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United States District Court
Northern District of California

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

MAHAN TALESHPOUR,
Plaintiff,
v.
APPLE INC.,
Defendant.

Case No. [5:20-cv-03122-EJD](#)

**ORDER GRANTING MOTION TO
DISMISS THIRD AMENDED
COMPLAINT**

Re: Dkt. No. 68

Plaintiffs Mahan Taleshpour, Rory Fielding, Peter Odogwu, Wade Buscher, Gregory Knutson, Darien Hayes, Liam Stewart, Nathan Combs, and Kendall Bardin bring this action against Defendant Apple Inc. (“Apple”) on behalf of themselves and members of a putative class, asserting eleven claims related to an alleged product defect in certain MacBook Pro laptops. Before the Court is Apple’s Motion to Dismiss the Third Amended Complaint (“TAC”). Mot. to Dismiss Third Am. Compl. (“Mot.”), Dkt. No. 68. The Court finds the motion appropriate for decision without oral argument pursuant to Civil Local Rule 7-1(b). For the reasons below, the Court GRANTS the motion with limited leave to amend.

I. BACKGROUND

In 2016, Apple introduced its updated 13- and 15-inch MacBook Pro models. Third Am. Compl. (“TAC”), Dkt. No. 66 ¶ 17. To make these MacBook Pros thinner and sleeker than their predecessors, Apple used thin, flexible backlight ribbon cables to connect the lighting mechanism of the display screen to the display controller board. *Id.* ¶ 18. These backlight ribbon cables wrap around the display controller board at the hinge of the laptop and are secured by a pair of spring-

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1 loaded covers. *Id.*

2 This configuration causes the backlight ribbon display cables rub against the control board
3 when the laptop is opened and closed. *Id.* ¶ 20. Over time, the rubbing causes the cables to tear,
4 which leads to various problems with the display screen. *Id.* For example, the tearing of the cable
5 can cause a “stage lighting” effect, consisting of alternating patches of darkness along the bottom
6 of the display. *Id.* ¶ 21. Further tearing can lead to more serious display issues, such as large
7 blocks of color that obscure portions of the screen, and eventually, can cause the display to fail
8 entirely. *Id.* ¶¶ 22-23. To varying degrees, these issues with the display screen all allegedly
9 render the laptop unusable and unfit for its ordinary purpose. *Id.*

10 Plaintiffs allege that the backlight cables tear because they are “too short and do not
11 provide enough slack to withstand the repetitive opening and closing of the MacBook Pros” (the
12 “Alleged Defect”). *Id.* ¶ 20. Faced with complaints from numerous consumers about the stage
13 lighting effect and the failure of the display, Apple attempted to remedy the Alleged Defect by
14 making the backlight cables two millimeters longer in the 13- and 15-inch MacBook Pro models
15 released in July 2018. *Id.* ¶¶ 30, 32.

16 In May 2019, Apple also introduced the “MacBook Pro Display Backlight Service
17 Program,” through which Apple agreed to replace the display on all 13-inch 2016 MacBook Pro
18 models that exhibited the stage lighting effect or a total failure of the display backlight system. *Id.*
19 ¶ 33. Under the service program, Apple will refund the owner of a 13-inch 2016 MacBook Pro
20 who paid to have the display fixed. *Id.* The service program covers only the 13-inch 2016
21 MacBook Pro; it does not cover the 15-inch MacBook Pro, or any MacBook Pro model released
22 after 2016. *Id.*

23 Plaintiffs are all owners of 15-inch 2016 MacBook Pro or MacBook Pro models released
24 after 2016 and allege that their laptops all suffered from the same backlight cable defect as the 13-
25 inch version. *Id.* ¶¶ 35, 41, 46, 51, 56, 61, 66, 71, 76. Plaintiffs all experienced issues with their
26 display screens, including the stage lighting effect or “vertical pink lines,” which ultimately
27 rendered their laptops inoperable. *Id.* ¶¶ 37, 43, 48, 53-54, 58-59, 63-64, 68, 73-74, 78-79. In all

1 cases, these issues manifested after the one-year warranty Apple provided expired. *Compare id.*
 2 ¶¶ 35, 41, 46, 51, 56, 61, 66, 71, 76 with *id.* ¶¶ 37, 43, 48, 53-54, 58-59, 63-64, 68, 73-74, 78-79.

3 **II. LEGAL STANDARD**

4 **A. Rule 12(b)(6)**

5 Federal Rule of Civil Procedure 8(a) requires a plaintiff to plead each claim with enough
 6 specificity to “give the defendant fair notice of what the . . . claim is and the grounds upon which
 7 it rests.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal quotations omitted). A
 8 complaint which falls short of the Rule 8(a) standard may therefore be dismissed if it fails to state
 9 a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). “Dismissal under Rule
 10 12(b)(6) is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts
 11 to support a cognizable legal theory.” *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097,
 12 1104 (9th Cir. 2008). When deciding whether to grant a motion to dismiss, the Court must accept
 13 as true all “well pleaded factual allegations” and determine whether the allegations “plausibly give
 14 rise to an entitlement to relief.” *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). The Court must also
 15 construe the alleged facts in the light most favorable to the plaintiff. *Love v. United States*, 915
 16 F.2d 1242, 1245 (9th Cir. 1989). While a complaint need not contain detailed factual allegations,
 17 it “must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is
 18 plausible on its face.’” *Ashcroft*, 556 U.S. at 678 (quoting *Bell Atl. Corp.*, 550 U.S. at 570).

