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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

NICHOLAS LUSSON, BRYANT KUSHMICK, ALEXANDER SAENZ, JOHN DENOMA, and NORA PENNER, individually, and on behalf of all others similarly situated,

Plaintiffs,

v.

APPLE INC.,

Defendant.

Case No. 3:16-CV-00705-VC

DEFENDANT APPLE INC.'S MOTION TO DISMISS SECOND AMENDED CLASS ACTION COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Hearing Date: June 16, 2016
Time: 10:00 a.m.
Judge: Hon. Vince Chhabria
Courtroom: 4

Complaint Filed: February 11, 2016

NOTICE OF MOTION AND MOTION TO DISMISS

TO PLAINTIFFS AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on June 16, 2016, at 10:00 a.m. or as soon thereafter as the matter may be heard, in the United States District Court, Northern District of California, San Francisco Courthouse, located at 450 Golden Gate Avenue, Courtroom 4, before the Honorable Vince Chhabria, Defendant Apple Inc. ("Apple") will, and hereby does, move the Court for an order dismissing all the claims in Plaintiffs' Second Amended Class Action Complaint ("SAC") pursuant to Rules 12(b)(1), 12(b)(6), and 9(b) of the Federal Rules of Civil Procedure.

Specifically, Apple seeks an order: (1) dismissing Plaintiffs' entire SAC with prejudice because the claims and relief that Plaintiffs assert are moot; (2) dismissing Plaintiffs' tort claims for negligence and negligent misrepresentation because such claims are barred by the economic loss doctrine; (3) dismissing Plaintiffs' negligent misrepresentation claim also because it is based exclusively on an alleged "omission"; (4) dismissing Plaintiffs' UCL, FAL, CLRA, and negligent misrepresentation claims because Plaintiffs fail to meet the heightened pleading standard under Rule 9(b); (5) dismissing Plaintiffs' UCL, FAL, and CLRA claims also because Plaintiffs cannot assert consumer protection claims for an alleged "defect" that arose after the expiration of Apple's one-year warranty period; (6) dismissing Plaintiffs' request for injunctive relief because Plaintiffs lack standing to seek such relief; and (7) dismissing Plaintiffs' "claim" for unjust enrichment because unjust enrichment is not an independent cause of action in California.

This Motion is based on the Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, the Request for Judicial Notice, Declarations of Matthew D. Powers and James Johnson, and any other related documents filed in connection with this Motion, the papers and records on file in this action, and such other written and oral argument as may be presented to the Court.

Dated: May 2, 2016

MATTHEW D. POWERS
O'MELVENY & MYERS LLP

By: /s/ Matthew D. Powers
Matthew D. Powers

Attorneys for Defendant
APPLE INC.

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I. INTRODUCTION

All of the claims in the Second Amended Class Action Complaint ("SAC") should be dismissed. Plaintiffs fail to allege facts necessary to support key elements of their negligence and fraud-based claims that Apple "misled" them and "failed to disclose" an "Error 53" issue in their iPhones and iPad devices. In fact, what Plaintiffs do allege (together with judicially noticeable facts) shows that their claims are barred as a matter of law and, in any event, are moot.

Plaintiffs contend that Apple "knew" but "took no steps to warn consumers and owners" that "updating software or restoring data would result in an Error 53 code that would render the device inoperable and cause data loss." (*E.g.*, SAC ¶¶ 5, 29.) But they neglect to inform the Court that Apple has already corrected Error 53 for everyone (including Plaintiffs) by releasing a software "fix" that allows affected devices to be restored and by reimbursing consumers who paid for "out of warranty" repairs or purchased new devices (from Apple or otherwise) because of Error 53. Under the circumstances, there is nothing left to litigate and the claims in the SAC are all moot.

Even if Plaintiffs' claims were not moot (they are), the SAC suffers from a host of other defects. ***First***, Plaintiffs' tort claims (for negligence and negligent misrepresentation) are barred by the economic loss rule, *Ladore v. Sony*, 75 F. Supp. 3d 1065, 1075 (N.D. Cal. 2014), and the negligent misrepresentation claim is also barred because it is based entirely on an alleged "omission," *Thomas v. Costco*, 2014 WL 5872808, at *3-4 (N.D. Cal. Nov. 12, 2014) (negligent misrepresentation cannot be based on "failure to disclose"). ***Second***, Plaintiffs' fraud-based consumer protection claims fail because Plaintiffs (1) do not plead with sufficient particularity under Rule 9(b) that they saw, much less relied upon, any specific false statement or omission, *Vess v. Ciba-Geigy*, 317 F.3d 1097, 1106 (9th Cir. 2003), and (2) cannot assert consumer protection claims for any "defect" that arose after the expiration of Apple's one-year warranty, *Wilson v. Hewlett-Packard*, 668 F.3d 1136, 1145 (9th Cir. 2012) ("[A] manufacturer's duty to consumers is limited to its warranty obligations absent either an affirmative misrepresentation or a safety issue."). ***Third***, Plaintiffs lack Article III standing to pursue injunctive relief because they do not—and, under the circumstances, cannot—allege a realistic threat of future injury. *Gest*

v. Bradbury, 443 F.3d 1177, 1181 (9th Cir. 2006). ***Finally***, Plaintiffs may not pursue a "claim" for unjust enrichment because "unjust enrichment" is not an independent cause of action in California, the terms of Apple's Limited Warranty "defin[e] the rights of the parties," and, in any event, any claim to restitution is moot in light of Apple's software update and reimbursement program. *E.g.*, *Marcus v. Apple Inc.*, 2015 WL 151489, at *10 (N.D. Cal. Jan. 8, 2015).

