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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

PATRICIA WEEKS, et al.,
Plaintiffs,
v.
GOOGLE LLC,
Defendant.

Case No. 18-cv-00801 NC

**ORDER GRANTING IN PART AND
DENYING IN PART MOTION TO
DISMISS AND GRANTING LEAVE
TO AMEND**

Re: Dkt. No. 42

In the age of smartphones, many consumers expect not only to be able to place and receive calls on their devices, but also to be able to verbally give commands to their phones. This lawsuit is about the alleged failure of a smartphone, the Google Pixel, to deliver on either of these functions. In this product defect lawsuit, plaintiffs Patricia Weeks, Alicia Helms, and Brian McCloy allege that the Pixel has a microphone defect that caused the phone to fail to place and receive calls. This, plaintiffs allege, rendered their phones unfit for their usual purpose.

Defendant Google LLC warranted the Pixels under a Limited Warranty for one year, and gave Google, in its sole discretion, the power to repair, replace, or provide a refund for defective Pixels. Plaintiffs took advantage of the Limited Warranty, but instead of refunds or repairs, plaintiffs allege that Google would only provide them with equally defective replacement Pixels. These replacement Pixels allegedly also suffered from the microphone defect that plaintiffs' original phones had. Plaintiffs bring this consumer class
Case No. 18-cv-00801 NC

1 action seeking damages, declaratory judgment, and injunctive relief requiring Google to
2 disclose the defect. Google moves to dismiss plaintiffs’ amended complaint under Federal
3 Rule of Civil Procedure 12(b)(6). For the reasons stated below, the Court GRANTS IN
4 PART and DENIES IN PART Google’s motion to dismiss. The warranty-based claims are
5 dismissed, but the claims for (1) breach of the covenant of good faith and fair dealing, (2)
6 the California Consumer Legal Remedies Act, (3) the California Unfair Competition Law,
7 and (4) fraudulent concealment survive this motion. The Court GRANTS plaintiffs
8 LEAVE TO AMEND their complaint consistent with this order.

9 **I. BACKGROUND**

10 Weeks, Helms and McCloy are citizens of the states of Florida, North Carolina, and
11 Illinois, respectively. Dkt. No. 26 at 2. Defendant Google LLC is incorporated in
12 Delaware, but has its principal place of business in Mountain View, California, within this
13 judicial district. *Id.* Plaintiffs seek to represent a nationwide class of Pixel purchasers.
14 The Pixel was released by Google on October 20, 2016. *Id.* at 9. All named plaintiffs
15 purchased their devices directly from Google, or from an authorized seller of the Pixel. *Id.*
16 at 10. The Pixel was sold at prices ranging from \$649 to \$869 a unit. *Id.* at 2.

17 When buying the phones, plaintiffs all were required to agree to the terms of
18 purchase and warranties presented by Google, which plaintiffs were not given an
19 opportunity to negotiate. *Id.* at 4, 6, 7. Moreover, plaintiffs assert that they were unaware
20 prior to purchase that Google had placed “any disclaimer of or limit on warranty coverage”
21 of the Pixels. *Id.* The Limited Warranty in question states in relevant part that: “Google
22 warrants that a new Phone . . . will be free from defects in materials and workmanship
23 under normal use in accordance with Google’s published user documentation for one year
24 from the date of original retail purchase in its original packaging by you.” Dkt. No. 43-1 at
25 4 (Google “Hardware Warranty Center”). The “Limited Warranty does not guarantee that
26 use of the Phone will be uninterrupted or error free.” *Id.* As to the section of the warranty
27 dealing with remedies, the warranty provides:
28

1 **EXCLUSIVE REMEDY:** If a defect arises and you return your
2 Phone during the Limited Warranty period (which is one year
3 for new devices and ninety days for refurbished devices),
4 Google will in its sole discretion and to the extent permitted by
5 law either repair your Phone using new or refurbished parts,
6 replace your Phone with a new or refurbished Phone
7 functionally at least equivalent to yours, or accept the return of
8 the Phone in exchange for a refund of the purchase price you
9 paid for the Phone. If Google repairs or replaces the Phone, the
10 repaired or replaced Phone will continue to be warranted for the
11 remaining time of the original warranty period.

12
13 **THE LIMITED WARRANTY WRITTEN ABOVE IS THE**
14 **ONLY EXPRESS WARRANTY GOOGLE PROVIDES FOR**
15 **THE PHONE, AND THE ABOVE REMEDY IS YOUR SOLE**
16 **REMEDY.**

17 *Id.* at 4-5 (bolding and all caps in original), 8-9 (same).

18 Plaintiffs purchased their Pixels between November 2016 and February 2017, and
19 all of their phones exhibited the alleged microphone defect within one year of purchase.
20 Dkt. No. 26. at 3-8. Per plaintiffs, despite Google’s knowledge of the microphone defect
21 (based on customer complaints on Google’s customer service forum), Google at no time
22 warned them of the defect prior to purchase. *Id.* at 12, 20.

23 Each plaintiff states that had he or she known about the microphone defect, he or
24 she would (1) not have purchased the Pixel, (2) not have purchased it at the price he or she
25 did, or (3) have returned the Pixel during the buyer’s remorse period. *Id.* at 4, 6-7, 8.
26 Also, plaintiffs represent that they “would like to buy more Google mobile phone products,
27 [but] they will not do so unless Google takes sufficient steps to cure the microphone defect
28 and ensure the accuracy of its representations about its Pixel product line.”¹ *Id.* at 8.

 Plaintiffs filed this case on February 6, 2018. Dkt. No. 1. The operative amended
complaint alleges claims for: (1) breach of express warranty; (2) breach of the implied
covenant of good faith and fair dealing; (3) breach of the implied warranty of
merchantability; (4) violation of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301, *et*

¹ There are facts in the Amended Complaint regarding the microphone defect and specific consumer complaints regarding the Pixel. For purposes of this motion, however, the Court does not recount them because they do not bear on the outcome. The interested reader may refer to the amended complaint for additional background. Dkt. No. 26.

1 *seq.*; (5) violation of California’s Unfair Competition Law (UCL), Cal. Bus. & Prof. Code
 2 § 17200; (6) violation of California’s Consumer Legal Remedies Act (CLRA), Cal. Civ.
 3 Code § 1750, *et seq.*; and (7) fraudulent concealment. Dkt. No. 26. Plaintiffs sue under
 4 California law because Google’s Terms of Sale for Devices requires that California law
 5 apply to any disputes.² *Id.* at 22. Google filed this motion to dismiss the entire complaint,
 6 and plaintiffs oppose the motion. Dkt. Nos. 42, 51.

