In re Nexus 6P Products Liability Litigation

2018 | Cited 0 times | N.D. California | March 5, 2018

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UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

IN RE NEXUS 6P PRODUCTS LIABILITY LITIGATION

Case No. 17-cv-02185-BLF

ORDER GRANTING WITH LEAVE TO AMEND IN PART AND WITHOUT LEAVE TO AMEND IN PART AND DENYING IN PART HUAW MOTION TO DISMISS CONSOLIDATED AMENDED COMPLAINT AND TO STRIKE CLASS ALLEGATIONS; GRANTING WITH LEAVE TO AMEND IN PART AND WITHOUT LEAVE TO AMEND IN PART AND DENYING IN PART ISMISS CONSOLIDATED AMENDED COMPLAINT [Re: ECF 38, 39]

In this putative consumer class action, Plaintiffs Roy Berry, Jonathan Makcharoenwoodhi, Alex Gorbatchev, Brian Christensen, Anthony Martorello, Khanh Tran, Edward Beheler, Yuriy Davydov, Rebecca Harrison, Zachary Himes, Taylor Jones, Paul Servodio, Justin Leone, James smartphones. Plaintiffs sued the companies that developed the phone Huawei Device USA, Inc.

for breach of warranty, fraud, and unjust enrichment. Their twenty-three causes of action span a litany of state laws and one federal statute.

to Dismiss the Consolidated Amended Hu 38;

, the Court granted with leave to amend 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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e ground that the Court lacks personal jurisdiction over Huawei. which assert that Plaintiffs have failed to state a claim on which relief can be granted and that

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The Court held a hearing on these motions on January 18, 2018. The Court has considered the arguments presented at oral argument and in the briefing, as well as the submitted evidence and applicable law. For the reasons that follow, the Court hereby GRANTS WITH LEAVE TO AMEND IN PART, GRANTS WITHOUT LEAVE TO AMEND IN PART, AND DENIES IN PART Motions to Dismiss. ss allegations. I. BACKGROUND The following facts are drawn from the CAC 28. In September 2015, Google unveiled the Nexus 6P, the newest version of its Nexus 6

smartphone. CAC ¶ 165. Google and Huawei created the Nexus 6P together, with Google handling software development and Huawei handling device manufacture. Id. At the launch event and in advertising, Google touted many of the superior features of the phone. See id. ¶¶ 7, 169, 171. Unfortunately, according to the CAC, the Nexus 6P suffers from two defects. First, some phones unexpectedly turn off and, upon turning back on, experience an endless bootloop cycle (the Id. ¶ 174. When the Bootloop Defect manifests, the phone becomes nonoperational and all unsaved data is lost because the phone cannot proceed beyond the start-up screen. Id. ¶ 175. Second, some phones prematurely shut off despite showing a battery charge of anywhere from 15 90% (the Id. ¶ 177. When the Battery Drain Defect manifests, the phone remains dead until the user reconnects it to power. Id. ¶ 178. After some charging, the battery shows the same or similar charge as indicated before the premature shut-off. Id.; see also id. ¶ 61. Complaints about the Bootloop and Battery Drain Defects began cropping up online as early as September and October 2016. Id. ¶¶ 175, 184, 187 88. This putative class action was commenced on April 19, 2017. ECF 1. Plaintiffs filed the 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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operative complaint the CAC on May 23, 2017. Plaintiffs seek to represent a nationwide class of customers who purchased or own a Nexus 6P. CAC ¶¶ 1, 205. They also propose twelve statewide subclasses, which cover all persons or entities in the states of California, Florida, Illinois, Indiana, Michigan, New York, North Carolina, North Dakota, Ohio, Pennsylvania, Texas, and Washington who purchased or own at least one Nexus 6P. Id. ¶ 205.

Plaintiffs bring twenty-three causes of action against both Huawei and Google under a spattering of state laws and one federal law. At the high level, their claims fall into three buckets: (1) warranty claims, (2) fraud claims, and (3) unjust enrichment claims. Their warranty claims consist of claims for (1) breach of express warranty on behalf of the nationwide class or each statewide subclass, (2) breach of the implied warranty of merchantability on behalf of the nationwide class or each statewide subclass, (3) violation of the California Song Beverly Consumer Warranty Act on behalf of the California subclass, and (4) violation of the federal Magnuson Moss Warranty Act presumably on behalf of the nationwide class. Id. ¶¶ 213 67, 284 96. Their fraud claims consist of (1) a common-law claim for deceit and fraudulent concealment on behalf of each statewide subclass and (2) claims for violations of state consumer protection statutes on behalf of the relevant statewide subclass. 1

Id. ¶¶ 268 77, 297 535. Finally, their unjust enrichment claims are asserted on behalf of the nationwide class based on the universal principles of equity. Id. ¶¶ 278 83.