At the end of the day, further litigation in this case is unnecessary, imprudent, and an avoidable drain on the resources of the parties and the Court. Plaintiffs should obtain the relief they seek by installing the software update (if they have not already done so) and—as other consumers have done—requesting reimbursement from Apple directly. Accordingly, this litigation should end and the Court should dismiss the SAC with prejudice.

II. BACKGROUND FACTS

A. Plaintiffs' Claims Regarding Error 53

In the SAC, Plaintiffs allege Apple failed to warn consumers that updating software or restoring data on certain iPhones and iPads that had been damaged or repaired could result in an "Error 53" code that "would render the device inoperable and cause data loss"—"colloquially known as 'bricking' the device." (SAC ¶¶ 5, 18, 25, 29.) According to Plaintiffs, Error 53 affected versions 8.0.1 through 9.2 of Apple's Operating Software (iOS) and impacted a small percentage of consumers beginning in "early 2015." (*Id.* ¶¶ 4, 5.) Plaintiffs allege that Error 53 could be triggered under various circumstances, including when users updated or installed iOS after having repaired or replaced damaged components (*e.g.*, the "Home" button or display screen) and, in some cases, after devices had experienced "gradual degradation" with "no replacement or repair." (*Id.* ¶¶ 19-21.)

In fact, Error 53 was not designed to affect customers' devices. Instead, it was the result of a test designed by Apple to check whether certain components—particularly Touch ID, which allows a user to store a fingerprint as a "passkey" to access their device, including sensitive applications like Apple Pay—had been installed and were working properly before the device left the factory. (*Id.* ¶¶ 9, 10, 15, 30.) In all versions of iOS that are implicated here, the Touch ID feature on consumers' devices was intended to simply stop functioning (rather than deactivating

the entire device) if the operating system detected that the security enclave underlying Touch ID had been damaged or otherwise compromised. (*Id.* ¶ 15.) Although many devices affected by Error 53—including Plaintiffs' devices—were repaired by unauthorized third parties, Error 53 also appeared on devices repaired by Apple and on some devices that had been damaged but never repaired at all. (*Id.* ¶¶ 19-21, 47, 51, 57, 62, 66.)

Here, Plaintiffs experienced Error 53 after they damaged their devices (or they malfunctioned) often as a result of customer mistakes—which ranged from dropping an iPhone into a toilet to shattering the screen. (*E.g.*, *id.* ¶¶ 47 (Lusson's iPhone "received water damage"), 51 (Kushmick's iPhone "developed a small crack in the Home button"), 61 (Denoma's "iPhone screen shattered"), 66 (Penner's "iPhone 6 fell into a toilet").) Apple warns consumers that repairs should only be made by Apple technicians or by authorized service providers ("ASPs") (*e.g.*, Best Buy).[1] But each Plaintiff either tried to repair their own device, obtained a repair from an unauthorized third party, or did nothing. (*Id.* ¶¶ 47, 51, 58, 62, 66.) Although the circumstances of each Plaintiff vary, they all allege they were impacted by Error 53 when they attempted to install new versions of the iOS operating system after the damage (and unauthorized repairs) occurred. (*Id.* ¶¶ 48, 52, 57, 63, 67.)

Next, although Plaintiffs' claims are based on "misrepresentations" and "omissions" (*e.g.*, *id.* ¶¶ 97, 105), they do not identify any statement by Apple that Plaintiffs contend was actually false. Nor do Plaintiffs allege that they saw, much less relied upon, any specific "false" statement by Apple about Error 53, or that suggested their devices could never malfunction or would always be error-free. This is because they cannot—Apple's Limited Warranty explicitly discloses the unsurprising fact that "the operation of the Apple Product [may not] be uninterrupted or error-free,"[2] and Section 7.4 of Apple's Software License Agreement ("SLA") (that consumers must

[1] Under Apple's Limited Warranty, repairs must be made by Apple or an ASP and, in any event, the warranty explicitly excludes from coverage devices that have been damaged "by accident, abuse, misuse, liquid damage … or other external cause." (Apple's Request For Judicial Notice ("RJN"), Ex. A at 1, 2, https://www.apple.com/legal/warranty/products/ios-warranty-document-us.html#2013328_201623 (Limited Warranty applicable to Plaintiffs' devices) (consumers must "submit a valid claim to Apple or an AASP" to recover under the Limited Warranty, and noting that the warranty "does not apply … to damage caused by service … performed by anyone who is not a representative of Apple or an [ASP]").)