19 A court generally may not consider any material beyond the pleadings when ruling on a
 20 Rule 12(b)(6) motion. If matters outside the pleadings are considered, “the motion must be treated
 21 as one for summary judgment under Rule 56.” Fed. R. Civ. P. 12(d). However, documents
 22 appended to the complaint, incorporated by reference in the complaint, or which properly are the
 23 subject of judicial notice may be considered along with the complaint when deciding a Rule
 24 12(b)(6) motion. *Khoja v. Orexigen Therapeutics*, 899 F.3d 988, 998 (9th Cir. 2018); *see also Hal*
 25 *Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990).
 26 Likewise, a court may consider matters that are “capable of accurate and ready determination by
 27 resort to sources whose accuracy cannot reasonably be questioned.” *Roca v. Wells Fargo Bank*,

1 N.A., No. 15-cv-02147-KAW, 2016 WL 368153, at *3 (N.D. Cal. Feb. 1, 2016) (quoting Fed. R.
2 Evid. 201(b)).

3 **B. Rule 9(b)**

4 Consumer protection claims that sound in fraud are subject to the heightened pleading
5 requirements of Federal Rule of Civil Procedure 9(b). *See Vess v. Ciba-Geigy Corp. USA*, 317
6 F.3d 1097, 1102 (9th Cir. 2003); *San Miguel v. HP Inc.*, 317 F. Supp. 3d 1075, 1084 (N.D. Cal.
7 2018). Rule 9(b) requires that “a party must state with particularity the circumstances constituting
8 fraud.” Fed. R. Civ. P. 9(b). The circumstances constituting the fraud must be “specific enough to
9 give defendants notice of the particular misconduct which is alleged to constitute the fraud
10 charged so that they can defend against the charge and not just deny that they have done anything
11 wrong.” *Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1985). Therefore, a party alleging
12 fraud must set forth “the who, what, when, where, and how” of the misconduct. *Vess*, 317 F.3d at
13 1106 (quoting *Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir. 1997)). “[I]n a case where fraud is
14 not an essential element of a claim, only allegations . . . of fraudulent conduct must satisfy the
15 heightened pleading requirements of Rule 9(b)” while “[a]llegations of non-fraudulent conduct
16 need satisfy only the ordinary notice pleading standards of Rule 8(a).” *Id.* at 1104–05.

17 With respect to Plaintiffs’ omissions-based fraud claims, “the pleading standard is lowered
18 on account of the reduced ability in an omission suit ‘to specify the time, place, and specific
19 content, relative to a claim involving affirmative misrepresentations.’” *Barrett v. Apple Inc.*, No.
20 5:20-CV04812-EJD, 2021 WL 827235, at *7 (N.D. Cal. Mar. 4, 2021) (quoting *In re Apple & AT*
21 *& TM Antitrust Litig.*, 596 F. Supp. 2d 1288, 1310 (N.D. Cal. 2008)); *see also Falk v. Gen. Motors*
22 *Corp.*, 496 F. Supp. 2d 1088, 1099 (N.D. Cal. 2007).

23 **III. DISCUSSION**

24 Plaintiffs bring claims for: (1) violation of the California Unfair Competition Law, Cal.
25 Bus. & Prof. Code §§ 17200, et seq. (“UCL”) (Count 1), (2) violation of the California Consumers
26 Legal Remedies Act, Cal. Civ. Code §§ 1761 and 1770 (“CLRA”) (Count 2), and (3) equivalent
27 deceptive trade practice laws in Alaska, Florida, Massachusetts, Michigan, Missouri, New Jersey,

1 Texas, and Washington (Counts 4-11) (collectively, “the Deceptive Trade Practice Claims”); and
 2 (4) fraudulent concealment (Count 3). Apple seeks to dismiss all of Plaintiffs’ claims pursuant to
 3 Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be
 4 granted. The Court addresses each claim in turn.

5 **A. Fraud Claims**

6 **1. Affirmative representations**

7 Plaintiffs allege with respect to each of their fraud claims that Apple committed fraud
 8 through affirmative representations in its 2016 promotional campaign for MacBook Pros. The
 9 TAC includes the same allegations from the Second Amended Complaint (“SAC”) concerning
 10 Apple’s description of the displays on the relevant MacBook Pro models as the “brightest and
 11 most colorful Retina display yet,” as well as an advertisement and an October 27, 2016 press
 12 release stating that the new MacBook Pros had “the best Mac display ever.” *Compare* TAC ¶ 17
 13 *with* Dkt. No. 30 ¶ 16. The TAC also includes new allegations of affirmative representations,
 14 specifically that: (1) Apple’s promotional campaign stressed that the new display screens are the
 15 best in the computer industry (TAC ¶ 17); (2) “the Retina display on the new MacBook Pro at 500
 16 nits of brightness is an amazing 67 percent brighter than the previous generation, features 67
 17 percent more contrast and is the first Mac notebook display to support wider color gamut” (*id.* ¶
 18 24); and (3) Apple products will last for a minimum of four years (*id.* ¶ 16).