7 All parties consented to the jurisdiction of a magistrate judge under 28 U.S.C. §
 8 636(c). Dkt. Nos. 12, 22, 59, 60.

9 **II. LEGAL STANDARD**

10 A motion to dismiss for failure to state a claim under Rule 12(b)(6) tests the legal
 11 sufficiency of a complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). On a
 12 motion to dismiss, all allegations of material fact are taken as true and construed in the
 13 light most favorable to the non-movant. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-
 14 38 (9th Cir. 1996). The Court, however, need not accept as true “allegations that are
 15 merely conclusory, unwarranted deductions of fact, or unreasonable inferences.” *In re*

16
 17 ² As a result, it does not appear that the Court needs to face thorny choice of law concerns,
 18 as another court in this district did in a similar case, *In re Nexus Products Liability*
 19 *Litigation*, 293 F. Supp. 3d 888 (N.D. Cal. 2018). However, the Court alerts the parties to
 20 the analysis in *Frenzel v. AliphCom*, 76 F. Supp. 3d 999, 1009 (N.D. Cal. 2014), in which
 21 District Court Judge William H. Orrick considered the plaintiff’s omission of allegations
 22 regarding the terms of use in the complaint’s venue allegations as part of his analysis in
 23 dismissing the class and individual claims. Judge Orrick gave the plaintiff leave to amend
 24 in that case, and here the Court will too. *Id.* at 1010. Plaintiffs must amend their
 25 jurisdictional and venue allegations to make clear that the terms of use are the reason why
 26 this case may remain in this district. Moreover, the Court warns plaintiffs that it is
 27 possible that the Court will be required to dismiss the California consumer protection
 28 claims against Google. *In re Sony Gaming Networks & Customer Data Sec. Breach Litig.*,
 903 F. Supp. 2d 942, 964 (S.D. Cal. 2012) (“Plaintiffs contend that the choice of law
 provision in the SNE Terms of Service Agreement dictates that California law applies to
 claims relating to their PSN accounts. By its own terms, however, the provision dictates
 only that California law applies to the construction and interpretation of the contract, and
 thus the provision does not apply to Plaintiffs’ non-contractual claims asserted under
 California’s consumer protection statutes. . . . [T]he Court DISMISSES Plaintiffs’ claims
 arising under the UCL, FAL, and the CLRA, with respect to the nonresident named
 Plaintiffs with prejudice.”). The Court will no doubt revisit this issue in a future motion to
 dismiss, motion for summary judgment, or motion for class certification. However, the
 Court lacks information to make a decision on this point now because the issue is not
 briefed, and the Court lacks the benefit of the parties’ analysis of the Google Store’s Terms
 of Sale for Devices.

1 *Gilead Scis. Secs. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008). Although a complaint need
2 not allege detailed factual allegations, it must contain sufficient factual matter, accepted as
3 true, to “state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*,
4 550 U.S. 544, 570 (2007). A claim is facially plausible when it “allows the court to draw
5 the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft*
6 *v. Iqbal*, 556 U.S. 662, 678 (2009).

7 If a court grants a motion to dismiss, leave to amend should be granted unless the
8 pleading could not possibly be cured by the allegation of other facts. *Lopez v. Smith*, 203
9 F.3d 1122, 1127 (9th Cir. 2000).

10 **III. DISCUSSION**

11 Google moves to dismiss the amended complaint in its entirety, and plaintiffs
12 oppose the motion. The Court will go through Google’s arguments one by one.

13 **A. The Breach of Express Warranty Claim is Dismissed.**

14 Google moves to dismiss plaintiffs’ express warranty claim because it asserts that it
15 fulfilled its obligations under the Limited Warranty by replacing the Pixels with other
16 functionally-equivalent Pixels. Dkt. No. 42 at 12. Moreover, Google argues, to the extent
17 that plaintiffs seek to invalidate the Limited Warranty as being unconscionable, plaintiffs
18 do not provide sufficient facts to demonstrate unconscionability. *Id.* at 14.

19 Plaintiffs do not challenge the existence of an express warranty, nor do they
20 challenge what it says. Instead, plaintiffs apply *different* language from the Limited
21 Warranty in arguing that Google breached the express warranty. Specifically, plaintiffs
22 assert Google breached provision that guaranteed that the Pixel “will be free from defects
23 in materials and workmanship under normal use[.]” Dkt. No. 51 at 17 (citing Dkt. No. 43-
24 1 at 4). Therefore, plaintiffs’ position is that Google breached the Limited Warranty by
25 selling the defective Pixels, and then replacing them with equally defective Pixels. *Id.*

26 California Commercial Code § 2313(1)(a) explains that the term “express warranty”
27 covers “[a]ny affirmation of fact or promise made by the seller to the buyer which relates
28 to the goods and becomes part of the basis of the bargain creates an express warranty that

1 the goods shall conform to the affirmation or promise.” Such warranties apply to
2 “transactions in goods.” *See* Cal. Comm. Code § 2102; *see also* Cal. Civ. Code
3 § 1791.2(a)(1) (defining “express warranty” as “[a] written statement arising out of a sale
4 to the consumer of a consumer good pursuant to which the manufacturer, distributor, or
5 retailer undertakes to preserve or maintain the utility or performance of the consumer good
6 or to provide compensation if there is a failure in utility or performance”). “An express
7 warranty is a term of the parties’ contract.” *Tae Hee Lee v. Toyota Motor Sales, U.S.A.,*
8 *Inc.*, 992 F. Supp. 2d 962, 978 (C.D. Cal. 2014) (citing *A.A. Baxter Corp. v. Colt*
9 *Industries, Inc.*, 10 Cal. App. 3d 144, 153 (1970)).

10 “To state a claim for breach of express warranty under California law, a plaintiff
11 must allege (1) the exact terms of the warranty; (2) reasonable reliance thereon; and (3) a
12 breach of warranty which proximately caused plaintiff’s injury.” *Minkler v. Apple, Inc.*, 65
13 F. Supp. 3d 810, 817 (N.D. Cal. 2014) (citing *Williams v. Beechnut Nutrition Corp.*, 185
14 Cal. App. 3d 135, 142 (1986)). “To allege facts identifying the exact terms of the
15 warranty, a plaintiff must provide ‘specifics’ about what the warranty statement was, and
16 how and when it was breached.” *T & M Solar & Air Conditioning, Inc. v. Lennox Int’l*
17 *Inc.*, 83 F. Supp. 3d 855, 875 (N.D. Cal. 2015) (quoting *Minkler*, 65 F. Supp. 3d at 816–
18 17).