[2] *See* RJN, Ex. A at 1.

accept before updating software) indicates that "[i]nstallation of this iOS software may affect the availability and usability of … Apple products and services."[3] Instead, Plaintiffs appear to contend that Apple should have disclosed that "updating software or restoring data," typically after consumers used "independent repair services," could "trigger Error 53." (SAC ¶¶ 5, 29.)

Here, Plaintiffs ask the Court to order Apple to do what it has already done: (1) take corrective action to prevent and fix Error 53 and (2) provide monetary relief for costs incurred based on Error 53. Specifically, Plaintiffs assert claims for negligence and negligent misrepresentation, purported violations of California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200 *et seq.*, California's False Advertising Law ("Cal. FAL"), Cal. Bus. & Prof. Code § 17500 *et seq.*, and the California Consumer Legal Remedies Act ("CLRA"), Cal. Civ. Code § 1750 *et seq.*, and a "claim" for unjust enrichment, and ask the Court to order Apple to (1) release "a software update preventing Error 53 from rendering Affected Models completely inoperable and unusable and/or rendering 'bricked' devices operable and usable again," and (2) "put[] all repair or replacement costs under warranty." (SAC, Prayer ¶¶ C, D.)

B. Apple's Software Fix And Full Reimbursement Program

Apple has already implemented a program that both eliminates Error 53 and compensates those customers who paid for replacement devices.[4] On February 18, 2016, Apple issued a press release notifying consumers that Apple had (1) released a software update to iOS that permanently fixes the Error 53 issue and allows consumers "to successfully restore [their] device[s] using iTunes on [their] Mac or PC," and (2) is reimbursing in full anyone who "paid for an out-of-warranty device replacement based on an [E]rror 53 issue" (the "Reimbursement

[3] *See* RJN, Ex. B at Section 7.4, http://images.apple.com/legal/sla/docs/iOS91.pdf (Apple's Software License Agreement) (also disclosing that Apple does not guarantee that "the operation of the iOS software and services will be uninterrupted or error-free").

[4] Plaintiffs apparently chose not to discuss Apple's remedy for Error 53 when they filed their SAC on April 13 (almost two months after Apple announced its program). But since the claims here are moot and the Court lacks jurisdiction under Fed. R. Civ. P. 12(b)(1), the Court can and should consider extrinsic evidence—here, the existence and scope of Apple's fix and reimbursement program, which cannot reasonably be disputed in any event—to resolve this jurisdictional issue. *E.g.*, *McKinley v. Sw. Airlines Co.*, 2015 WL 2431644, at *2 (C.D. Cal. May 19, 2015) ("The presumption of correctness that we accord to a complaint's allegations falls away on the jurisdictional issue once a defendant proffers evidence that calls the court's jurisdiction into question.").

Program"). (Declaration of James Johnson ("Johnson Decl.") ¶ 2 & Ex. A.)

By installing Apple's free software update, anyone impacted by Error 53 can now restore their device. (*Id.* ¶¶ 2, 3.) And consumers who paid for out-of-warranty service to repair or replace their device (or purchased a new device, from Apple or otherwise) can be reimbursed for the full cost of that repair, replacement, or purchase. (*Id.* ¶ 4 & Ex. B.) In short, Apple is already implementing a program that (1) restores devices previously impacted by Error 53, and (2) fully reimburses consumers who paid for repairs or replacements because of Error 53.

III. LEGAL STANDARD

Since Apple has moved to dismiss the SAC under Rules 12(b)(6), 12(b)(1), and 9(b), there are three standards that govern aspects of this Motion. Dismissal under Rule 12(b)(6) is appropriate where there is either a "lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica*, 901 F.2d 696, 699 (9th Cir. 1988). Accordingly, Plaintiffs' SAC should be dismissed if it does not "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). And while the Court must accept well-pled facts as true, the Court need not assume the truth of legal conclusions merely because they are pled in the form of factual allegations. *Iqbal*, 556 U.S. at 677-79. "[C]onclusory allegations without more are insufficient to defeat a motion to dismiss for failure to state a claim." *McGlinchy v. Shell*, 845 F.2d 802, 810 (9th Cir. 1988).

Next, if Plaintiffs lack standing or the claims and relief are moot, the action "should be dismissed" under Rule 12(b)(1). *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1174 (9th Cir. 2004); *Nasoordeen v. FDIC*, 2010 WL 1135888, at *5 (C.D. Cal. Mar. 17, 2010) (citing *In re Burrell*, 415 F.3d 994, 998 (9th Cir. 2005) ("If the controversy is moot, both the trial and appellate courts lack subject matter jurisdiction, and the concomitant power to declare the law by deciding the claims on the merits") (internal citations omitted))); *Tosh-Surryhne v. Abbott Labs*, 2011 WL 4500880, at *3 (E.D. Cal. Sept. 27, 2011). The standing elements are "not mere pleading requirements" but are an "indispensable part of the plaintiff's case" and "must be supported at each stage of the litigation in the same manner as any other essential element of the case." *Cent.*

Delta Water Agency v. United States, 306 F.3d 938, 947 (9th Cir. 2002).