19 With respect to the allegations repeated from the SAC, the Court already determined those
 20 representations to be nonactionable puffery. Dkt. No. 55 at 14–17 (citing *Ahern v. Apple Inc.*, 411
 21 F. Supp. 3d 541 (N.D. Cal. 2019)). With their current amendments, Plaintiffs seek to cure the
 22 deficiencies the Court previously identified by distinguishing *Ahern*. Plaintiffs contend that,
 23 unlike the *Ahern* plaintiffs, they have pled “a product design defect central to the function and
 24 operation of their laptops,” not merely a defect affecting “the quality of the user experience.” Pls.’
 25 Opp’n to Mot. to Dismiss Third Am. Compl. (“Opp’n”), Dkt. No. 71, at 8 (citing *Ahern*, 411 F.
 26 Supp. 3d at 568); *but see* Opp’n at 9 (“Plaintiffs here plead Apple’s misrepresentations about
 27 MacBook Pro monitor *quality*.”) (emphasis original). Plaintiffs appear to confuse *Ahern*’s ruling

1 on affirmative misrepresentations with its ruling on fraudulent concealment theories. *See Ahern*,
2 411 F. Supp. 3d at 568 (discussing pure omission allegations).

3 Instead, Plaintiffs contend that “[w]hen a plaintiff alleges such product ineffectiveness or
4 failure, representations about that product’s superior quality are provably false and thus not mere
5 ‘puffery.’” Opp’n at 9. Plaintiffs cite *Vigil v. Gen. Nutrition Corp.*, No. 15-CV-00079-JM-DBHx,
6 2015 WL 2338982 (S.D. Cal. May 13, 2015) and *In re Bang Energy Drink Mktg. Litig.*, No. 18-
7 cv-05758-JST, 2020 WL 4458916 (N.D. Cal. Feb. 6, 2020) in support of this proposition. In
8 *Vigil*, the district court found the defendant’s statement that its male supplement “[f]ormulated
9 with premium ingredients to provide maximum potency” was not nonactionable puffery because
10 the statement at issue arguably promised customers that the supplement was capable of having
11 some kind of effect on male potency when viewed in context with other statements on the product
12 label. 2015 WL 2338982, at *8–9 (“If Plaintiff can prove that Staminol is totally incapable of
13 doing so, this statement is provably false to the extent that it makes that representation, or at least
14 contributes to the likelihood that the packaging is deceptive as a whole.”). In *Bang Energy*, the
15 court found that the defendant’s use of the term “Super Creatine” was an actionable
16 misrepresentation because the defendant used it to qualify an ingredient about which it made
17 specific claims and was therefore capable of being proven true or false. 2020 WL 4458916, at *8–
18 9. Neither of these cases support Plaintiffs’ contention because they concerned statements that
19 were capable of being proven true or false. The Court finds no reason to alter its earlier finding
20 that the statements that the laptops are “revolutionary,” “groundbreaking,” offer “breakthrough
21 performance,” and contain “the best Mac display ever” are subjective and immeasurable assertions
22 and thus constitute nonactionable puffery. Dkt. No. 55 at 17.

23 Turning to the new allegations in the TAC, the Court first addresses the allegation that
24 “APPLE’s promotional campaign for the MacBook Pros stressed that the new display screens are
25 the best in the computer industry.” TAC ¶ 17. The Court perceives this allegation as an attempt to
26 plead an actionable statement akin to those in *Beyer v. Symantec Corp.*, 333 F. Supp. 3d 966 (N.D.
27 Cal. 2018). The Court previously rejected Plaintiffs’ comparison to *Beyer*, finding that “the

1 statement that the MacBook Pro display is ‘the best Mac display ever’ does not imply Apple’s
2 adherence to industry best practices,” as it only compares the display to other Macs. Dkt. No. 55
3 at 16–17. This additional allegation does not support Plaintiffs’ case, however, as the TAC does
4 not contain any actual examples of or quotations from Apple making such a representation. The
5 only example of Apple’s promotional campaign that Plaintiffs provide is the October 2016 press
6 release¹, which says nothing about the new MacBook Pro display being the best in the computer
7 industry. Plaintiffs do not address this inconsistency in their opposition brief. *See* Opp’n. The
8 Court thus finds no factual basis for such an allegation.