19 There is much bluster in the papers, and it takes some unpacking to decipher what
20 the parties’ actual positions on this claim are. Plaintiffs’ position is that Google breached
21 the express warranty because the Limited Warranty guaranteed the Pixel would be free
22 from defects. Therefore, in the event that the phone failed, the replacement that plaintiffs
23 received should have been likewise defect-free. The Court notes that it is not plaintiffs’
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1 position that Google did not offer them a remedy in the Limited Warranty.³ Instead,
 2 plaintiffs argue that the Limited Warranty was breached because both the original Pixels
 3 and the replacement Pixels contained defective microphones. In contrast, Google argues
 4 that while the Limited Warranty guaranteed a defect-free phone, Google also warned in the
 5 Limited Warranty that it did not guarantee that the Pixels’ use would be uninterrupted or
 6 error-free. Moreover, the Limited Warranty provides that in the event that a defect arises,
 7 the sole remedy is to repair, replace, or refund, and Google claims to have fulfilled its end
 8 of the bargain. Google provided plaintiffs with “functionally-equivalent phones,” which
 9 allegedly manifested the same defect. *See* Dkt. Nos. 48-1 at 4-5; 54 at 7.

10 **1. “Defect-Free Phone” vs. Use Not “Uninterrupted or Error-Free”**

11 The first question the Court must answer is whether a breach of express warranty
 12 claim may be premised on language in the warranty that states that a product will be
 13 “defect-free.”

14 Plaintiffs argue their express warranty claim survives because “an express warranty
 15 is breached when a product contains an inherent defect which is substantially certain to
 16 result in malfunction during the useful life of the product.” Dkt. No. 51 at 18 (citing *Hicks*
 17 *v. Kaufman & Broad Home Corp.*, 89 Cal. App. 4th 908, 923 (2001) and *Hewlett-Packard*
 18 *Co. v. Superior Court*, 167 Cal. App. 4th 87, 95 (2008)). In essence, this argument goes to
 19 whether it is actionable to sue under an express warranty theory just because a product is

21 ³ This may seem counterintuitive because plaintiffs allege in different parts of the amended
 22 complaint facts that would appear to contradict this finding. For example, plaintiff Weeks
 23 alleges she “asked Google for her money back or for a new, non-defective replacement
 24 [but] Google refused, [and that a]s a result of the microphone defect and Google’s failure
 25 to provide warranty service, Dr. Weeks no longer uses her Pixel and instead uses a
 26 replacement phone.” Dkt. No. 26 at 4. Similarly, plaintiff Helms accepted a replacement
 27 phone that also proved to be defective, and claims that she “called Google about the
 28 problem[, and a]fter another round of unsuccessful troubleshooting of the defective
 replacement, Google refused to offer Ms. Helms further warranty support.” *Id.* at 6. What
 all of these allegations have in common is that at no point do plaintiffs allege that Google
 did not continue to offer them replacement phones. And while at the August 15, 2018,
 hearing plaintiffs argued that these allegations amount to a breach of express warranty, the
 Court disagrees that plaintiffs plausibly allege that Google at any time failed to offer them
 replacement phones consistent with the Limited Warranty. Plaintiffs may certainly amend
 their complaint to allege that Google stopped offering replacement phones in contravention
 with the Limited Warranty, but they have not done so here.

1 defective.

2 *Hewlett-Packard Co. v. Superior Court*, which relied on *Hicks*, is more relevant
 3 here. In that case, defendant HP appealed a grant of class certification. Specifically, HP
 4 appealed a finding that common issues predominated. *Id.* at 94. The court of appeals
 5 allowed a claim “that certain HP notebook computers contained types of inverters that HP
 6 knew would likely fail” sometime before the end of the product’s “useful life,” but did not
 7 touch the factual or legal merits of the claim. *Id.* at 95 (“While *Daugherty* may have
 8 implications for the *merits* of the underlying action, and indeed may serve to bar claims by
 9 plaintiffs that occurred outside of the warranty period, it does not affect a determination of
 10 class certification.” (emphasis in original)). Therefore, this case is not the ringing
 11 endorsement of plaintiffs’ express warranty claim that they represent it to be. *Hewlett-*
 12 *Packard Co. v. Superior Court* relied on the *Hicks* case, which dealt with defects in the
 13 foundation to homes. But many courts have rejected *Hicks* in the context of consumer
 14 goods. *Elias v. Hewlett-Packard Co.*, 903 F. Supp. 2d 843, 851 (N.D. Cal. 2012) (“it is
 15 unclear whether *Hicks* applies to consumer products with limited lifespans such as
 16 computers—indeed, multiple district courts have concluded that it does not”) (collecting
 17 cases).

18 The Court understands plaintiffs’ outrage at Google’s being able to replace a
 19 defective Pixel with another defective Pixel for 365 days straight.⁴ It beggars reason and
 20 would appear to make hash of the spirit of the warranty. But the warranty provided a
 21 remedy, and as far as the Court can tell, Google abided by its remedy. At least one other
 22 court in this district has rejected an argument similar to the one plaintiffs make here. *Kent*
 23 *v. Hewlett-Packard Co.*, No. 09-cv-05341 JF PVT, 2010 WL 2681767, at *6 (N.D. Cal.
 24 July 6, 2010) (finding that limited warranty language that laptop would be “free from
 25 defects” did not mean that “recurring failures” in laptop would be considered as breaches

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 27 ⁴ Plaintiffs also briefly argue that allowing Google to replace one Pixel with another
 28 equally defective Pixel ‘would render the protections of the Limited Warranty illusory, but
 do not elaborate on this point further in the briefing. Dkt. No. 51 at 17. The Court does
 not make any finding as to this argument because it is not properly before it.

