

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

PAUL ORSHAN, et al.,
Plaintiffs,
v.
APPLE INC.,
Defendant.

Case No. [5:14-cv-05659-EJD](#)

**ORDER GRANTING MOTION TO
DISMISS SECOND AMENDED CLASS
ACTION COMPLAINT**

Re: Dkt. No. 52

Plaintiffs Paul Orshan (“Orshan”), Christopher Endara (“Endara”), and David Henderson (“Henderson”) (collectively, “Plaintiffs”) filed this class action suit against Apple Inc. (“Apple” or “Defendant”) on behalf of themselves and others similarly situated, alleging that Apple violated various consumer protection laws by misleading consumers regarding the storage capacity of certain mobile devices running iOS 8. Second Amended Complaint (“SAC”), Dkt. No. 48. On June 14, 2018, Apple moved to dismiss all of the claims in the SAC with prejudice. Dkt. No. 52 (“MTD”). On September 5, 2018, the matter was submitted for decision without oral argument pursuant to Civil Local Rule 7-1(b). For the reasons discussed below, Apple’s motion is granted.

I. BACKGROUND

A. Plaintiffs’ First Amended Complaint

Plaintiffs initiated this action on December 30, 2014 and filed their First Amended Complaint (“FAC”) on April 9, 2015. Dkt. Nos. 1, 18. Plaintiffs are California consumers who purchased Apple products running iOS 8. According to the allegations in the FAC, all three Plaintiffs purchased their devices “in reliance on Defendant’s claims, on its website,

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1 advertisements, product packaging, and other promotional materials, that the devices came with 16
 2 GB of storage space” and they “expected that capacity would be available for [their] personal
 3 use.” *Id.* ¶¶ 18, 20, 23. Contrary to these expectations, anywhere from 18.1%-23.1% of this
 4 capacity (2.9-3.7 GB) was used by iOS 8 and not available to Plaintiffs for personal storage. *Id.*
 5 ¶¶ 28-30. Plaintiffs alleged that had they known this, they “would not have upgraded to iOS 8,”
 6 “would not have purchased the 16 GB of storage capacity or would not have been willing to pay
 7 the same price for it.” *Id.* ¶¶ 18, 20, 23.

8 Plaintiffs also alleged that in addition to not meeting consumer expectations, Apple
 9 “exploits the discrepancy between represented and available capacity for its own gain by offering
 10 to sell, and by selling, cloud storage capacity” through its iCloud service. *Id.* ¶ 36. The FAC
 11 stated that Apple charges anywhere from \$0.99 to \$29.99 per month for iCloud subscriptions, and
 12 Apple does not permit its users to use cloud storage services from other vendors. *Id.*

13 Plaintiffs’ FAC asserted the following causes of action: (1) violation of California’s Unfair
 14 Competition Law (“UCL”), Cal. Bus. & Prof. Code § 17200 et seq.; (2) violation of the False
 15 Advertising Law (“FAL”), Cal. Bus. & Prof. Code § 17500 et seq.; and (3) violation of the
 16 Consumers Legal Remedies Act (“CLRA”), Cal. Civ. Code § 1750 et seq. SAC ¶¶ 50-76

17 **B. The Court’s Dismissal Order**

18 Apple filed a motion to dismiss on May 15, 2015. Dkt. No. 24. On March 27, 2018, this
 19 court issued an Order Granting Motion to Dismiss First Amended Class Action Complaint. Dkt.
 20 No. 47. The court found that Plaintiffs’ FAC appeared to allege two related but slightly different
 21 theories of deception underlying the alleged violations of the three consumer protection statutes.
 22 First, Plaintiffs alleged that “Apple specifically represented that the devices [purchased by
 23 Plaintiffs] had 16 GB of storage capacity” and that, based on this representation, Plaintiffs
 24 “expected that capacity would be available for personal use.” FAC ¶¶ 18, 20, 23. This theory
 25 assumed that consumers expected that 100% of the storage capacity (i.e., 8 GB or 16 GB) of their
 26 devices would be available for personal use. Second, Plaintiffs alleged that Apple “did not
 27 adequately disclose . . . the additional and substantial storage capacity that would be consumed by

1 [iOS 8]” and that, because of this, Plaintiffs did not expect iOS to consume such a “substantial”
 2 portion of their device’s storage capacity. *See id.* This second theory assumed that consumers
 3 expected that iOS would not take up as much storage space as it did.