9 With respect to the statement about the Retina display, the Court previously held that this
10 statement was the only actionable statement from the 2016 MacBook Pro advertisement cited in
11 the SAC, because it consisted of more specific statements about the objective characteristics of the
12 MacBook Pro display capable of being proven false. Dkt. No. 55 at 17. However, the Court noted
13 that Plaintiffs had not alleged that those statements were false:

14 Nothing about this Alleged Defect relates to the thickness,
15 brightness, or color gamut of the MacBook display touted in the
16 quoted advertisement. Because Plaintiffs do not allege that the
17 statements in the advertisements are false or that they would lead a
18 reasonable consumer to draw inaccurate conclusions about the
19 reliability of useful life of the display, the court finds that these
20 statements are not affirmative misrepresentations sufficient to
21 support Plaintiffs’ fraud claims.

19 *Id.* The TAC asserts that the advertisement’s “representations about the purportedly exceptional
20 brightness and quality of the MacBook Pro displays, however, are ultimately false,” and that the
21 Alleged Defect is “the complete opposite of the bright, clear, sharp display APPLE represents it to
22 be.” TAC ¶ 24. But those allegations still say nothing about the thickness, brightness, or color
23 gamut of the MacBook display. Moreover, Apple argues, Plaintiffs have not alleged any facts
24 suggesting that these statements were false at the time they were made or at the time of sale. Mot.
25 at 8–9 (citing *In re Sony Grand Wega KDF-E A10/A20 Series Rear Projection HD TV Television*

26 _____
27 ¹ Judicial notice of the October 2016 press release is proper, as the release is incorporated in the
28 complaint. TAC ¶ 17 n.2; *Khoja*, 899 F.3d at 998.

1 *Litig.*, 758 F. Supp. 2d 1077, 1090 (S.D. Cal. 2010)). Plaintiffs do not directly address this issue
2 in their opposition brief and do not point to any facts suggesting otherwise. Opp'n at 9.

3 Last, with respect to the new allegation that Apple represents its products as lasting for a
4 minimum of four years, the Court finds that the TAC's allegations mischaracterize Apple's
5 statement. The webpage cited as the source of the statement is entitled, "Additional Questions:
6 More answers to your questions about Apple and the environment," and it appears in the
7 "Environment" section of Apple's website.² Apple Inc., *Environment – Answers – Apple*,
8 Apple.com, <https://www.apple.com/environment/answers/> (last visited July 17, 2021). The
9 relevant portion of the webpage reads:

10 2. How does Apple conduct its Product Greenhouse Gas Life Cycle
11 Assessment?

12 Apple uses five steps when conducting a product life cycle
assessment (LCA):

13 . . .

14 2. To model customer use, we measure the power consumed by a
15 product while it is running in a simulated scenario. Daily usage
16 patterns are specific to each product and are a mixture of actual
17 and modeled customer use data. For the purposes of our
assessment, years of use, which are based on first owners, are
18 modeled to be four years for macOS and tvOS devices and three
years for iOS, iPadOS and watchOS devices. Most Apple
19 products last longer and are often passed along, resold, or
returned to Apple by the first owner for others to use. More
information on our product energy use is provided in our
Product Environmental Reports.

20 *Id.* A review of this webpage reveals that the purported four-year lifespan representation concerns
21 modeling assumptions Apple made for the purposes of engaging in an environmental assessment
22 of greenhouse gas emissions resulting from Apple products. *Id.* Using a particular model for
23 environmental assessment purposes is not equivalent to guaranteeing a product lifespan of four
24 years without repair. It is simply not plausible that a consumer considering whether to purchase a
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26 _____
27 ² Judicial notice of the webpage is proper, as the statement appearing on the page is incorporated
in the complaint. TAC ¶ 16; *Khoja*, 899 F.3d at 998.

1 MacBook Pro would seek technical information about the laptop’s specifications from the portion
 2 of Apple’s website addressing frequently asked questions about its environmental practices.
 3 Moreover, the Court cannot reasonably infer that Plaintiffs actually viewed the environmental
 4 questions webpage and relied on it. The TAC alleges that each plaintiff “saw advertisements and
 5 marketing materials on APPLE’s website in which APPLE represented the MacBook had the best
 6 display to date.” TAC ¶¶ 36, 42, 47, 52, 57, 62, 67, 72, 77. The environmental questions webpage
 7 cannot be fairly described as an advertisement or marketing material, and it says nothing at all
 8 about the MacBook in particular, much less that it had “the best display to date.”

9 Accordingly, the Court finds that Plaintiffs have not stated any fraud claims based on
 10 affirmative misrepresentations.

11 2. Fraud by omission

12 Plaintiffs’ fraudulent concealment and various Deceptive Trade Practice Claims all stem
 13 from the contention that Apple failed to disclose the Alleged Defect in the MacBook Pros. “To
 14 state a claim for fraudulent omission, the omission must be contrary to a representation actually
 15 made by the defendant, or an omission of a fact the defendant was obliged to disclose.” *In re*
 16 *Apple Inc. Device Performance Litig. (In re Apple II)*, 386 F. Supp. 3d 1155, 1175 (N.D. Cal.
 17 2019) (internal citation omitted) (emphasis added). “When a defect does not relate to an
 18 unreasonable safety hazard, a defendant has a duty to disclose when (1) the omission is material;
 19 (2) the defect is central to the product’s function; and (3) at least one of the following four factors
 20 is met: the defendant is the plaintiff’s fiduciary; the defendant has exclusive knowledge of material
 21 facts not known or reasonably accessible to the plaintiff; the defendant actively conceals a material
 22 fact from the plaintiff; or the defendant makes partial representations that are misleading because
 23 some other material fact has not been disclosed.” *Id.* at 1176.