1 of the limited warranty because HP did not warrant that the laptop’s operation would be
 2 “uninterrupted or error-free”). “HP is not liable for breach of express warranty merely
 3 because a product manifests recurring failures during the warranty period. Rather, the
 4 question is whether Plaintiffs sought repairs, refunds, or replacements and, if so, whether
 5 HP responded appropriately under the warranty.”⁵ *Id.*

6 Similarly, in *Ferranti v. Hewlett-Packard Co.*, District Judge Edward J. Davila
 7 considered a breach of express warranty claim to be premised not on the “defect-free”
 8 language of the warranty, but rather on whether the defendant responded appropriately in
 9 remedying any problems with the product. No. 13-cv-03847 EJD, 2014 WL 4647962, at
 10 *6 (N.D. Cal. Sept. 16, 2014) (“HP argues that its one-year limited warranty is a warranty
 11 for repairing and replacing the product, not a promise that the use of the printer will be
 12 uninterrupted and error free.”); *see also Frenzel v. AliphCom*, 76 F. Supp. 3d 999, 1019
 13 (N.D. Cal. 2014) (“[W]hen Frenzel’s initial second generation Jawbone UP malfunctioned,
 14 Jawbone issued him a replacement device. . . . In doing so, Jawbone complied with its
 15 warranty obligations as described [in the limited warranty] When Frenzel’s
 16 replacement device subsequently died, Jawbone refused to issue him an additional
 17 replacement[,] . . . [b]ut Frenzel has not alleged facts indicating that this occurred within
 18 the applicable warranty period. Absent such an allegation, Frenzel may not maintain his
 19 claims for breach of express warranty against Jawbone.”); *Nygren v. Hewlett-Packard Co.*,
 20 No. 07-cv-05793 JW, 2008 WL 11399759, at *5 (N.D. Cal. Oct. 24, 2008) (“Courts have
 21 held that a manufacturer does not breach an express warranty if it offers to provide the

23 ⁵ The operative complaint states in the express warranty claim that the Limited Warranty’s
 24 one year time limits is unconscionable. Google originally also moved to dismiss the
 25 express warranty claim based on the insufficiency of the unconscionability allegations in
 26 the complaint. *See* Dkt. No. 26 at 24; Dkt. No. 42 at 14-15. Even though Google did brief
 27 this argument, plaintiffs did not rebut it in any detail, instead arguing that
 28 unconscionability would be an issue for summary judgment. Based on the fact that this
 issue is under-briefed by plaintiffs, and the allegations of unconscionability are
 insufficient, the Court alerts plaintiffs that they must do more to allege, or provide
 evidence of, substantive *and* procedural unconscionability on a later motion. For purposes
 of this motion, however, the Court need not reach this issue, as it is unnecessary to the
 Court’s decision on Google’s motion to dismiss the express warranty claim.

1 remedies specified in the warranty.”).

2 Therefore, the Court does not consider the alleged defect *by itself* to be a basis for
3 the breach of express warranty claim. The precedents plaintiffs cite prove not to be
4 favorable to them. Plaintiffs may have another avenue to challenge Google’s conduct, but
5 this is not it. Next, the Court evaluates whether Google fulfilled its duties under the
6 Limited Warranty as to the remedy provided.

7 **2. The Sufficiency of Google’s Fulfillment of the Warranty’s Remedies**

8 The second question the Court must answer is whether Google’s replacement of
9 allegedly defective Pixels with other allegedly defective Pixels is a violation of the Limited
10 Warranty. There are a series of policy arguments to be made on this point, but here the
11 Court is concerned with whether Google’s alleged conduct was valid under the Limited
12 Warranty.

13 Plaintiffs cite *Horvath v. LG Elecs. Mobilecomm U.S.A., Inc.*, No. 11-cv-01576 H-
14 RBB, 2012 WL 2861160, at *6 (S.D. Cal. Feb. 13, 2012). *Horvath* is similar to this case
15 in that it involved cell phones having an alleged manufacturing defect and a manufacturer
16 that replaced the allegedly defective phones with other allegedly defective phones. Yet the
17 difference between the two cases is that the warranty in *Horvath* significantly differed
18 from the one presented to the Court. *Id.* at *6; *id.* at *4 (citing First Amended Complaint,
19 Exhibit 1, “LG’s Limited Warranty Statement”). LG’s warranty guaranteed that the phone
20 would be free from defects, but did not set forth a specific remedy. On the other hand, in
21 this case, the Limited Warranty did not guarantee that the use of the Pixels would be
22 “uninterrupted or error-free” and the warranty did set forth exclusive remedies. Dkt. No.
23 48-1 at 4-5. One of these remedies was that Google could “replace your Phone with a new
24 or refurbished Phone functionally at least equivalent to yours[.]” *Id.*

25 This distinction makes the difference. In *Horvath*, LG “instructed consumers,
26 including Plaintiffs, to take their defective G2X phones to their cell phone carrier to
27 address the defects. . . . [and] Defendant breached because Plaintiffs undertook measures
28 to remedy the G2X defects, in accordance with LG Electronics’ warranty instructions,

1 including giving LG Electronics and its authorized sellers over ten opportunities to remedy
2 the defects” *Id.* Importantly, the court in *Horvath* allowed the express warranty to
3 survive on the following facts: “Plaintiffs allege that they were not made whole and instead
4 received replacement G2X phones that also proved defective and afflicted with the same
5 defects.” *Id.* This supports plaintiffs’ position in this case. Respectfully, however, the
6 Court does not find this holding persuasive under these facts. This finding is not supported
7 by any reasoning, and in any case, this case is distinguishable because Google specifically
8 provided the conduct that plaintiffs complain of as a remedy in the Limited Warranty. On
9 these facts, an express warranty claim does not lie.

10 Similarly, in *Nygren v. Hewlett-Packard Co.*, District Judge James Ware allowed a
11 breach of express warranty claim to survive a motion to dismiss because a warranted repair
12 during the warranty period did not cure the defect in a laptop. 2008 WL 11399759; *id.* at
13 *5 (These allegations are sufficient to state a claim for breach of express warranty as to
14 Plaintiff Nygren because they state that a malfunction occurred within the warranty period
15 and that Defendant failed to repair, replace, or repurchase the defective product as required
16 by the warranty terms.”). In other words, HP did not provide the plaintiff in *Nygren* with
17 the remedy it guaranteed under the warranty.

18 Plaintiffs also cite to *Rutledge v. Hewlett-Packard Co.*, 238 Cal. App. 4th 1164
19 (2015), for the proposition that “[t]he replacement of a defective product with another
20 defective product constitutes a breach of express warranty when the defendant expressly
21 warrants the product as free from defects in materials and workmanship.” Dkt. No. 51 at
22 17. On its face, this language appears to be favorable to plaintiffs’ warranty claim. In
23 *Rutledge*, the case was on appeal from the trial court’s grant of summary judgment against
24 plaintiffs as to a breach of express warranty claim, amongst other things. HP’s warranty
25 on the notebooks warranted that if HP received notice of defects during the warranty
26 period, HP had the option of either repairing or replacing the defective devices. *Rutledge*,
27 238 Cal. App. 4th at 1179. One of the named plaintiffs notified HP of an inverter defect
28 within the warranty period and had her device repaired twice within the one year period.