In June 2017, Huawei and Google filed their Motions to Dismiss. argument regarding lack of personal jurisdiction was addressed in a prior order. See ECF 113. Here, the Court focuses on the sufficiency of the CAC to Dismiss assert that Plaintiffs have failed to allege sufficient facts entitling them to relief on their

1 Specifically, the state consumer protection statutes are: the California Unfair Competition Law, the California Consumer Legal Remedies Act, the California False Advertising Law, the Florida Deceptive and Unfair Trade Practices Act, the Illinois Consumer Fraud and Deceptive Business Practices Act, the Illinois Uniform Deceptive Trade Practices Act, the Indiana Deceptive Consumer Sales Act, the Michigan Consumer Protection Act, New York General Business Law §§ 349 350, the North Carolina Unfair and Deceptive Trade Practices Act, the North Dakota Consumer Fraud Act, the Ohio Deceptive Trade Practices Act, the Ohio Consumer Sales Practices Act, the Pennsylvania Unfair Trade Practices and Consumer Protection Law, the Texas Deceptive Trade Practices Act, and the Washington Consumer Protection Act. 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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claims. Huawei Mot. 9 28; Google Mot. 3 29. Huawei and Google also request that the Court strike Plaintiffs class allegations. Huawei Mot. 26 28; Google Mot. 29. II. LEGAL STANDARD

A. Rule 12(b)(6) al Rule of Civil Procedure 12(b)(6) for failure to state a Conservation Force v. Salazar, 646 F.3d 1240, 1241 42 (9th Cir. 2011) (quoting Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001)). When determining whether a claim has been stated, the Court accepts as true all well-pled factual allegations and construes them in the light most favorable to the plaintiff. Reese v. BP Exploration (Alaska) Inc., 643 F.3d 681, 690 (9th Cir. 2011).

In re Gilead Scis. Sec. Litig., 536 F.3d 1049, 1055 (9th Cir. 2008) (quoting Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001)). While a accepted as true, Ashcroft v. Iqbal, 556

U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). A claim is facially plausible when the alleged reasonable inference that Id.

B. Rule 12(f) nd money that

Whittlestone, Inc. v. Handi Craft Co., 618 F.3d 970, 973 (9th Cir. 2010) (quoting Fantasy, Inc. v. Fogerty, 984 F.2d 1524, 1527 (9th Cir. 1993), d on other grounds by Fogerty v. Fantasy, Inc.,

materials from pleadings, such motions are generally disfavored because the motions may be used 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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as delaying tactics and Barnes v. AT & T Pension Ben. Plan Nonbargained Program, 718 F. Supp. 2d 1167, 1170 (N.D. Cal. 2010).

the court. Nurse v. United States, 226 F.3d 996, 1000 (9th Cir. 2000). If allegations are stricken, leave to amend should be freely given when doing so would not cause prejudice to the opposing party. See , 607 F.2d 824, 826 (9th Cir. 1979) (per curiam). III. DISCUSSION Both Huawei and Google contend that Plaintiffs have failed to allege sufficient facts entitling them to relief on their claims. Before turning to the merits of those arguments, the Court quest for judicial notice. A. Request for Judicial Notice In connection with its Motion to Dismiss, Google seeks judicial notice of two documents: referenced in the CAC, and both are capable of accurate and ready determination because they are

publicly available online. These documents are properly subject to judicial notice. See Fed. R. Evid. 201(b); Knievel v. ESPN, 393 F.3d 1068, 1076 (9th Cir. 2005). Plaintiffs did not formally Accordingly, B. Motions to Dismiss for Failure to State a Claim

properly plead their causes of action. The Court begins by making some general observations about changes that should be made to any amended pleading. The Court then addresses the namely, whether Huawei and Google had knowledge of the defects at the time of sale. Finally, the Court proceeds to analyze separately the claims asserted against Huawei and the claims asserted against Google. 1. General Observations The Court starts with a couple general observations about the pleadings. First, in their twenty-three causes of actions, Plaintiffs often lump Huawei and Google together, alleging 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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See, e.g., CAC ¶¶ and Class members. Defendants were provided notice of the Defects by complaints lodged by consumers before or within a reasonable amount of time after the allegations of the Defects Phones they sold are not of a merchantable quality, but instead contain a Bootloop Defect and a

Battery Drain and suppressed material facts concerning the performance and quality of the Phones, and the quality of the Huawei, Google, and Nexus brands. Specifically, Defendants knew (or in the exercise of reasonable diligence should have known) of the Defects, but failed to disclose them prior to or at the time they marketed Phones and sold them

setup obfuscates what roles Huawei and Google independently played in the alleged harm and whether either is liable for its own conduct. See Adobe Sys. Inc. v. Blue Source Grp., Inc., 125 F. Supp. 3d 945, 964 (N.D. Cal. 2015). In an amended pleading, Plaintiffs must identify what action each Defendant took that caused Plain harm, without resort to generalized allegations against Defendants as a whole. In re iPhone Application Litig., No. 11-MD-02250-LHK, 2011 WL 4403963, at *8 (N.D. Cal. Sept. 20, 2011). Second, Plaintiffs assert claims for breach of express warranty, breach of implied warranty, and unjust enrichment on behalf of a nationwide class but do not specify what law governs. 2

As discussed in more detail below with respect to these individual causes of action, the failure to identify the relevant law makes it difficult, if not impossible, for the Court to provide a thorough analysis of Throughout this order, the Court often uses the law that the parties apply in their briefing without elaborating on other potentially applicable state laws. 3