24 Apple now contends that no duty to disclose exists where the defect arises only after
 25 expiration of the warranty period, and that such an omission is not material (and thus not
 26 actionable) as a matter of law except when the defect poses a safety hazard. Mot. at 12–17. The
 27 Court’s previous ruling did not address this warranty argument, which Apple made only obliquely

1 with respect to the fraud by omission claims.³ See Dkt. No. 33 at 14–19.

2 As the Ninth Circuit and other courts in this District have acknowledged, “[t]he state of the
3 law on the duty to disclose under California law is in some disarray.” *In re Apple Inc. Device*
4 *Performance Litig. (In re Apple I)*, 347 F. Supp. 3d 434, 458 (N.D. Cal. 2018). In 2012, the Ninth
5 Circuit concluded based on California state law that in the absence of affirmative
6 misrepresentations, a plaintiff must “allege that the design defect caused an unreasonable safety
7 hazard.” *Wilson v. Hewlett-Packard Co.*, 668 F.3d 1136, 1141 (9th Cir. 2012) (citing *Daugherty*
8 *v. Am. Honda Motor Co.*, 144 Cal. App. 4th 824 (2006)); see also *Williams v. Yamaha Motor Co.*,
9 851 F.3d 1015, 1026 (9th Cir. 2017) (citing *Wilson* as “holding that where a defendant has not
10 made an affirmative misrepresentation, a plaintiff must allege the existence of an unreasonable
11 safety hazard”). However, in 2015, the California Court of Appeal appeared to suggest that a
12 plaintiff pursuing a fraudulent omission claim need not always plead an unreasonable safety
13 hazard. See *Rutledge v. Hewlett-Packard Co.*, 238 Cal. App. 4th 1164 (2015) (allowing
14 consumer-protection claims to proceed even without “defects related to safety concerns”). More
15 recently, in 2018, the Ninth Circuit recognized this tension in the cases but declined to decide
16 whether the safety-hazard requirement applies in all circumstances. See *Hodsdon v. Mars*, 891
17 F.3d 857, 861–62 (9th Cir. 2018) (“While the recent California cases do cast doubt on whether
18 *Wilson*’s safety-hazard requirement applies in all circumstances, we have no occasion in this case
19 to consider whether the later state-court cases have effectively overruled *Wilson*.”).

20 However, the Ninth Circuit does not appear to have directly addressed the question of
21 whether a duty to disclose exists when the alleged defect arises only after a limited warranty
22 period expires. The last direct word from the Ninth Circuit on the subject appears in *Wilson*,

23
24
25 ³ Apple moved for leave to file a motion for reconsideration of the Court’s prior order granting in
26 part and denying in part Apple’s motion to dismiss the SAC, arguing that the Court committed
27 manifest error by not considering the warranty argument in analyzing Plaintiffs’ fraudulent
28 omission claims. Dkt. No. 59. In view of the operative TAC and the fact that the Court is now
considering what would presumably be Apple’s same arguments on the issue, the motion for leave
to file a motion for reconsideration is DENIED as moot.

1 which states that “California federal courts have generally interpreted *Daugherty* as holding that
 2 ‘[a] manufacturer’s duty to consumers is limited to its warranty obligations absent either an
 3 affirmative misrepresentation or a safety issue.’” 668 F.3d at 1141 (quoting *Oestreicher v.*
 4 *Alienware Corp.*, 322 F. App’x 489, 493 (9th Cir. 2009)). Plaintiffs contend that *Rutledge* and
 5 *Hodsdon* have rejected *Wilson*’s strict “safety hazard” pleading requirement altogether in omission
 6 cases, and that the expiration of a limited warranty period is otherwise irrelevant. Opp’n at 2–6.

7 The Court disagrees with Plaintiffs’ reading of *Rutledge* and *Hodsdon*. In *Rutledge*, the
 8 California Court of Appeals stated:

9 HP argues Degenshein and class members similar to him do not
 10 have a claim for fraudulent concealment under the UCL, because
 11 they received notebooks with inverters that functioned for the
 12 duration of the one-year warranty, and were not damaged by HP’s
 13 alleged failure to disclose the fact of the faulty inverter. However, a
 14 claim for fraudulent business practices reflects the UCL’s focus on
 15 the defendant’s conduct, rather than the plaintiff’s damages, in
 16 service of the statute’s larger purpose of protecting the general
 public against unscrupulous business practices. The question under
 the UCL is related to HP’s conduct in failing to disclose the faulty
 inverter, not on whether the notebook’s computer functioned for
 one-year. HP’s argument that the expiration of the warranty period
 precludes a claim for fraudulent concealment under the UCL is
 incorrect.