1 *Id.* at 1182. The inverter defect arose again months after the second repair. *Id.* What
2 allowed plaintiff’s claim to survive was the fact that there was evidence in the record
3 showing that HP’s authorized repair center tasked with replacing the defective inverters
4 did so incorrectly. *Id.* at 1178 (“With regard to the Ambit inverters, appellants present
5 evidence of a second service note that was issued in November 2003 . . . This service note
6 stated that the torque setting of Bizcom’s automated screwdrivers used to install the Ambit
7 inverters was too high, resulting in solder cracking on the inverters.”).

8 Thus, plaintiffs’ argument that *Rutledge* gets them past Google’s motion is strained.
9 In *Rutledge*, the warranty allowed HP to either repair or replace defective products. *Id.* at
10 1179. But what HP did wrong in that case is that it “failed to adequately repair [plaintiff’s]
11 notebook, and did not return it to her in the condition as warranted.” *Id.* at 1183. In other
12 words, HP did not fulfill its remedial obligations under the warranty. As a result, *Rutledge*
13 is meaningfully distinguishable.

14 This case is different from *Horvath*, *Nygren*, or *Rutledge* because instead of
15 repairing the allegedly defective Pixels, Google opted to replace them. The question of
16 whether it was valid under the express warranty to replace a defective Pixel with another
17 defective Pixel must be answered in the affirmative based on a plain reading of the Limited
18 Warranty. This finding is also supported by case law within this district. *In re Seagate*
19 *Tech. LLC Litig.*, 233 F. Supp. 3d 776, 782 (N.D. Cal. 2017) (Spero, C. Mag. J.) (“Under
20 the terms of the warranty, a replacement drive must only be ‘functionally equivalent’ to the
21 original product. . . . the Court holds that failure of a replacement drive—which Plaintiffs
22 characterize as ‘replac[ing] defective Drives with defective Drives, . . . is not in itself a
23 breach of the express terms of Seagate’s warranty, so long as Seagate provided a further
24 replacement upon request if the drive was still within warranty.”); *Bros. v. Hewlett-*
25 *Packard Co.*, No. 06-cv-02254 RMW, 2007 WL 485979, at *4 (N.D. Cal. Feb. 12, 2007)
26 (“While plaintiffs now make the argument that replacing the failed motherboard with a
27 motherboard equipped with the same GPU was inadequate, replacement or repair of
28 malfunctioning components during the life of the warranty is exactly what the Limited

1 Warranty provides. . . . HP could not have breached the Limited Warranty by acting in
2 conformance with it.”). It may be that plaintiffs may bring a *different* claim against
3 Google, but on *these* facts—and based on the arguments made here—plaintiffs are
4 ineligible to bring an express warranty claim.

5 Because plaintiffs have not presented a viable claim for breach of express warranty,
6 the Court GRANTS Google’s motion to dismiss, but gives plaintiffs LEAVE TO AMEND.

7 **B. The Breach of the Covenant of Good Faith and Fair Dealing Claim**
8 **Survives.**

9 Google moves to dismiss the claim for breach of the covenant of good faith and fair
10 dealing, arguing that it fails for the same reasons that the breach of express warranty claim
11 fails. Dkt. No. 42 at 15. Plaintiffs oppose Google’s motion, and argue that their claim is
12 “premised on Google’s knowledge of the defect and concomitant exercise of its discretion
13 under the Limited Warranty to refuse to provide effective free repairs or refunds, and
14 instead to replace failed products with equally failure-prone products, thereby depriving
15 consumers of the benefits of the warranty and increasing the likelihood of out-of-warranty
16 failures.” Dkt. No. 51 at 21.

17 “The elements of a claim of breach of the implied covenant are (1) the parties
18 entered into a contract; (2) the plaintiff fulfilled its obligations under the contract; (3) any
19 conditions precedent to the defendant’s performance occurred; (4) the defendant unfairly
20 interfered with the plaintiff’s rights to receive the benefits of the contract; and (5) the
21 plaintiff was harmed by the defendant’s conduct.” *MH Pillars Ltd. v. Realini*, 277 F.
22 Supp. 3d 1077, 1088 (N.D. Cal. 2017). Breaching a specific provision of a contract is not
23 a prerequisite to state a claim under the covenant of good faith and fair dealing. *Carma*
24 *Developers (Cal.), Inc. v. Marathon Dev. California, Inc.*, 2 Cal. 4th 342, 373 (1992).
25 However, the covenant may not “be read to prohibit a party from doing that which is
26 expressly permitted by an agreement.” *Id.* at 374 (“implied terms should never be read to
27 vary express terms”). “The general rule regarding the covenant of good faith is plainly
28 subject to the exception that the parties may, by express provisions of the contract, grant

1 the right to engage in the very acts and conduct which would otherwise have been
2 forbidden by an implied covenant of good faith and fair dealing. This is in accord with the
3 general principle that, in interpreting a contract an implication should not be made when
4 the contrary is indicated in clear and express words.” *Id.* (ellipses, citations, and quotation
5 marks omitted).

6 Here, the dispute is not about the elements of the claim; rather, the dispute is about
7 whether plaintiffs are even eligible to bring this claim. The Court found that Google did
8 not breach the express warranty under the facts presented in the FAC, and that Google
9 acted in accordance with the Limited Warranty. But plaintiffs argue that “Google’s
10 inadequate performance is not ‘expressly permitted’ and frustrated Plaintiffs’ ‘reasonable
11 expectations’ under the warranty,” and so Google’s reliance on *Carma* is “misplaced.”
12 Dkt. No. 51 at 21 n.3. This inadequate performance was the replacement of defective
13 Pixels with defective Pixels. Dkt. No. 26 at 25. For purposes of this motion, the Court
14 agrees, and does not find Google showed that its conduct was “expressly permitted” and
15 met with plaintiffs’ reasonable expectations. The motion to dismiss is DENIED.

16 **C. The Breach of Implied Warranty of Merchantability and Magnuson-Moss**
17 **Warranty Act Claims are Dismissed.**

18 Google asserts plaintiffs may not bring an implied warranty claim because the
19 Limited Warranty supersedes any implied warranty. Dkt. No. 42 at 16. Moreover, Google
20 argues that if plaintiffs are unable to bring an express warranty claim, they also may not
21 bring an implied warranty claim. Dkt. No. 54 at 11. In response, plaintiffs assert that
22 while the Limited Warranty did contain a disclaimer on “any implied warranty of
23 merchantability,” that disclaimer only applied to issues with the devices *outside* of the one
24 year Limited Warranty period. Dkt. No. 51 at 22. Here, the defect rendering the Pixels
25 unusable in their ordinary function manifested themselves within one year. *Id.* It appears
26 that plaintiffs seek damages for this alleged breach. Dkt. No. 26 at 27.