4 This court held that Plaintiffs’ first theory of fraud failed as a matter of law because
 5 Apple’s website, advertisements, product packaging, and promotional materials clarified that the
 6 “actual formatted capacity” of Apple’s devices would be “less” than the full 16 GB. Dkt. No. 47,
 7 p. 8 (citing RJN Ex. P, available at <https://www.apple.com/iphone/compare> (“1GB = 1 billion
 8 bytes; actual formatted capacity less.”) (emphasis added) and RJN Exs. Q, R (same)). Therefore,
 9 no reasonable consumer could have read these materials and concluded that an entire 16 GB
 10 would be available for personal use on a 16 GB Apple device. The court also held that
 11 amendment was futile as to Plaintiff’s first theory of fraud.

12 As to the second theory of fraud, this court held that Plaintiffs’ allegations were
 13 insufficient to satisfy Rule 9(b) of the Federal Rules of Civil Procedure. Plaintiffs generally
 14 alleged that Apple made “claims, on its website, advertisements, product packaging, and on their
 15 promotional materials, that the devices came equipped with 16 GB of storage space.” FAC ¶¶ 18,
 16 20, 23. Plaintiffs also claimed, with respect to Plaintiffs Orshan and Henderson, that Apple “did
 17 not adequately disclose in conjunction with upgrades to iOS 8 the additional and substantial
 18 storage capacity that would be consumed by the upgrade.” FAC ¶¶ 18, 23. Neither Apple’s
 19 alleged statements regarding 16 GB of storage space nor its alleged nondisclosure, however,
 20 supported Plaintiffs’ mistaken expectations that iOS 8 would not consume as much storage
 21 capacity as it did. Therefore, the court granted Plaintiffs leave to amend the second theory of
 22 fraud.

23 C. Plaintiffs’ Second Amended Complaint

24 Plaintiffs filed the SAC on May 1, 2018. The SAC asserts the same UCL, FAL and CLRA
 25 claims based upon the same core allegation: that Apple represented on its website,
 26 advertisements, product packaging, and other promotional materials that Plaintiffs’ devices came
 27 with 16 GB of storage space. SAC ¶¶ 15, 18, 20, 23. Newly added to the SAC is that “[t]his is the

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1 principle false representation made by Defendant and relied upon by Named Plaintiffs Orshan,
 2 Endara and Henderseon [sic].” *Id.* ¶ 15.¹ Plaintiffs continue to allege that in reliance on the
 3 allegedly false representation, Plaintiffs expected that 16 GB would be available for personal use.
 4 *Id.* ¶¶ 18-23. Contrary to Plaintiffs’ expectations, anywhere from 18.1%-21.3% of the 16 GB of
 5 storage capacity (~2.9-3.4 GB) was used by iOS 8 and not available for Plaintiffs’ personal use.
 6 *Id.* ¶¶ 2, 11, 28-30. Plaintiffs also continue to allege Apple “did not adequately disclose in
 7 conjunction with upgrades to iOS 8 the additional and substantial storage capacity that would be
 8 consumed by the upgrade.” *Id.* ¶¶ 18, 32. Plaintiffs estimate that iOS 8 uses between 600 MG and
 9 1.3 GB more storage space than iOS 7, and that “no consumer could reasonably anticipate” this
 10 increase. *Id.* ¶ 32. Plaintiffs add to the SAC that Plaintiffs and consumers did not expect the iOS
 11 update to include unnecessary and unwanted applications that cannot be erased. *Id.* ¶ 18.
 12 Plaintiffs also reallege that Apple “exploits the discrepancy between represented and available
 13 capacity for its own gain by offering to sell, and by selling, cloud storage capacity to purchasers
 14 whose internal storage capacity is at or near exhaustion.” *Id.* ¶ 36.