And, finally, Plaintiffs' fraud-based claims must satisfy Rule 9(b), which requires Plaintiffs to "state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b); *Kearns v. Ford*, 567 F.3d 1120, 1126-27 (9th Cir. 2009) (UCL and CLRA); *Neilson v. Union Bank*, 290 F. Supp. 2d 1101, 1141 (C.D. Cal. 2003) (negligent misrepresentation). Thus, Plaintiffs must plead the time, place, and content of the specific false representation or omission—the "who, what, when, where, and how"—as well as facts demonstrating their reliance on the allegedly fraudulent conduct. *Vess*, 317 F.3d at 1106; *Kearns*, 567 F.3d at 1124.

IV. ARGUMENT

The entire SAC suffers from a fundamental defect: the claims are moot because Apple has fixed Error 53 and is reimbursing consumers for replacement devices. And even if the claims were not moot (they are), the SAC suffers from several other defects that also warrant dismissal.

A. Plaintiffs' Claims Are Moot

In the SAC, Plaintiffs seek injunctive relief requiring that Apple (1) release a "software update preventing Error 53 from rendering" affected devices "inoperable and unusable and/or rendering 'bricked' devices operable and usable again," and (2) "put[] all repair or replacement costs under warranty." (SAC, Prayer.) But since Apple has already done that—and more—as a practical matter, this case is over.

Here, Apple has already: (1) engineered and released a software update to iOS that permanently eliminates Error 53 and fully restores affected devices and (2) announced (and is implementing) a program to reimburse consumers for out-of-warranty costs related to repairing or replacing affected devices—regardless of whether those consumers paid for a more expensive device or (like Plaintiffs) would ordinarily be precluded from coverage under the Limited Warranty for having damaged their device and/or obtained unauthorized repairs. (Johnson Decl. ¶¶ 2-4.) Thus, Apple is already providing complete relief to Plaintiffs and all affected consumers.

Under the circumstances, there is nothing left to litigate. A pending action is moot when a judicial ruling "can have no practical impact or provide the parties effectual relief." *Woodward Park v. Garreks*, 77 Cal. App. 4th 880, 888 (2000); *Redwood Coast v. State Bd. of Forestry*, 70

Cal. App. 4th 962, 968 (1999) (matter is moot when its resolution will not "significantly affect the legal relations of the parties."); *Cheng v. BMW*, 2013 WL 3940815, at *4 (C.D. Cal. July 26, 2013) (dismissing complaint where BMW issued nationwide recall and offered a repair or replacement remedy). This is particularly true where, as here, a defendant makes an offer of full relief that makes the plaintiffs whole. *E.g.*, *Winzler v. Toyota*, 681 F.3d 1208 (10th Cir. 2012) (recall effectively mooted claims); *Tosh-Surryhne*, 2011 WL 4500880, at *3 (claims moot where defendant offers full refund: "[w]hen a defendant offers to make plaintiffs whole, '[t]hat tender end[s] any dispute over restitution'"); *Graham v. DaimlerChrysler*, 34 Cal. 4th 553, 563 (2004) (claims moot after defendant offered to repurchase or replace trucks); *MacDonald v. Ford*, 2015 WL 6745408, at *3 (N.D. Cal. Nov. 2, 2015) (recall mooted plaintiffs' claims).

In *Tosh-Surryhne*, for example, the plaintiff brought warranty and consumer protection claims after she bought baby formula that had been recalled. 2011 WL 4500880, at *1. The Court dismissed the complaint, because the defendant's "full offer of restitution for the recalled containers of [baby formula]" mooted the plaintiff's claims. *Id.* at *4-5. And in *Graham*, Chrysler "incorrectly marketed" certain trucks as having triple the true towing capacity. 34 Cal. 4th at 561. After plaintiffs sued, Chrysler offered to "repurchase or replace[]" customers' trucks. *Id.* at 563. As a result, the claims were moot because Chrysler's remedy "offered all purchasers the relief plaintiffs sought." *Id.* Just as in *Tosh-Surryhne* and *Graham*, Apple's software fix and Reimbursement Program provide Plaintiffs (and all affected consumers) with the relief they seek.

And even where a claim is not technically moot as a constitutional matter, courts should still reject claims when, as here, "events so overtake a lawsuit that the anticipated benefits of a remedial decree no longer justify the trouble of deciding the case on the merits." *E.g.*, *Winzler*, 681 F.3d at 1210; *Cheng*, 2013 WL 3940815, at *2 ("Under the doctrine of prudential mootness, there are circumstances under which a controversy, not constitutionally moot, is so 'attenuated that considerations of prudence and comity … counsel [the court] to stay its hand, and to withhold relief it has the power to grant.'") (citing *Fletcher v. United States*, 116 F.3d 1315, 1321 (10th Cir. 1997))). For example, in *Winzler*, the plaintiff brought claims alleging that the car she purchased contained defective parts "making them prone to stall without warning." 681 F.3d at

1209. The plaintiff sought an order "requiring Toyota to notify all relevant owners of the defect and then to create and coordinate an equitable fund to pay for repairs." *Id.* After Toyota announced a nationwide recall, including an offer to repair or replace defective parts at no cost, the Court dismissed the complaint as prudentially moot, noting that "[e]ven though a flicker of life may be left in [the case], even though it may still qualify as an Article III 'case or controversy,' a case can reach the point where prolonging the litigation any longer would itself be inequitable." *Id.* at 1210 (internal citations omitted); *Cheng*, 2013 WL 3940815, at *3-4. The same is true here: the facts have "so overtake[n] [the] lawsuit that the anticipated benefits of a remedial decree no longer justify the trouble of deciding the case on the merits." *Winzler*, 681 F.3d at 1210.