27 “The implied warranty of merchantability arises by operation of law rather than
28 contract.” *In re Nexus*, 293 F. Supp. 3d at 925 (citing *Hauter v. Zogarts*, 14 Cal. 3d 104,

1 (1975)). The implied warranty guarantees not that the goods “precisely fulfill the
2 expectation of the buyer,” but instead that the goods meet “a minimum level of quality.”
3 *Am. Suzuki Motor Corp. v. Superior Court*, 37 Cal. App. 4th 1291, 1296 (1995) (citation
4 omitted). “The core test of merchantability is fitness for the ordinary purpose for which
5 such goods are used.” *Mexia v. Rinker Boat Co.*, 174 Cal. App. 4th 1297, 1303 (2009).
6 Where the contract sets out a remedy, and “the remedy is expressly agreed to be
7 exclusive,” then it is the “sole remedy.” Cal. Comm. Code § 2719(1)(b).

8 Here, the sole remedy available to plaintiffs was to have their phones repaired,
9 replaced, or to be refunded. Dkt. No. 48-1 at 4. The Limited Warranty set a one-year time
10 limit for other warranties, including the implied warranty of merchantability: “GOOGLE
11 EXPRESSLY DISCLAIMS ALL OTHER WARRANTIES AND CONDITIONS OF
12 ANY KIND . . . ARISING FROM COURSE OF CONDUCT OR OTHERWISE,
13 REGARDING THE PHONE, EXCEPT THAT ANY IMPLIED WARRANTIES OF
14 MERCHANTABILITY . . . ARE LIMITED IN DURATION TO THE PERIOD OF THE
15 EXPRESS WARRANTY ABOVE (EITHER ONE YEAR OR NINETY DAYS,
16 DEPENDING ON WHETHER THE PHONE IS NEW OR REFURBISHED[.])” *Id.* at 5.

17 Plaintiffs’ phones’ microphones allegedly failed within the one year period in which
18 the implied warranty of merchantability applied. Plaintiffs claim Google failed to repair or
19 replace their phones. Dkt. No. 51 at 22. This is an odd claim for plaintiffs to make when
20 two of them accepted replacement phones, and none claim that Google refused to offer
21 them replacement phones, thereby living up to the “repair, replace, or refund” guarantee
22 during the one year Limited Warranty period. Dkt. No. 26 at 4, (plaintiff Weeks), 6
23 (plaintiff Helms), 7 (plaintiff McCloy). And it is undisputed that the implied warranty of
24 merchantability applied during one year. The Court notes that there is no argument in the
25 papers that the one year time limit should be invalidated, as there is in the complaint. *Id.* at
26 27. Therefore, because the Court is unable to find that plaintiffs are entitled to any relief
27 outside of the Limited Warranty on this claim, the Court DISMISSES this claim WITH
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1 LEAVE TO AMEND.⁶

2 Plaintiffs also seek to bring a claim under the Magnuson-Moss Warranty Act
3 (MMWA), but an implied warranty claim under that statute also fails, as it rises and falls
4 with the other warranty claims before the Court.

5 The MMWA “allows a consumer to bring a suit where he claims
6 to be damaged by the failure of a supplier, warrantor, or service
7 contractor to comply with any obligation under [the MMWA] or
8 under a written warranty, implied warranty, or service contract.”
9 *Schimmer v. Jaguar Cars, Inc.*, 384 F.3d 402, 405 (7th Cir.
10 2004) (internal quotations and citations omitted).

11 *In re Apple iPhone 3G Prod. Liab. Litig.*, 859 F. Supp. 2d 1084, 1089–90 (N.D. Cal.
12 2012). But the MMWA does not provide remedies for breaches of limited warranties. *Id.*
13 at 1090. The MMWA allows consumers to enforce written and implied warranties by
14 borrowing state law claims, meaning that a federal MMWA claim depends on the validity
15 of state law warranty claims. *Id.*; *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1022
16 n.3 (9th Cir. 2008) (“the federal claims hinge on the state law warranty claims”).

17 Therefore, because plaintiffs’ state law warranty claims—both express and
18 implied—do not survive this motion, the claim under the MMWA likewise fails. This
19 claim is DISMISSED WITH LEAVE TO AMEND.

20 **D. The Fraudulent Concealment Claim Survives.**

21 Google seeks to dismiss plaintiffs’ fraudulent concealment claim because it had no
22 duty to disclose, and plaintiffs did not rely on any representations or omissions on its part.
23 Dkt. No. 42 at 20. Google claims, using plaintiffs’ own allegations, that the complaints
24 regarding the Pixel were publicly available before any plaintiff bought his or her Pixel. *Id.*
25 This means that information regarding the alleged defect was not in Google’s exclusive
26 knowledge, and so Google had no duty to disclose the alleged defect. *Id.*

27 “Under California law, the elements of a common-law claim for fraudulent
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⁶ The exception to this finding is with respect to plaintiffs’ allegations that the one year time limit on the implied warranty of merchantability should be invalidated. Those allegations were not challenged in this motion.

1 omission are: (1) the defendant concealed or suppressed a material fact; (2) the defendant
 2 was under a duty to disclose the fact to the plaintiff; (3) the defendant intentionally
 3 concealed or suppressed the fact with intent to defraud the plaintiff; (4) the plaintiff was
 4 unaware of the fact and would have acted differently if she had known of the concealed or
 5 suppressed fact; and (5) the plaintiff sustained damage as a result of the concealment or
 6 suppression.” *Ralston v. Mortg. Inv’rs Grp., Inc.*, No. 08-cv-00536 JF PVT, 2010 WL
 7 3211931, at *3 (N.D. Cal. Aug. 12, 2010) (citing *Hahn v. Mirda*, 147 Cal. App. 4th 740,
 8 748 (2007)). Moreover, under Federal Rule of Civil Procedure 9(b), plaintiffs alleging
 9 fraud must “state with particularity the circumstances constituting fraud or mistake.”

10 As to the second element, “there are four circumstances in which an obligation to
 11 disclose may arise: (1) when the defendant is in a fiduciary relationship with the plaintiff;
 12 (2) when the defendant had exclusive knowledge of material facts not known to the
 13 plaintiff; (3) when the defendant actively conceals a material fact from the plaintiff; and
 14 (4) when the defendant makes partial representations but also suppresses some material
 15 facts.” *Smith v. Ford Motor Co.*, 749 F. Supp. 2d 980, 987 (N.D. Cal. 2010), *aff’d*, 462
 16 Fed. Appx. 660 (9th Cir. 2011). Under the second circumstance, “[e]xclusivity is not
 17 applied with rigidity.” *Czuchaj v. Conair Corp.*, No. 13–CV–1901 BEN (RBB), 2014 WL
 18 1664235, at *4 (S.D. Cal. Apr. 17, 2014); *In re MyFord Touch Consumer Litig.*, 46 F.
 19 Supp. 3d 936, 960 (N.D. Cal. 2014). Moreover, “exclusivity is analyzed in part by
 20 examining whether the defendant had “superior’ knowledge of the defect.” *Johnson v.*
 21 *Harley-Davidson Motor Co. Grp., LLC*, 285 F.R.D. 573, 583 (E.D. Cal. 2012). In
 22 addition, “exclusive knowledge is not automatically defeated by the presence of
 23 information online.” *Czuchaj*, 2014 WL 1664235, at *4 (collecting cases).