17 238 Cal. App. 4th at 1175. As Apple correctly observes, the individual *Rutledge* plaintiff
 18 mentioned above experienced the defect prior to the warranty expiration, and the plaintiff who
 19 only experienced the defect after the warranty period expired adequately alleged reliance on an
 20 affirmative representation. *Id.* at 1171, 1176 (“Degenshein experienced problems with his display
 21 screen blacking out shortly before the expiration of his one-year warranty . . .”). *Rutledge* does
 22 not appear to stand for the proposition that the expiration of the warranty period is irrelevant to a
 23 materiality analysis. Indeed, the Ninth Circuit expressly acknowledged that one possible reading
 24 of *Rutledge* is that “there is a duty to disclose defects that go to the central function of the product
 25 and which arise during the warranty period.” *Hodsdon*, 891 F. Supp. 3d at 863 (emphasis added).
 26 Plaintiffs’ proposed application of *Rutledge* would run afoul of longstanding public policy against
 27 disregarding a warranty’s limits. *See, e.g., Williams*, 851 F.3d at 1029 (“[T]he fact that the alleged
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1 defect concerns premature, but usually post-warranty, onset of a natural condition raises concerns
 2 about the use of consumer fraud statutes to impermissibly extend a product’s warranty period.”);
 3 *In re Apple II*, 386 F. Supp. 3d at 1178 (“California law is clear that its consumer fraud statutes
 4 cannot be used to extend a product’s warrant[y].”); *Collins v. eMachines, Inc.*, 202 Cal. App. 4th
 5 249, 257 (2011) (“To allow a CLRA claim in these circumstances would be to supplant warranty
 6 law; failure of a product to last forever would become a defect and a manufacturer would no
 7 longer be able to issue limited warranties.”) (internal quotation and citation omitted).

8 District courts within the Ninth Circuit—including the Northern District of California—
 9 discussing the issue post-*Rutledge* and -*Hodsdon* have repeatedly held that “a manufacturer has a
 10 duty to disclose any defects that fall within the warranty period, whether relating to safety or to
 11 costly repairs, that would have caused the consumer to not purchase the [product] if they had been
 12 disclosed.” *Baranco v. Ford Motor Co.*, 294 F. Supp. 3d 950, 960 (N.D. Cal. 2018) (quoting
 13 *Apodaca v. Whirlpool Corp.*, No. 13-00725 JVS (ANx), 2013 WL 6477821, at *7 (C.D. Cal. Nov.
 14 8, 2013)) (internal quotation marks omitted); *see also Sloan v. Gen. Motors LLC*, 287 F. Supp. 3d
 15 840 (N.D. Cal. 2018), *order clarified*, No. 16-CV-07244-EMC, 2018 WL 1156607 (N.D. Cal.
 16 Mar. 5, 2018), *and on reconsideration*, 438 F. Supp. 3d 1017 (N.D. Cal. 2020) (same); *In re Apple*
 17 *II*, 386 F. Supp. 3d at 1178–79 (alleged defect was not material where plaintiffs did not allege that
 18 it occurred on devices still under warranty); *Zuehlsdorf v. FCA US LLC*, No.
 19 EDCV181877JGBKX, 2019 WL 2098352, at *9 (C.D. Cal. Apr. 30, 2019) (noting that
 20 “different rules [apply] to claims based on defects that manifest during the warranty period versus
 21 after the warranty period”); *Loo v. Toyota Motor Sales, USA, Inc.*, No. 819CV00750VAPADSX,
 22 2019 WL 7753448, at *10 (C.D. Cal. Dec. 20, 2019) (acknowledging different materiality
 23 standard based on warranty status). But if the defect arises outside of the warranty period,
 24 however, then the manufacturer only has a duty to disclose “safety issues.” *Baranco*, 294 F. Supp.
 25 3d at 960; *Sloan*, 287 F. Supp. 3d at 869 (“With respect to defects that manifested only after the
 26 warranty period, Plaintiffs must allege that the defect poses an unreasonable safety hazard.”).

27 “The purpose of this limitation in the post-warranty context is to ensure that durational limits on

1 express warranties are not rendered meaningless.” *Baranco*, 294 F. Supp. 3d at 960; *Sloan*, 287 F.
2 Supp. 3d at 869.

3 Here, Plaintiffs do not allege that the defect arose before the expiration of the warranty
4 period. See TAC ¶¶ 37, 43, 48, 53-54, 58-59, 63-64, 68, 73-74, 78-79. Consequently, Apple only
5 had a duty to disclose safety issues. *Baranco*, 294 F. Supp. 3d at 960; *Sloan*, 287 F. Supp. 3d at
6 869; see also *Hodsdon*, 891 F. Supp. 3d at 863. Plaintiffs have not alleged that the Alleged Defect
7 presented any particular safety hazard. Accordingly, the Court finds that Plaintiffs have not
8 adequately stated a claim as to the omission-based Deceptive Trade Practice Claims and
9 fraudulent concealment claim.