To be sure, Plaintiffs purport to seek other ancillary relief, including punitive damages, attorneys' fees, interest, and consequential damages (*e.g.*, "loss of data"). (SAC ¶ 5, Prayer.) But such relief is either not validly pled for these Plaintiffs or is barred as a matter of law. For example, punitive damages are not authorized under the UCL and FAL, and while such damages may be permitted for CLRA, negligence and negligent misrepresentation claims, these claims are barred for the reasons discussed below. *See infra*, Sections IV.B and IV.C. And in any event, Apple's alleged misconduct falls far short of warranting such exceptional relief.[5]

Plaintiffs' requests for other ancillary relief are equally unavailing. Whether Plaintiffs are entitled to attorneys' fees under a catalyst theory or interest on a judgment are independent questions to be resolved after a determination on the merits. *E.g.*, *MacDonald*, 2015 WL 6745408 (addressing catalyst-based request for attorneys' fees after complaint was dismissed as moot). And although it is unclear from the SAC what consequential damages these Plaintiffs seek (if any), damages based on purported "data loss" are not recoverable here. Plaintiffs do not allege that they, personally, suffered any data loss—and most consumers will be able to restore

[5] *E.g.*, *In re TracFone*, 112 F. Supp. 3d 993 (N.D. Cal. 2015) ("[W]hile punitive damages can theoretically be awarded under the CLRA, [the plaintiff] has not cited any CLRA case where such damages were actually awarded, nor … sufficiently demonstrated that [the defendant's] conduct here would warrant a punitive damages award … ."); *Molina v. J.C. Penny*, 2015 WL 183899, at *3 (N.D. Cal. Jan. 14, 2015) ("Generally, mere or even gross negligence will not support an award of punitive damages.").

devices without any data loss. *See supra* Section II.B; (Johnson Decl. ¶ 3.) More fundamentally, consequential damages are unavailable here—Apple explicitly disclaims such damages in its Limited Warranty and discloses that "Apple is not responsible for … incidental or consequential damages … including … loss of use, … loss of business, loss of opportunity, … loss of, damage to, compromise or corruption of data …," and further discloses in Section 7.4 of its SLA that "[i]nstallation of this iOS software may affect the availability and usability of … Apple products and services." (RJN, Ex. A at 3; *id.*, Ex. B.) *See also* Cal. Comm. Code § 2719 (allowing disclaimer of consequential damages); *Stearns v. Select Comfort*, 2009 WL 4723366, at *9-10 (N.D. Cal. Dec. 4, 2009) (enforcing warranty disclaimer under Cal. Comm. Code § 2719); *Avinelis v. BASF*, 2008 WL 4104277, at *5-7 (E.D. Cal. Sept. 3, 2008) (same).

In short, Apple's comprehensive response to Error 53 makes further litigation unnecessary, imprudent, and wasteful. *Benson v. S. Cal. Auto Sales*, 239 Cal. App. 4th 1198, 1212 (2015) ("It is neither efficient nor economical to engage in protracted litigation and to run up attorney fees when an appropriate correction has been offered at the very outset."); *Tosh-Surryhne*, 2011 WL 4500880, at *3 (where defendant offers relief sought, "any claim brought [after] that point is an unnecessary call upon this court's resources"). Here, Plaintiffs never explain what specific relief they seek that Apple has not already provided, much less why they should (or even could) be entitled to such relief.[6]

B. Plaintiffs' Negligence And Negligent Misrepresentation Claims Fail

1. Plaintiffs' Tort Claims Are Barred By The Economic Loss Rule

Plaintiffs' claims for negligence (Count I) and negligent misrepresentation (Count II) are barred by the "economic loss" rule, under which plaintiffs may not recover in tort for "purely

[6] The Supreme Court's recent decision in *Campbell-Ewald v. Gomez* does not save Plaintiffs' SAC. 136 S. Ct. 663 (2016). *Campbell-Ewald* held that an unaccepted or lapsed offer of judgment under Rule 68 to a named plaintiff (without addressing the whole class) did not moot the claims as a constitutional matter. The Court emphasized that the offer of judgment affected only the named plaintiff, was never tendered, and, under contract principles, the plaintiff's rejection of the offer left the parties in the same adverse position—"both [parties] retained the same stake in the litigation they had" before the offer of judgment. *Id.* at 670-71. In contrast, Apple's response to Error 53 is available to ***all*** consumers, and the remedies—the software fix and Reimbursement Program—do not expire. In fact, consumers have been, and are continuing to be, reimbursed under the program. (Johnson Decl. ¶ 4.)