15 II. LEGAL STANDARDS

16 Federal Rule of Civil Procedure 8(a) requires a plaintiff to plead each claim with sufficient
 17 specificity to “give the defendant fair notice of what the . . . claim is and the grounds upon which
 18 it rests.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal quotations omitted). A
 19 complaint which falls short of the Rule 8(a) standard may be dismissed if it fails to state a claim
 20 upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). “Dismissal under Rule 12(b)(6) is
 21 appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support
 22 a cognizable legal theory.” *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th
 23 Cir. 2008). Moreover, the factual allegations “must be enough to raise a right to relief above the
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25 ¹ This newly added allegation is inconsequential because the court has already held that this fraud
 26 theory fails as a matter of law. *See* Dkt. No. 47, p. 8-9 (“given that a reasonable consumer would
 27 expect that an iPhone and iPad would at least devote some storage space to iOS, and Apple itself
 28 disclosed that the “actual formatted capacity [of these devices was] less” than 16 GB, no
 reasonable consumer would have expected that all of the advertised storage capacity would be
 available for personal use.”).

1 speculative level” such that the claim “is plausible on its face.” *Twombly*, 550 U.S. at 556-57.

2 When deciding whether to grant a motion to dismiss, the court generally “may not consider
3 any material beyond the pleadings.” *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d
4 1542, 1555 n.19 (9th Cir. 1990). The court must accept as true all “well-pleaded factual
5 allegations.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The court must also construe the
6 alleged facts in the light most favorable to the plaintiff. *Love v. United States*, 915 F.2d 1242,
7 1245 (9th Cir. 1998). “[M]aterial which is properly submitted as part of the complaint may be
8 considered.” *Twombly*, 550 U.S. at 555. But “courts are not bound to accept as true a legal
9 conclusion couched as a factual allegation.” *Id.*

10 Fraud-based claims such as Plaintiffs’ claims are subject to heightened pleading
11 requirements under Federal Rule of Civil Procedure 9(b). In that regard, a plaintiff alleging fraud
12 “must state with particularity the circumstances constituting fraud.” Fed. R. Civ. P. 9(b). The
13 allegations must be “specific enough to give defendants notice of the particular misconduct which
14 is alleged to constitute the fraud charged so that they can defend against the charge and not just
15 deny that they have done anything wrong.” *Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir.
16 1985). To that end, the allegations must contain “an account of the time, place, and specific
17 content of the false representations as well as the identities of the parties to the
18 misrepresentations.” *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007). Averments of
19 fraud must be accompanied by the “who, what, when, where, and how” of the misconduct
20 charged. *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) (citation omitted).
21 Additionally, “the plaintiff must plead facts explaining why the statement was false when it was
22 made.” *Smith v. Allstate Ins. Co.*, 160 F. Supp. 2d 1150, 1152 (S.D. Cal. 2001) (citation omitted);
23 *see also In re GlenFed, Inc. Sec. Litig.*, 42 F.3d 1541, 1549 (9th Cir. 1994) (en banc) (superseded
24 by statute on other grounds).

25 **III. DISCUSSION**

26 **A. Request to Take Judicial Notice**

27 As a preliminary matter, Apple requests that this court again take judicial notice of items

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1 the court took judicial notice of in ruling on the previous motion to dismiss. Plaintiffs do not
 2 oppose Apple's request. Dkt. No. 55, p. 6. Apple's request is granted for the reasons previously
 3 stated in the court's March 27, 2018 Order Granting Motion to Dismiss. The court will take
 4 judicial notice of the items, but will not accept the truth of the factual statements or opinions
 5 expressed therein. *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 960
 6 (9th Cir. 2010) (explaining that the court may take judicial notice of publications to indicate what
 7 was in the public domain, but not whether the content of the publications is true).

8 **B. Failure to State a Claim**

9 As a result of the court's ruling on Apple's previous motion to dismiss, the only potentially
 10 viable theory of fraud remaining in this case depends on Plaintiffs' allegation that Apple deceived
 11 Plaintiffs into thinking that iOS 8 would not consume as much storage capacity as it did. Despite
 12 having been given leave to amend, the SAC still fails to allege facts to plausibly support this
 13 theory of fraud.

14 The UCL prohibits "any unlawful, unfair or fraudulent business act or practice." Cal. Bus.
 15 & Prof. Code § 17200. The FAL makes it unlawful for a business to disseminate any statement
 16 "which is untrue or misleading, and which is known, or which by the exercise of reasonable care
 17 should be known, to be untrue or misleading" in connection with the sale of "real or personal
 18 property" or "services." *Id.* § 17500. The CLRA "provides a cause of action for 'unfair methods
 19 of competition and unfair or deceptive acts or practices' in consumer sales." *Berger v. Home*
 20 *Depot USA, Inc.*, 741 F.3d 1061, 1069 (9th Cir. 2014) (quoting Cal. Civ. Code § 1770(a)).