10 **B. UCL Claim**

11 **1. “Unfair” prong**

12 “Under the unfairness prong of the UCL, a practice may be deemed unfair even if not
13 specifically proscribed by some other law.” *In re Carrier IQ, Inc.*, 78 F. Supp. 3d 1051, 1115
14 (N.D. Cal. 2015) (internal citation omitted). California courts have developed at least two tests for
15 “unfairness” within the meaning of the UCL: “(1) the tethering test, which requires that the public
16 policy which is a predicate to a consumer unfair competition action under the unfair prong of the
17 UCL must be tethered to specific constitutional, statutory, or regulatory provisions” and “(2) the
18 balancing test, which examines whether the challenged business practice is immoral, unethical,
19 oppressive, unscrupulous or substantially injurious to consumers and requires the court to weigh
20 the utility of the defendant’s conduct against the gravity of the harm to the alleged victim.”
21 *Herskowitz v. Apple Inc.*, 940 F. Supp. 2d 1131, 1145–46 (N.D. Cal. 2013).

22 With respect to the tethering test, Plaintiff Taleshpour alleges that Apple’s conduct is
23 unfair because it violates California public policy of “requiring a manufacturer to ensure that
24 goods it places on the market are fit for their ordinary and intended purposes.” TAC ¶ 96. In
25 other words, he pleads that Apple’s conduct violated the public policy legislatively declared in the
26 CLRA. For the reasons described above, however, the Court finds that Taleshpour has not stated a
27 claim under the CLRA and therefore has not alleged any violation of public policy. See *supra*

1 Section III.A.

2 With respect to the balancing test, Taleshpour argues that he pleads facts sufficient to state
3 a claim based on Apple’s purported representation that MacBook Pro laptops have a minimum
4 lifespan of four years. Opp’n at 10–11 (citing TAC ¶¶ 97, 100). Under the balancing test, an act
5 or practice is “unfair” if “the consumer injury is substantial, is not outweighed by any
6 countervailing benefits to consumers or to competition, and is not an injury the consumers
7 themselves could have reasonably avoided.” *Tietsworth v. Sears*, 720 F. Supp. 2d 1123, 1137
8 (N.D. Cal. 2010) (quoting *Daugherty*, 144 Cal. App. 4th at 839) (internal quotation marks
9 omitted). This test typically requires a fact intensive inquiry, not conducive to resolution at the
10 motion to dismiss phase. See *In re MacBook Keyboard Litig.*, No. 5:18-cv-02813-EJD, 2019 WL
11 1765817, at *9 (N.D. Cal. Apr. 22, 2019). As discussed above, the Court finds the allegations
12 concerning the alleged four-year lifespan are not plausible. See *supra* Section III.A.1.

13 Moreover, a “[f]ailure to disclose a defect that might shorten the effective life span of a
14 component part to a consumer product does not constitute a ‘substantial injury’ under the unfair
15 practices prong of the UCL where the product functions as warranted throughout the term of its
16 express warranty.” *In re Sony Grand Wega*, 758 F. Supp. 2d at 1091; see also *Clemens v.*
17 *DaimlerChrysler Corp.*, 534 F.3d 1017, 1026–27 (9th Cir. 2008); *Daugherty*, 144 Cal. App. 4th at
18 838–39. Taleshpour did not experience the Alleged Defect until well after the one-year limited
19 warranty expired. TAC ¶¶ 35, 37.

20 Accordingly, the Court finds that Taleshpour has not adequately pled a substantial injury
21 and thus does not state a claim under the unfair prong of the UCL.

22 2. “Unlawful” prong

23 Plaintiffs’ claim under the unlawful prong of the UCL is based on their CLRA claim. TAC
24 ¶ 94. Because Plaintiffs failed to state a viable claim under the CLRA, they have also “failed to
25 state a claim under the ‘unlawful’ prong of the UCL.” *In re MacBook Keyboard Litig.*, 2019 WL
26 1765817, at *8–9 (citing *McKinney v. Google, Inc.*, No. 5:10-CV-01177 EJD, 2011 WL 3862120,
27 at *7 (N.D. Cal. Aug. 30, 2011)). Accordingly, the Court dismisses Plaintiffs’ UCL claim brought

1 under the unlawful prong.

2 **C. New Jersey Consumer Fraud Act Claim**

3 Apple provides additional argument as to why Plaintiff Stewart fails to state a claim under
4 the New Jersey Consumer Fraud Act (“NJCFA”). Mot. at 19–20. To state an actionable NJCFA
5 claim, a plaintiff must allege facts establishing three elements: (1) unlawful conduct by the
6 defendant; (2) an ascertainable loss on the part of the plaintiff; and (3) a causal relationship
7 between the defendant’s unlawful conduct and the plaintiff’s ascertainable loss. *Duffy v. Samsung*
8 *Elects. Am., Inc.*, No. CIV. 06–5259 (DRD), 2007 WL 703197, at *6 (D.N.J. Mar. 2, 2007); *see*
9 *also Int’l Union of Operating Eng. Local No. 68 Welfare Fund v. Merck & Co., Inc.*, 929 A.2d
10 1076, 1086 (N.J. 2007).

