the owner's manual, which was placed in the glove compartment of the car, where it was unavailable to the consumer until after she took delivery." *Id.* at 101. However, *Razor* is distinguishable from the instant case. The *Razor* court did not consider the circumstance where, as here, the Limited Warranty unequivocally provides that "if you do not agree to the terms of the warranty, do not use the product and return it . . . for a refund." Limited Warranty, at 1; *see In re VTech Data Breach Litig.*, 2017 WL 2880102, at *8 (N.D. Ill. July 5, 2017) (describing *Razor* as holding that a term unavailable to a consumer until after purchase "might be unconscionable, especially if [the plaintiff] was not given an opportunity to review and reject that term *by returning the product* without incurring financial loss" (emphasis added)). Contrary to Plaintiffs' argument, courts applying Illinois law have enforced provisions in contracts where the party "had an opportunity to return the [product] after reading" the contract. *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1148 (7th Cir. 1997); *see also McNamara v. Samsung Telecommunications Am., LLC*, 2014 WL 5543955, at *2 (N.D. Ill. Nov. 3, 2014) (refusing to find arbitration provision

unconscionable under Illinois law where plaintiff could return the product for a refund within 30 days of purchase). Plaintiffs do not dispute that they could return the iPhone without cost within 14 days of purchase if they were not satisfied with the terms of the Limited Warranty. *See* TACC ¶¶ 36, 88.

Moreover, Plaintiffs acknowledge that Apple's Limited Warranty was available online prior to and at the time of their purchase, and Plaintiffs do not allege that they did not or could not review the Limited Warranty online prior to their purchase. *See* TACC ¶¶ 106–08 (providing hyperlink to Apple's Limited Warranty online); *see Darne*, 2015 WL 9259455, at *8 (finding plaintiffs failed to allege procedural unconscionability under Illinois law where the plaintiffs did not allege when they became aware of the warranty, whether the warranty induced their purchases, "or whether they learned about the warranty's duration after completing their purchases"). Further, although Apple "unilaterally drafted the terms of the warranty," Plaintiffs had the option of purchasing a different smartphone from a different smartphone manufacturer, and Plaintiffs do not dispute that they had the option of purchasing an extended service plan to extend the duration of the 1-year warranty. *Darne*, 2015 WL 9259455, at *8 (quoting *Smith v. Ford Motor Co.*, 462 F. App'x 660, 663–64 (9th Cir. 2011)). Accordingly, the Court finds that Plaintiffs have failed to adequately allege that the Limited Warranty is procedurally unconscionable under Illinois law.

Based on the allegations in the TACC, the Court concludes that Plaintiffs have failed to allege that Defendant's 1-year Limited Warranty is unconscionable under Illinois law. Accordingly, the limitations contained within the Limited Warranty are enforceable. Plaintiffs cannot state a breach of express warranty claim because the Limited Warranty excludes defects in design and Plaintiffs allege only a design defect claim. Thus, for all Plaintiffs, Plaintiffs cannot allege that Defendant breached the express warranty. In addition, the Limited Warranty applies for only 1-year, and for all but two Plaintiffs, the touchscreen defect manifested outside of the 1-year Limited Warranty period. Thus, the Court GRANTS Defendant's motion to dismiss Plaintiffs' selected breach of warranty claim under Illinois law. The Court grants Defendant's

motion with prejudice. The Court dismissed Plaintiffs' breach of warranty claim in this Court's prior order for the same reasons that the Court dismisses Plaintiffs' instant breach of warranty claim in the TACC. The Court provided Plaintiffs leave to amend to adequately allege either a design defect or unconscionability of the Limited Warranty, and Plaintiffs have failed to do so. Thus, the Court finds that granting Plaintiffs an additional opportunity to amend the complaint would be futile, cause undue delay, and unduly prejudice Defendants by requiring Defendants to file repeated motions to dismiss. *See Leadsinger*, 512 F.3d at 532.

2. Breach of Implied Warranty

Defendant also moves to dismiss Plaintiffs' claim for breach of implied warranty. Plaintiffs allege that "Apple provided Plaintiffs and the Class Members with an implied warranty that the iPhones and any parts thereof are merchantable and fit for the ordinary purposes for which they were sold." TACC ¶ 296. Plaintiffs allege that the iPhones "were not fit for their ordinary and intended purpose" as smartphones, and thus Defendant breached the implied warranty that the iPhones were of merchantable quality and fit for use." *Id.* ¶ 299.