21 To state a plausible claim under any of these consumer protection statutes, a plaintiff "must allege
 22 that Defendant's representations are likely to deceive a reasonable consumer." *Red v. Kraft*
 23 *Foods, Inc.*, No. CV 10-1028-GW (AGRx), 2012 U.S. Dist. LEXIS 164461, at *6, 2012 WL
 24 5502754 (C.D. Cal. Oct. 25, 2012) (citing *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 938 (9th
 25 Cir. 2008)). A true representation can mislead a reasonable consumer if it is actually misleading
 26 or has the capacity, likelihood or tendency to deceive or confuse members of the public. *Kasky v.*
 27 *Nike, Inc.*, 27 Cal. 4th 939, 951 (2002). "The term 'likely' indicates that deception must be

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1 probable, not just possible.” *McKinniss v. Sunny Delight Bevs. Co.*, No. CV 07-02034-RGK
2 (JCx), 2007 U.S. Dist. LEXIS 96108, at *7, WL (C.D. Cal. Sept. 4, 2007) (citing *Freeman v.*
3 *Time, Inc.*, 68 F.3d 285, 289 (9th Cir. 1995)).

4 The question of whether a business practice is deceptive generally presents a question of
5 fact not suited for resolution on a motion to dismiss. *See Williams*, 552 F.3d at 938. However, in
6 certain instances, the court may be able to consider the viability of the alleged consumer law
7 claims based on its review of the product packaging. *See Brockey v. Moore*, 107 Cal. App. 4th 86,
8 100, 131, 131 Cal. Rptr. 2d 746 (2003) (“the primary evidence in a false advertising case is the
9 advertising itself”). Thus, where a court can conclude as a matter of law that members of the
10 public are not likely to be deceived by the product packaging, dismissal is appropriate. *See, e.g.*,
11 *Ebner v. Fresh, Inc.*, 838 F.3d 958, 965-66 (9th Cir. 2016) (affirming dismissal of claims that
12 defendant deceived consumers about the amount of product in its lip balm because, among other
13 things, an “accurate net weight label [wa]s affixed to every [] tube”); *Sugawara v. Pepsico, Inc.*,
14 No. 208CV01335-MCEJFM, 2009 WL 1439115, at *3-4 (E.D. Cal. May 21, 2009) (finding that
15 the packaging for Cap’n Crunch cereal and its use the term “Berries” was not misleading, as a
16 matter of law); *Videtto v. Kellogg USA*, No. 2:08CV01324-MCEDAD, 2009 WL 1439086 at *2
17 (E.D. Cal., May 21, 2009) (dismissing UCL, FAL and CLRA claims based on allegations that
18 consumers were misled into believing that “Froot Loops” cereal contained “real, nutritious fruit”).

19 The SAC includes verbatim the allegations the court previously found were insufficient to
20 state a plausible claim of fraud under any of the consumer protection statutes. Plaintiffs allege that
21 Apple made claims, on its website, advertisements, product packaging, and on their promotional
22 materials, that the devices came equipped with 16 GB of storage space. FAC ¶¶ 18, 20, 23; SAC
23 ¶¶ 18, 20, 23. Plaintiffs Orshan and Henderson allege that they “upgraded to iOS 8 with the belief
24 that the upgrade would not substantially inhibit [their] available storage capacity.” FAC ¶¶ 18, 23;
25 SAC ¶¶ 18, 23. For Plaintiff Endara who purchased a device running iOS 8, Plaintiffs allege that
26 he did not know, and Apple did not adequately disclose, that the operating system and other pre-
27 installed software consume a “substantial portion” of the represented storage capacity. FAC ¶ 20;

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1 SAC ¶ 20.