economic loss due to disappointed expectations." *See Ladore*, 75 F. Supp. 3d at 1075 (dismissing negligent misrepresentation claim for failure to allege non-economic loss); *Minkler v. Apple Inc.*, 65 F. Supp. 3d 810, 820 (N.D. Cal. 2014); *see also UMG Recordings v. Global Eagle*, 117 F. Supp. 3d 1092, 1103 (C.D. Cal. 2015) ("The California Supreme Court has noted that the economic loss rule is necessary to prevent[] the law of contract and the law of tort from dissolving into one another"); *Tasion Comm'n v. Ubiquiti Networks*, 2013 WL 4530470, at *9 (N.D. Cal. Aug. 26, 2013) ("[w]here a purchaser's expectations in a sale are frustrated because the product he bought is not working properly, his remedy is said to be in contract alone, for he has suffered only 'economic' losses."). The types of "economic loss" that are barred by this doctrine are precisely those that Plaintiffs seek here: "damages for inadequate value, costs of repair and replacement of the defective product or consequent loss of profits—without any claim of personal injury or damages to other property." *Tasion*, 2013 WL 4530470, at *3; *Sharma v. BMW*, 2014 WL 2795512, at *6 (N.D. Cal. June 19, 2014) (repair costs not recoverable because "a manufacturer's liability" for negligence "is limited to damages for physical injuries and there is no recovery for economic loss alone").[7]

2. Negligent Misrepresentation Requires A "Positive Assertion"

Plaintiffs' negligent misrepresentation claim (Count II) also fails because Plaintiffs do not allege to have relied on a single false statement—or any statement—by Apple. Instead, the negligent misrepresentation claim (and the SAC more generally) appears based entirely on an alleged "omission"—namely, that Apple allegedly "knew" but failed to "warn consumers and owners" that updating or restoring data on devices that had been damaged or repaired may trigger Error 53. (*E.g.*, SAC ¶¶ 5, 25, 29 ("Apple failed to disclose the security features triggering Error 53 … ."), 85, 86.) But to state a claim for negligent misrepresentation, Plaintiffs must point to a "positive assertion" that they saw and relied upon—"omissions" or "implied assertions" are

[7] *See also CHMM, LLC v. Freeman Marine*, 791 F.3d 1059, 1062 (9th Cir. 2015) ("[P]laintiff can sue the manufacturer in tort only for damage resulting from physical injury to persons or to property *other than the product itself*") (emphasis in original); *Vavak v. Abbott Labs., Inc.*, 2011 WL 10550065, at *6 (C.D. Cal. Jun. 17, 2011) ("[T]o the extent Plaintiff's negligence claims are based solely on money damages incurred from the purchase price, the claims are barred."); *Jimenez v. Sup. Ct.*, 29 Cal. 4th 473, 483 (2002); *Seely v. White Motor Co.*, 63 Cal. 2d 9, 18 (1965).

insufficient as a matter of law. *E.g.*, *Lopez v. Nissan*, 201 Cal. App. 4th 572, 596 (2011) ("A negligent misrepresentation claim 'requires a positive assertion,' not merely an omission."). Here, the only affirmative statements by Apple that Plaintiffs even reference in the SAC were either made long after Plaintiffs purchased their devices, are not statements of "fact," have nothing to do with the specific Error 53 issue, and/or are not actually false (nor even alleged to be false). (*E.g.*, SAC ¶¶ 11-13, 15, 24, 30.) And, in any event, Plaintiffs do not allege that they personally reviewed and relied on any of these statements before purchasing their device or updating iOS. Plaintiffs' negligent misrepresentation claim fails as a matter of law.

C. Plaintiffs Fail To Plead Necessary Elements Of Their Fraud-Based Claims

The UCL, FAL, CLRA, and negligent misrepresentation claims (Counts II-V) should also be dismissed because Plaintiffs fail to allege with the requisite particularity that they saw, much less relied on, any actionable false statement or omission by Apple regarding Error 53. These claims should also be dismissed to the extent they are based on an alleged Error 53 "defect" that arose after the expiration of Apple's one-year warranty period.

1. Plaintiffs Do Not Satisfy Rule 9(b)

Plaintiffs must plead and ultimately prove actual reliance to succeed on their consumer protection and negligent misrepresentation claims. *See* Cal. Bus. & Prof. Code § 17204; *Princess Cruise Lines, Ltd. v. Sup. Ct.*, 179 Cal. App. 4th 36, 46 (2009); *Kwikset Corp. v. Sup. Ct.*, 51 Cal. 4th 310, 326 (2011) (UCL); *Friedman v. Mercedes Benz*, 2013 WL 8336127, at *6 (C.D. Cal. June 12, 2013) (both fraudulent and negligent misrepresentation require that "a plaintiff … plead actual reliance"). And since Plaintiffs' claims sound in fraud, under Rule 9(b), "[i]n alleging fraud or mistake, [Plaintiffs] must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b); *Brazil v. Dole*, 935 F. Supp. 2d 947, 963-64 (N.D. Cal. 2013) (Rule 9(b) applies to CLRA, FAL, UCL). Thus, Plaintiffs must plead the time, place, and specific content of the representation or omission—"the who, what, when, where, and how"—as well as facts showing their reliance on the "fraud." *Vess*, 317 F.3d at 1106; *Kearns*, 567 F.3d at 1124.