11 Apple first contends that Plaintiffs have not alleged unlawful conduct. Plaintiffs disagree,
12 relying in part on their allegations regarding Apple’s representation of a four-year lifespan. Opp’n
13 at 12–13. For the reasons described above, those allegations are not plausible. *See supra* Section
14 III.A.1. Moreover, “unless a defendant manufacturer knows with certainty that a product will fail,
15 it does not violate the NJCFA by failing to inform its consumers of the possibility of failure.”
16 *Dawson v. General Motors LLC*, 2019 WL 3283046, at *5–6 (D.N.J. July 22, 2019); *see also*
17 *Priano-Keyser v. Apple Inc.*, No. 19-09162 (KM)(MAH), 2019 WL 7288941, at *8 (D.N.J. Dec.
18 30, 2019) (noting that “[t]o support a [NJ]CFA cause of action for fraud in the context of a
19 warranted defect, a plaintiff must show that the manufacturer was not in good faith insuring
20 against a risk, but that it actually knew with certainty that the product at issue or one of its
21 components was going to fail”) (internal quotation marks omitted); *Mickens v. Ford Motor Co.*,
22 900 F. Supp. 2d 427, 442 (D.N.J. 2012) (“In cases . . . where an allegedly defective product was
23 covered by a warranty, [a] claim that a defect may, but has not, manifested itself until after the
24 expiration of the warranty period cannot form the basis of a claim under the [NJ]CFA. Rather, a
25 plaintiff must sufficiently allege that the defendant manufacturer *knew with certainty* that the
26 product at issue or one of its components was going to fail.”) (emphasis original; internal
27 quotation marks omitted). Here, the TAC does not contain any allegations that Apple knew with

1 certainty that the Alleged Defect would manifest.

2 Apple also argues that Plaintiffs are unable to allege ascertainable loss, because “failure of
3 a product after its warranty is not an ascertainable loss under the NJCFA.” Mot. at 20 (citing
4 *Duffy*, 2007 WL 703197, at *8; *Nobile v. Ford Motor Co.*, No. 10–1890 (PGS), 2011 WL 900119,
5 at *5–6 (D.N.J. Oct. 1, 2012)). “[A] plaintiff cannot demonstrate ‘ascertainable loss’ under the
6 NJCFA where the allegedly defective [] component outperforms its warranty period.” *Davidson*
7 *v. Apple, Inc.*, No. 16-cv-4942-LHK, 2017 WL 3149305, at *16 (N.D. Cal. Jul 25, 2017) (quoting
8 *In re Porsche Cars N.A., Inc.*, 880 F. Supp. 2d 801, 857 (S.D. Ohio 2012)) (internal quotation
9 marks omitted); *see also Mickens*, 900 F. Supp. 2d at 442 (“[W]here an allegedly defective
10 product was covered by a warranty, [a] claim that a defect may, but has not, manifested itself until
11 after the expiration of the warranty period cannot form the basis of a claim under the [NJ]CFA.”).
12 Here, Plaintiff Stewart did not experience the Alleged Defect until well after the warranty period
13 ended and therefore cannot plead an ascertainable loss. TAC ¶¶ 66, 68; *Davidson*, 2017 WL
14 3149305, at *16 (“Plaintiffs cannot state a claim under the NJCFA because the only New Jersey
15 Plaintiff experienced the touchscreen defect after the expiration of the 1-year Limited Warranty
16 period.”).

17 Accordingly, the Court dismisses the NJCFA claim.

18 **D. Leave to Amend**

19 While leave to amend generally is granted liberally, the Court has discretion to dismiss a
20 claim without leave to amend if amendment would be futile. *Manzarek v. St. Paul Fire & Marine*
21 *Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008); *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1051
22 (9th Cir. 2008) (“Dismissal without leave to amend is proper if it is clear that the complaint could
23 not be saved by amendment.”).

24 With respect to the fraud claims based on affirmative representations, the Court finds that
25 leave to amend would be futile and prejudicial to Apple, given that Plaintiffs have amended their
26 complaint three times already. *Leadsinger, Inc. v. BMF Music Publ’g*, 512 F.3d 522, 532 (9th Cir.
27 2008) (“The decision of whether to grant leave to amend nevertheless remains within the

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1 discretion of the district court, which may deny leave to amend due to ‘undue delay, bad faith or
2 dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments
3 previously allowed, undue prejudice to the opposing party by virtue of allowance of the
4 amendment, [and] futility of amendment.’”) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)).
5 With respect to the fraud claims based on fraud by omission, the Court grants Plaintiffs leave to
6 amend to plead a safety hazard arising out of the Alleged Defect. The Court further grants
7 Plaintiffs leave to amend the NJCFA claim to plead facts suggesting that Apple knew with
8 certainty that the Alleged Defect would occur.

9 **IV. CONCLUSION**

10 For the foregoing reasons, the Court GRANTS Apple’s motion to dismiss with limited
11 leave to amend. Plaintiffs shall file an amended complaint by **August 2, 2021**.

12 **IT IS SO ORDERED.**

13 Dated: July 19, 2021



EDWARD J. DAVILA
United States District Judge