As the Court set forth in its prior Order, Apple's disclaimer on implied warranties provides as follows:

> WARRANTY LIMITATIONS SUBJECT TO CONSUMER LAW
>
> TO THE EXTENT PERMITTED BY LAW, THIS WARRANTY AND THE REMEDIES SET FORTH ARE EXCLUSIVE AND IN LIEU OF ALL OTHER WARRANTIES, REMEDIES AND CONDITIONS, WHETHER ORAL, WRITTEN, STATUTORY, EXPRESS OR IMPLIED. **APPLE DISCLAIMS ALL STATUTORY AND IMPLIED WARRANTIES, INCLUDING WITHOUT LIMITATION, WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE** AND WARRANTIES AGAINST HIDDEN OR LATENT DEFECTS, TO THE EXTENT PERMITTED BY LAW. IN SO FAR AS SUCH WARRANTIES CANNOT BE DISCLAIMED, APPLE LIMITS THE DURATION AND REMEDIES OF SUCH WARRANTIES TO THE DURATION OF THIS EXPRESS WARRANTY AND, AT APPLE'S OPTION, THE REPAIR OR REPLACEMENT SERVICES DESCRIBED BELOW. SOME STATES (COUNTRIES AND PROVINCES) DO NOT ALLOW LIMITATIONS ON HOW LONG AN IMPLIED WARRANTY (OR CONDITION) MAY LAST, SO THE

LIMITATION DESCRIBED ABOVE MAY NOT APPLY TO YOU.

Limited Warranty, at 1 (bold emphasis added).

In this Court's order dismissing Plaintiffs' breach of implied warranty claim in the SACC, the Court applied California law—the only law briefed by the parties—and held that Plaintiffs breach of implied warranty claim failed because Defendant's Limited Warranty disclaimed all implied warranties. *Davidson*, 2017 WL 976048, at *14. The Court held that, under California law, a company may disclaim the implied warranty of merchantability so long as the disclaimer 'mention[s] merchantability' and is 'conspicuous.'" *Id.* (quoting *Minkler v. Apple*, 65 F. Supp. 3d 810, 819 (N.D. Cal. 2014)). Further, a company may disclaim the implied warranty of fitness under California law "as long as the disclaimer is in writing and 'conspicuous.'" *Id.* This Court examined the case law and Apple's Limited Warranty and concluded that the Limited Warranty appropriately disclaimed implied warranties under California law because the disclaimer was in writing, stated in clear language, and was in capitalized formatting on the second paragraph of the Limited Warranty, which contrasted the disclaimer from the non-capitalized font on the same page. *Id.* at *14–15.

Illinois law, like California law, "permits parties to exclude implied warranties at the time of sale when certain conditions are met." *Great West Cas. Co. v. Volvo Trucks N.A., Inc.*, 2009 WL 588432, at *3 (N.D. Ill. Feb. 13, 2009). Specifically, "to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness, the exclusion must be by a writing and conspicuous." *Id.* (quoting 810 Ill. Comp. Stat. 5/2-316(2)).

The implied warranty disclaimer in Apple's Limited Warranty meets these standards. As the Court explained in its prior Order, the implied warranty disclaimer is in writing and "mention[s] merchantability." *Davidson*, 2017 WL 976048, at *14. Moreover, under Illinois law, as under California law, the implied warranty disclaimer is "conspicuous." *Great West Cas. Co.*,

2009 WL 588432, at *3. Under the Uniform Commercial Code, which governs the sale of goods in Illinois, conspicuous terms include "language in the body of a record or display in larger type than the surrounding text, or in contrasting type, font or color to the surrounding text of the same size, or set off from surrounding text of the same size by symbols or marks that call attention to the language." 810 Ill. Comp. Stat. 5/1-201(10)(B). The implied warranty disclaimer in the Limited Warranty is located in the second paragraph of the first page of the Limited Warranty. *See* Limited Warranty, at 1. The disclaimer is preceded by a heading and, unlike the subsequent text on the same page, the disclaimer is in all capital letters. *Id.* "Illinois courts have ruled that disclaimers printed in capital letters and set off from the surrounding text are conspicuous." *Great West Cas. Co.*, 2009 WL 588432, at *3 (collecting cases). Accordingly, the Court finds that Defendant's implied warranty "disclaimers were presented in a manner reasonably sufficient to draw attention to them." *R.O.W. Window Co. v. Allmetal, Inc.*, 856 N.E.2d 55, 59–60 (Ill. Ct. App. 2006).