But here, the only specific statements that Plaintiffs identify in the SAC are from a September 2015 publication by Apple entitled "iOS Security–iOS 9.0 or later" (SAC ¶¶ 11, 13,

24), an undated "marketing point[]" from Apple's website (*id.* ¶ 12), several generic statements by Apple regarding its "security measures" (*id.* ¶ 15), and April 2015 and February 2016 articles published by *The Daily Dot* and *TechCrunch* (*id.* ¶¶ 21, 30). Plaintiffs do not allege that any of these statements are actually "false," nor do Plaintiffs claim to have even seen—much less relied on—any of them. Indeed, with the exception of Plaintiff Penner, these statements were published ***after*** Plaintiffs' purchases.[8] If Plaintiffs' claims are based on an allegedly "false" statement by Apple regarding Error 53, then Plaintiffs must identify which specific statement(s) they saw (if any), why they are false, and how the statement(s) allegedly induced Plaintiffs to purchase their devices. *E.g.*, *In re Actimmune*, 614 F. Supp. 2d 1037, 1051-52 (N.D. Cal. 2009).[9]

To the extent Plaintiffs' claims are premised on an "omission," Plaintiffs fail to identify, specifically, what Apple should have disclosed that was not already disclosed in at least the Limited Warranty and SLA, where that disclosure should have been made, and how such a disclosure would have changed Plaintiffs' purchase behavior. *See Snyder v. Ford*, 2006 WL 2472187, at *3 (N.D. Cal. Aug. 24, 2006) (dismissing under Rule 9(b) for failure to describe the circumstances of purchase and what the defendant should have disclosed); *Marolda v. Symantec*, 672 F. Supp. 2d 992, 1002 (N.D. Cal. 2009). Apple's Limited Warranty already cautions consumers that their use of Apple devices may not be "uninterrupted or error-free" (*see* RJN, Ex. A at 1), and the SLA that accompanies each software update or download warns that "[i]nstallation of this iOS software may affect the availability and usability of … Apple products and services" (*see* RJN, Ex. B). Apple should not have to guess what other specific warning or disclosure Plaintiffs contend should have been included and where, especially since Error 53 arose from Plaintiffs' own "abuse [or] misuse" after Plaintiffs damaged their own devices and

[8] Plaintiff Lusson purchased his device around "fall 2014" (SAC ¶ 46); Plaintiff Kushmick purchased his device around "September 19, 2014" (*id.* ¶ 50); Plaintiff Saenz purchased his device around "November 2014" (*id.* ¶ 56); Plaintiff DeNoma purchased his device around "March 2014" (*id.* ¶ 60); and Plaintiff Penner purchased her device around "July 2015" (*id.* ¶ 65).

[9] *See also Cohen v. DirecTV*, 178 Cal. App. 4th 966, 978-79 (2010) (plaintiff must allege that he was exposed to a specific representation); *Kearns*, 567 F.3d at 1126 (plaintiff failed to specify "what the television advertisement or other sales material specifically stated … where [plaintiff] was exposed to them or which ones he found material … [and] which sales material he relied upon in making his decision to buy"); *Vess*, 317 F.3d at 1106 ("The plaintiff must set forth what is false or misleading about a statement, and why it is false.").

sought unauthorized repairs. (RJN, Ex. A at 1.) The Court should dismiss Plaintiffs' UCL, FAL, CLRA, and negligent misrepresentation claims for failing to satisfy Rule 9(b).

2. Plaintiffs Cannot Assert Fraud Claims For Post-Warranty Defects

Next, Plaintiffs' consumer protection claims fail as a matter of California law to the extent they are based on an Error 53 "defect" that manifested after the expiration of Apple's one-year Limited Warranty. In California, a "manufacturer's duty to consumers is limited to its warranty obligations absent either an affirmative misrepresentation or a safety issue." *Wilson*, 668 F.3d at 1141 ("California courts have generally rejected a broad obligation to disclose … ."); *Daugherty v. Am. Honda Motor Co.*, 144 Cal. App. 4th 824, 835 (2006); *Oestreicher v. Alienware Corp.*, 544 F. Supp. 2d 964, 969 (N.D. Cal. 2008) ("*Daugherty* expressly rejected the notion that a manufacturer can be liable under the CLRA for failure to disclose a defect that manifests itself after the expiration of the warranty period."); *Wirth v. Mars Inc.*, 2016 WL 471234, at *3-6 (C.D. Cal. Feb. 25, 2016) (applying *Wilson* and its progeny to UCL, FAL, CLRA). Indeed, "[u]nder a contrary rule … the '[f]ailure of a product to last forever would become a "defect," a manufacturer would no longer be able to issue limited warranties, and product defect litigation would become as widespread as manufacturing itself.'" *Wilson*, 668 F.3d at 1141-42 (internal citation omitted); *Oestreicher*, 544 F. Supp. 2d at 972 ("All parts will wear out sooner or later and thus have a limited effective life. Manufacturers always have knowledge regarding the effective life of particular parts and the likelihood of their failing within a particular period of time … A rule that would make failure of a part actionable based on such 'knowledge' would render meaningless time[] limitations in warranty coverage.") (citing *Abraham v. Volkswagon*, 795 F.2d 238, 250 (2d Cir. 1986)).