24 First, it is manifest that knowledge of a defect that would render a phone unfit for
 25 its normal use is material, and plaintiffs allege Google concealed or suppressed this fact.

26 As to the second element, plaintiffs allege “Google had a duty to disclose the
 27 microphone defect because it was within Google’s exclusive knowledge.” Dkt. No. 26 at
 28 32-33. As noted in the complaint, “[o]n November 8, 2016—before any Plaintiff bought

1 their phone—Google reiterated its awareness of [the microphone defect], extending
2 ‘apologies to anyone who is encountering issues with the mic,’ and stating it had not yet
3 determined a root cause” *Id.* at 14.

4 Though the Court has a hard time understanding how Google engaged in an act of
5 fraudulent omission if it publicly acknowledged the fact giving rise to the omission claim,
6 the Court also recognizes that people do not necessarily look at consumer complaints and
7 reviews online before they purchase a phone. For instance, to look at the consumer
8 complaints regarding the Pixel and Google’s responses, a prospective buyer of the phone
9 would have to find the following website: [https://productforums.google.com/forum/
10 #!forum/phone-by-google](https://productforums.google.com/forum/#!forum/phone-by-google), which is a *far* different site than the Google Store website
11 where such a buyer would actually purchase the phone.⁷ *Id.* at 11-12. Plaintiffs allege that
12 Google knew of the alleged defect at least since the day the phone was released, and if it
13 did not know before the launch date, it should have through pre-release testing. *Id.* at 12,
14 16-17. The Court recognizes Google’s position that while it knew *something* was causing
15 the phone to malfunction since the day after the phone’s launch, it did not know what the
16 problem was, and originally believed it was a software problem. August 15, 2018,
17 Hearing. Moreover, it is undisputed that Google did not itself manufacture the phone,
18 HTC did. Dkt. No. 54 at 14. But it is plaintiffs’ well-pleaded allegations that the Court is
19 required to accept as true, and they allege Google’s knowledge well before they purchased
20 their phones. Plaintiffs nudge this claim past the plausibility line.

21 Based on the above, the Court is disinclined to find that no duty existed, particularly
22 because it is Google that knows if it knew about the defect, and when it knew it. *Johnson*,
23 285 F.R.D. at 583; *In re MyFord*, 46 F. Supp. 3d at 960 (finding a duty at the motion to
24 dismiss stage where there was some public knowledge about the problems with a car
25 “infotainment system,” but not full public knowledge of the severity of the problem (i.e.,
26 that the problem was unfixable)); *but see Ferranti*, 2014 WL 4647962, at *5 (“Plaintiffs do
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28 ⁷ That website is: [https://web.archive.org/web/20161005090908/https://store.google.com/
product/pixel_phone](https://web.archive.org/web/20161005090908/https://store.google.com/product/pixel_phone)

1 not allege with particularity how HP had exclusive knowledge of material facts not known
2 to Mr. Martinho when the complaint alleges that there were consumer complaints posted
3 on HP Support Forums and poor reviews on other websites”). The Court is inclined to
4 take the more cautious approach here and wait for the parties to discover facts that will
5 demonstrate whether or not Google did in fact have a duty to disclose information that was
6 allegedly exclusively within its knowledge.

7 Plaintiffs also argue Google had a duty to disclose the microphone defect because it
8 made “partial representations” as to the Pixel’s voice-activated Google Assistant feature.
9 Dkt. No. 26 at 32-33; Dkt. No. 51 at 29. Because the Court finds that Google plausibly
10 had a duty to disclose due to its “exclusive knowledge,” the Court does not discuss the
11 duty to disclose under this circumstance further.

12 Third, plaintiffs allege that Google intentionally concealed or suppressed the defect
13 with the intent to defraud consumers, including plaintiffs. *See* Dkt. No. 26 at 33.

14 Fourth, plaintiffs allege that they relied on Google’s representations, as
15 demonstrated by their allegation that had they known of the microphone defect, they would
16 have behaved differently (i.e., they would not have bought the phone, or would have
17 bought it at the lower price point, or they would have returned it). Dkt. No. 51 at 25-26;
18 *Daniel v. Ford Motor Co.*, 806 F.3d 1217, 1225 (9th Cir. 2015) (“To prove reliance on an
19 omission, a plaintiff must show that the defendant’s nondisclosure was an immediate cause
20 of the plaintiff’s injury-producing conduct. . . . A plaintiff may do so by simply proving
21 ‘that, had the omitted information been disclosed, one would have been aware of it and
22 behaved differently.’ ” (quoting *Mirkin v. Wasserman*, 5 Cal. 4th 1082, 1093 (1993)).

23 Fifth, plaintiffs sufficiently allege they were damaged by Google’s alleged omission
24 of the microphone defect. Dkt. No. 26 at 33.

25 The motion to dismiss the fraudulent concealment claim is DENIED.

26 **E. The California Consumer Protection Law Claims Survive.**

27 Google also moves to dismiss plaintiffs’ California consumer protection claims.
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1 filed without notice, and 30 days after such notice, a plaintiff may amend his or her
2 complaint to request damages. Cal. Civ. Code § 1782(d).

3 Plaintiffs argue that they provided Google with actual notice on February 1, 2018,
4 before they filed their original complaint on February 6, 2018. Dkt. No. 51 at 15-16.
5 Plaintiffs did not request damages under the CLRA in the original complaint, instead only
6 requesting injunctive relief. *Id.* at 16. It was only in the amended complaint, filed two
7 months later that plaintiffs requested monetary damages under the CLRA. Plaintiffs argue
8 that this was permissible. *Id.* (citing *Morgan v. AT&T Wireless Servs., Inc.*, 177 Cal. App.
9 4th 1235, 1259-60 (2009)). Second, plaintiffs argue, Google was well-aware of the alleged
10 defect, and so it can hardly be said that Google had not been given an opportunity to cure.
11 *Id.* In any event, courts grant leave to amend with liberality. So too here. The Court finds
12 that because plaintiffs did not request monetary damages as to the CLRA claim in the
13 original complaint, plaintiffs provided adequate notice to Google.