2 In ruling on Apple’s motion to dismiss the FAC, this court already explained that these
3 allegations do not allow Apple to pinpoint which of its representations (or materials containing
4 omissions) gave rise to the alleged mistaken expectations which underlie Plaintiffs’ theory of
5 deception—i.e., that Apple deceived Plaintiffs into thinking that iOS 8 would not consume as
6 much storage capacity as it did. Plaintiffs still fail to explain how much storage space they
7 actually expected iOS 8 would use, the basis for this expectation, or how any of Apple’s alleged
8 misrepresentations or omissions created this expectation.

9 The newly added allegations in the SAC do not reveal anything more about Plaintiffs’
10 mistaken expectations about iOS 8. For example, the SAC includes allegations regarding the new
11 iPhone X and iPad 10.5. *See* SAC ¶¶ 1, 24. Plaintiffs point out that the iPhone X and iPad 10.5
12 have a higher “base memory” (64 GB) than earlier versions of these devices, while the size of their
13 operating system (iOS 11) has decreased. The storage capacity of later versions of the iPhone and
14 iPad and the size of iOS 11 could not possibly have affected Plaintiffs’ expectations about iOS 8 at
15 the time Plaintiffs bought or upgraded their devices.

16 Plaintiffs add allegations regarding the Apple Watch application as an example of a pre-
17 installed application that consumers are “force[d] to retain” and are “unable to delete.” *Id.* ¶¶ 2,
18 28. This application, however, was included in iOS 8.2, not iOS 8. *Id.* ¶ 2. Furthermore,
19 Plaintiffs fail to explain how the inability to delete pre-installed applications shaped Plaintiffs’
20 expectation about how much storage space iOS 8 would consume.

21 Plaintiffs add allegations regarding Samsung and its disclaimer about storage capacity in
22 the Galaxy S8 smartphone. *Id.* Samsung provides the following disclaimer language regarding
23 the storage capacity of its Galaxy S8 smartphone: “User memory is less than the total memory
24 due to the storage of the operating system and software used to operate the features. Actual user
25 memory will vary depending on the operator and may change after software upgrades are
26 performed.” *Id.* Plaintiffs fail to explain, however, how Samsung’s representations about storage
27 capacity in the Galaxy S8 smartphone could have reasonably influenced Plaintiffs’ expectations

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1 about the storage capacity of their Apple devices at the time they purchased or upgraded the
2 devices. Furthermore, Plaintiffs never claim to have seen or relied upon information about the
3 Galaxy S8 smartphone.

4 Plaintiffs attempt to insert a new theory of fraud in the SAC, alleging that Apple’s
5 statement that “actual formatted capacity less” is misleading. *Id.* ¶ 27. Plaintiffs allege that this
6 disclaimer was not sufficient to put Plaintiffs on notice of the difference between the 16 GB of
7 space promised and the usable space received because the dictionary definition of “format” does
8 not reference the operating system, “and it certainly does not mean the inclusion of software that
9 cannot be erased or a partition of the available storage space beyond what is even required for the
10 operating system.” *Id.* According to Plaintiffs, the unnecessary applications that could not be
11 deleted include: calculator, calendar, camera, clock, compass, contacts, FaceTime, game center,
12 iTunes store, mail, maps, messages, music, newsstand, notes, passbook, photos, reminders, Safari,
13 stocks videos, voice memos, and weather. *Id.*

14 None of these allegations salvage Plaintiffs’ claims. Plaintiffs do not allege that they
15 understood the term “formatted capacity” in the manner proposed above. And regardless of the
16 dictionary definition of “format,” no reasonable consumer could have read Apple’s disclaimer and
17 expected that all of the 16 GB would be available for personal use on their devices because the
18 average consumer would know and expect that their Apple devices come pre-installed with an
19 operating system and applications. Furthermore, no consumer could have read Apple’s disclaimer
20 and reasonably expected that iOS 8 would not consume a substantial amount of storage; the
21 disclosure simply does not imply anything about the amount of storage iOS 8 would or would not
22 consume. In sum, Plaintiffs have failed to plead facts that would make it plausible that they
23 reasonably expected iOS 8 not to consume a substantial amount of storage.

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1 **IV. ORDER**

2 Apple's motion to dismiss is GRANTED. Given the futility of further amendment,
3 Plaintiff's claims are dismissed without leave to amend.

4 The Clerk shall close the file.

5 **IT IS SO ORDERED.**

6 Dated: November 6, 2018



7 EDWARD J. DAVILA
8 United States District Judge
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