Plaintiffs contend that, even assuming that the Limited Warranty's implied warranty disclaimer is conspicuous, the Limited Warranty's implied warranty disclaimer is not enforceable because the Limited Warranty is unconscionable. Pl. Opp at 28–29. Plaintiffs again argue that "Illinois law **mandates** that Plaintiff should have the opportunity to offer evidence that any such disclaimer was unconscionable." *Id.* at 28. However, as discussed above with regards to Plaintiffs' breach of express warranty claim, federal courts have recognized that Plaintiffs must plausibly allege unconscionability in the complaint before they are entitled to an evidentiary hearing on unconscionability. *See Darne*, 2015 WL 9259455, at 7 n. 9 (rejecting argument that, under Illinois law, it was "premature to decide the unconscionability question on a motion to dismiss" and addressing the "adequacy of the allegations of unconscionability"); *see also Stravropoulos*, 2014 WL 2609431, at *3 (assessing whether the plaintiff "passed the pleadings threshold for unconscionability"). Plaintiffs' allegations regarding the unconscionability of the Limited Warranty for purposes of their implied warranty claim are the same as Plaintiffs'

allegations with regards to their breach of express warranty claim. As set forth above, the Court finds that Plaintiffs have not plausibly alleged that Apple's Limited Warranty is unconscionable under Illinois law. Accordingly, the implied warranty disclaimer contained within Defendant's Limited Warranty is enforceable, and the Court thus GRANTS Defendant's motion to dismiss Plaintiffs' breach of implied warranty claim under Illinois law. The Court grants Defendant's motion with prejudice. The Court dismissed Plaintiffs' breach of implied warranty claim in this Court's prior order for the same reasons that the Court dismisses Plaintiffs' instant breach of implied warranty claim in the TACC. The Court provided Plaintiffs leave to amend to adequately allege that the implied warranty disclaimer was inconspicuous or unconscionable, and Plaintiffs have failed to do so. Thus, the Court finds that granting Plaintiffs an additional opportunity to amend the complaint would be futile, cause undue delay, and unduly prejudice Defendants by requiring Defendants to file repeated motions to dismiss. *See Leadsinger*, 512 F.3d at 532.

3. Magnusson-Moss Act

Finally, Defendant moves to dismiss Plaintiffs' claim under the Magnusson-Moss Act. As the Court explained in its prior order, "[t]he parties do not dispute that 'claims under the Magnusson-Moss Act stand or fall with [Plaintiffs'] express and implied warranty claims under state law.'" *Davidson*, 2017 WL 976046, at *15 (quoting *Clemens*, 534 F.3d at 1022). Accordingly, Plaintiffs' Magnusson-Moss Warranty Act claim based on Plaintiffs' common law breach of express and implied warranty claims under Illinois law is DISMISSED with prejudice.

IV. CONCLUSION

For the foregoing reasons, Defendant's motion to dismiss the TACC is GRANTED in part and DENIED in part as follows:

- Defendant's motion to dismiss Plaintiffs' requests for injunctive relief is GRANTED with prejudice as to Plaintiffs Davidson, Borzymowski, Muilenburg, Petty, Bon, Corbett, and Pajaro, and DENIED as to Plaintiffs Brown, Baker, Cleary, Benelhachemi, Bauer, and Heirloom Estate Services.

- Defendant's motion to dismiss Plaintiffs' New Jersey Consumer Fraud Act; Florida Deceptive and Unfair Trade Practices Act; Washington Consumer Protection Act; Illinois Consumer Fraud and Deceptive Trade Practices Act; Texas Deceptive Trade Practices Act; Colorado Consumer Protection Act; and common law fraud claims is GRANTED with prejudice to the extent that these claims are premised on an affirmative misrepresentation theory.
- Defendant's motion to dismiss Plaintiffs' New Jersey Consumer Fraud Act; Florida Deceptive and Unfair Trade Practices Act; Washington Consumer Protection Act; Illinois Consumer Fraud and Deceptive Trade Practices Act; Texas Deceptive Trade Practices Act; Colorado Consumer Protection Act; and common law fraud claims is DENIED to the extent that these claims are premised on a fraudulent omissions theory. However, the Court GRANTS with prejudice Defendant's motion to dismiss Plaintiffs' claims for fraud under the New Jersey Consumer Fraud Act and Pennsylvania common law.
- Defendant's motion to dismiss Plaintiffs' claim for breach of express warranty under Illinois law is GRANTED with prejudice.
- Defendant's motion to dismiss Plaintiffs' claim for breach of implied warranty under Illinois law is GRANTED with prejudice.
- Defendant's motion to dismiss Plaintiffs' Magnusson-Moss Act claim based on Plaintiffs' express and implied warranty claims under Illinois law is GRANTED with prejudice.

IT IS SO ORDERED.

Dated: July 25, 2017

Lucy H. Koh

LUCY H. KOH
United States District Judge