14 **b. Fraudulent Concealment**

15 Before turning to the allegations of fraudulent concealment, the Court notes its
16 confusion as to the arguments in Google’s motion. The Court is unclear on exactly which
17 grounds Google moves to dismiss the CLRA claim, as the opposition and reply briefs
18 contain nary a reference to the CLRA. Instead, those briefs are aimed at defeating
19 plaintiffs’ fraudulent concealment allegations. *See e.g.*, Dkt. No. 54 at 12.

20 The Court declined to dismiss the fraudulent concealment claim in section III.D.
21 Based on the lack of briefing on *any other* reason that the Court should dismiss the CLRA
22 claim, the Court DENIES the motion to dismiss the CLRA claim.

23 **2. Unfair Competition Law, Cal. Bus. & Prof. Code § 17200**

24 In the amended complaint, plaintiffs allege Google engaged in unlawful, unfair, *and*
25 fraudulent conduct. Dkt. No. 26 at 28-30. Google moves to dismiss this claim under each
26 prong of the UCL. Google argues plaintiffs may not bring a UCL claim for four reasons:
27 (1) plaintiffs may not seek injunctive relief because they have not alleged they want to buy
28 another Pixel in the future: (2) plaintiffs do not allege any specific violations of the Song-

1 Beverly Warranty Act, Cal. Civ. Code § 1790, so as to bring a claim for “unfair” acts; (3)
2 plaintiffs have not established Google engaged in “unfair” acts; and (4) plaintiffs do not
3 sufficiently allege Google engaged in fraudulent conduct. Dkt. No. 42 at 22-23.

4 As to the first argument, that plaintiffs may not bring a UCL claim requesting
5 injunctive relief because they do not allege they want to buy another Pixel, this argument
6 lacks merit. Plaintiffs specifically allege they “would like to buy more Google mobile
7 phone products, [but] they will not do so unless Google takes sufficient steps to cure the
8 microphone defect and ensure the accuracy of its representations about its Pixel product
9 line.” Dkt. No. 26 at 8. In addition, Google contends plaintiffs may not seek an equitable
10 remedy, like restitution, because plaintiffs have not shown that the damages they seek in
11 connection with their warranty and fraud claims are insufficient. Dkt. No. 42 at 22. At the
12 pleading stage, the Court disagrees that it must limit plaintiffs’ potential damages.

13 Second, Google argues plaintiffs do not allege a specific violation of the Song-
14 Beverly Warranty Act. Plaintiffs do specify a violation, though the Court is dissatisfied
15 with plaintiffs’ lazy pleading. *Id.* at 28-29. (“Google’s conduct is unfair in violation of the
16 UCL because it violates California public policy, legislatively declared in the Song-
17 Beverly Warranty Act, requiring a manufacturer defined as a person or entity that
18 ‘manufactures, assembles, or produces consumer goods’—to ensure that goods it places on
19 the market are fit for their ordinary and intended purposes.”). This claim requires more
20 explanation in the complaint if plaintiffs seek to use the Act as a basis for “unfairness”
21 under the UCL. Yet there is an even bigger problem. The named plaintiffs are not
22 California citizens, and the Song-Beverly Warranty Act is limited to sales of goods within
23 the state of California. *In re Nexus 6P*, 293 F. Supp. 3d at 931 (citing Cal. Civ. Code §
24 1792). This is a more significant problem with bringing an unfairness claim than a simple
25 pleading problem. In amending their UCL claim, plaintiffs must consider whether the
26 Song-Beverly Warranty Act is an appropriate vehicle for an “unfairness” claim.

27 Third, as to Google’s argument that plaintiffs have not sufficiently alleged “unfair”
28 conduct, the Court disagrees. Dkt. No. 51 at 32. The “unfair” prong of the UCL creates a

1 claim for a business practice that is unfair, even if not proscribed by some other law.
2 *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1143 (2003). The UCL
3 does not provide a definition for “unfair” conduct, and the definition has long been “in
4 flux.” *See Lozano v. AT & T Wireless Servs., Inc.*, 504 F.3d 718, 735–36 (9th Cir. 2007).
5 Some California appellate courts apply this “balancing” test, which requires courts to
6 “weigh the utility of the defendant’s conduct against the gravity of the harm to the alleged
7 victim.” *Davis v. HSBC Bank Nevada, N.A.*, 691 F.3d 1152, 1169 (9th Cir. 2012) (internal
8 quotation marks omitted). “[P]arties may proceed with a UCL claim under the balancing
9 test by either alleging immoral, unethical, oppressive, unscrupulous, or substantially
10 injurious conduct by Defendants or by demonstrating that Defendants’ conduct violated an
11 established public policy.” *In re Anthem, Inc. Data Breach Litig.*, 162 F. Supp. 3d 953,
12 990 (N.D. Cal. 2016). There is another test, the three-part test set forth in § 5 of the
13 Federal Trade Commission Act: “(1) the consumer injury must be substantial; (2) the
14 injury must not be outweighed by any countervailing benefits to consumers or competition;
15 and (3) it must be an injury that consumers themselves could not reasonably have
16 avoided.” *Camacho v. Auto. Club of Southern California*, 142 Cal. App. 4th 1394 (2006).
17 However, this test is inappropriate in the consumer context, and Google is correct that this
18 test is geared towards harm to competition, not to consumers specifically. *Lozano*, 504
19 F.3d at 735. In any event, the Court finds it unnecessary to apply the § 5 test, because the
20 Court relies on the balancing test.

21 For purposes of this motion, the Court is disinclined to dismiss the UCL claim under
22 the unfairness prong. The Court is unwilling, at a motion to dismiss, to find that Google’s
23 actions were not at least oppressive or substantial injurious to plaintiffs, without
24 justification. *See Horvath*, 2012 WL 2861160, at *11.

25 Fourth, as to fraud, the Court already found that plaintiffs sufficiently stated a claim
26 for fraudulent concealment under the facts provided in the operative complaint. The
27 argument to dismiss on this basis therefore lacks merit.

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In sum, the motion to dismiss the UCL claim is DENIED.

IV. CONCLUSION

For the reasons stated above, the Court GRANTS Google’s motion to dismiss WITH LEAVE TO AMEND. Plaintiffs must file an amended complaint by September 6, 2018. Defendant must either answer the complaint within 21 days of the Second Amended Complaint being filed or re-move to dismiss.

IT IS SO ORDERED.

Dated: August 16, 2018



NATHANAEL M. COUSINS
United States Magistrate Judge