Here, there is obviously no safety defect, and Plaintiffs have yet to adequately plead any affirmative misrepresentation. And under California law, Apple has no duty to disclose that Plaintiffs' devices may wear out and/or experience defects after the expiration of Apple's one-year Limited Warranty. *Daugherty*, 144 Cal. App. 4th at 838 ("The only expectation buyers could have" about a product is "that it would function properly for the length of [the] express

warranty").[10] Yet with the exception of Plaintiff Penner (who is still under warranty), Plaintiffs do not allege that their devices experienced ***any*** problems—much less an Error 53 issue—until long after the expiration of their one-year warranty period. (SAC ¶¶ 46-48, 50-52, 56-57, 60-63.) Accordingly, Plaintiffs Lusson, Kushmick, Saenz, and Denoma are barred as a matter of California law from asserting claims under the UCL, FAL, and CLRA.

D. Plaintiffs Lack Standing To Seek Injunctive Relief

Plaintiffs' request for injunctive relief should also be dismissed because Plaintiffs lack standing to seek such relief. Plaintiffs have not alleged (and could not credibly allege) that they are personally threatened by any repetition of the "injury" they claim to have suffered. *See Gest*, 443 F.3d at 1181 (to seek injunctive relief in federal court, plaintiff must demonstrate that she is "realistically threatened by a repetition of [the violation]"). Plaintiffs are personally aware of the Error 53 issue and cannot possibly be deceived by any alleged misstatements or omissions about Error 53 in the future. *See, e.g.*, *Vavak*, 2011 WL 10550065, at *4; *Ham v. Hain Celestial Grp.*, 70 F. Supp. 3d 1188, 1196 (N.D. Cal. 2014).[11] And, of course, Apple has already corrected Error 53 in any event. *See, e.g.*, *Walsh v. Nev. Dep't of Human Res.*, 471 F.3d 1033, 1037 (9th Cir. 2006) (plaintiff was no longer an employee and there was "no indication … that [plaintiff] has any interest in returning to work," so she "would not stand to benefit from an injunction requiring anti-discriminatory policies she requests at her former place of work"); *see also Campion v. Old Republic*, 861 F. Supp. 2d 1139, 1149 (S.D. Cal. 2012) (plaintiff who did not intend to purchase

[10] *Oestreicher*, 544 F. Supp. 2d at 972 ("[T]he purpose of a warranty is to contractually mark the point in time during the useful life of a product when the risk of paying for repairs shifts from the manufacturer to the consumer."); *Hoey v. Sony*, 515 F. Supp. 2d 1099, 1105 (N.D. Cal. 2008) ("no authority … provides that the mere sale of a consumer electronics product in California can create a duty to disclose any defect that may occur during the useful life of the product."); *Berenblat v. Apple*, 2009 U.S. Dist. LEXIS 80734, at *17 (N.D. Cal. Aug. 21, 2009) (no claim for "failure to disclose a defect that might, or might not, shorten the effective life span of [a product] that functions precisely as warranted throughout the terms of the express warranty").

[11] Plaintiffs' failure to allege facts to support their individual claims for injunctive relief likewise doom their prayer for injunctive relief on behalf of the class. *Deitz v. Comcast*, 2006 WL 3782902, at *4 (N.D. Cal. Dec. 21, 2006) (class averments did not cure defect in complaint because "[u]nless the named plaintiff is himself entitled to seek injunctive relief, he 'may not represent a class seeking that relief.'"); *Wang v. OCZ Tech.*, 276 F.R.D. 618, 626 (N.D. Cal. 2011) ("Allegations that a defendant's continuing conduct subjects unnamed class members to the alleged harm is insufficient if the named plaintiffs are themselves unable to demonstrate a likelihood of future injury.").

another warranty plan lacked standing); *Stephenson v. Neutrogena*, 2012 WL 8527784, at *1 (N.D. Cal. July 27, 2012) (striking prayer for injunctive relief where plaintiff did not allege she would purchase products in the future).

E. The Court Should Dismiss Plaintiffs' "Claim" For Unjust Enrichment

The Ninth Circuit has clarified that "in California, there is not a standalone cause of action for 'unjust enrichment,' which is synonymous with 'restitution.'" *Astiana v. Hain Celestial Grp.*, 783 F.3d 753, 762 (9th Cir. 2015). And although some courts treat a "claim" for unjust enrichment as a claim under a "quasi-contract" theory, Plaintiffs may not do so here because the Limited Warranty for Plaintiffs' devices "defines the rights of the parties." *E.g.*, *Fisher v. Honda N. Am., Inc.*, 2014 WL 2808188, at *10 (C.D. Cal. June 12, 2014); *Marcus*, 2015 WL 151489, at *10 ("The existence of Apple's express Limited Warranty … precludes unjust enrichment as a cause of action."). The Court should dismiss Plaintiffs' unjust enrichment "claim" with prejudice.

V. CONCLUSION

For the foregoing reasons, Apple respectfully requests that the Court dismiss the Second Amended Complaint (Dkt. No. 24) with prejudice.

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