In any

2 For the breach of express warranty and breach of implied warranty claims, Plaintiffs alternatively assert that the claims may proceed under the applicable state law as to each of the twelve statewide subclasses. CAC ¶¶ 215, 236. 3 The parties are advised that in future briefing, to the extent they ask the Court to decide matters laws, they should be mindful of, and squarely address, whether there are material variations in state law. Cf. In re Hyundai and Kia Fuel Economy Litig., 881 F.3d 679, 702 (9th Cir. 2018) (holding that district court abused its discretion in certifying a settlement class . . . that the laws in various states were materially different than those 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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amended version of the pleadings, Plaintiffs should clarify what law governs each cause of action. Additionally, causes of action should not group together multiple sources of law; rather, Plaintiffs should plead separate causes of actions for each source of law, whether federal or state. 2. Whether Huawei and Google had knowledge of the defects at the time that Plaintiffs of causes of action either start from the premise or entirely depend on the fact that

Huawei and Google knew, or reasonably should have had known, of the defects at the time of sale.

score, as the answer colors the analysis of

see

also, e.g., id. ¶¶ 6, 186, 226, 270, 281, 318, 322, 335, 359. However, that statement is conclusory, and the CAC does not contain sufficient factual matter to make that inference plausible.

The key issue here is timing. The Nexus 6P was released in September 2015. Id. ¶ 165. In the CAC, Plaintiffs provide multiple examples of consumers posting online about the Bootloop and Battery Drain Defects, but do not provide specific dates for any of those postings. Id. ¶ 184. Plaintiffs do not allege that Huawei ever saw or responded to these online complaints, let alone that Huawei knew about them before Plaintiffs purchased their phones. See Wilson v. Hewlett- Packard Co. ct because they provide no indication whether the manufacturer was aware of the defect at the time of sale

those responses postdate fically, Plaintiffs allege that a Google representative responded to customer complaints about the Bootloop Defect in September 2016,

in California, and that these variations prevented the court from and pr). 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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your device. We are continuing to investigate the situation, but can confirm that this is strictly a CAC ¶ 187. Nevertheless, all Plaintiffs who allege that their phones manifested the Bootloop Defect purchased their phones before September 2016. See id. ¶¶ 19 (Gorbatchev: Oct. 2015), 28 (Christensen: Nov. 2015), 38 (Martorello: May 2016), 52 (Tran: Jan. 2016), 70 (Berry: Nov. 2015), 119 (Servodio: Mar. 2016).

Similarly, Plaintiffs allege that a Google representative responded to customer complaints about Battery Drain Defect] is something we have been keeping track of, and our team is investigating. . . . [M]any of you are reporting that you have been experiencing abnormal battery drain for Id. ¶ 188. Again, no Plaintiffs who allege that their phones manifested the

representative. See id. ¶¶ 12 (Makcharoenwoodhi: Apr. 2016), 28 (Christensen: Nov. 2015), 38 (Martorello: May 2016), 58 (Beheler: July 2016), 70 (Berry: Nov. 2015), 79 (Davydov: Dec. 2015), 91 (Harrison: Apr. 2016), 99 (Himes: Mar. 2016), 111 (Jones: Jan. 2016), 130 (Leone: Oct. 2015), 142 (Poore: Feb. 2016), 153 (Johnston: Oct. 2016).

Without that crucial temporal element, Plaintiffs have not adequately alleged that Huawei or Google knew (or reasonably should have known) of the defects when Plaintiffs purchased their phones. This factual gap is not filled by allegations that some Plaintiffs contacted Huawei and Google about the defects, as most of those conversations took place after October 2016 or are not alleged to have taken place on a specific date. See id. ¶¶ 15, 23, 30 31, 33, 54, 63 64, 67, 72 73, 83 85, 94, 113, 133, 147, 155. The two Plaintiffs who contacted Huawei and Google before September 2016 are not enough, see id. ¶¶ 41 43, 102, because a handful of complaints do not, by themselves, plausibly show that Huawei or Google had knowledge of the defects and concealed the defects from customers. See Berenblat v. Apple, Inc., No. 08-CV-04969-JF, 2010 WL 1460297, at *9 (N.D. Cal. Apr. 9, 2010) (reaching the same conclusion and explaining that

so see also Baba v. Hewlett-Packard Co., No. 09-CV-05946- 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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however, does not est

Perhaps sensing this deficiency, Plaintiffs shift gears in their opposition, positing that disclosed at or near the time of

272, does not equate to an allegation that straightforward testing would have revealed the defects.

Plaintiffs have not adequately alleged that Huawei or Google had knowledge of the defects at the time that Plaintiffs purchased their phones. Plaintiffs may amend the CAC to allege further facts in support of knowledge. With that conclusion in mind, the Court turns first to the claims asserted against Huawei and then to the claims asserted against Google.

3. Claims Asserted Against Huawei In broad strokes, the CAC asserts three categories of claims against Huawei warranty claims, fraud claims, and unjust enrichment claims. The Court addresses each of these categories one at a time. a. Warranty Claims Plaintiffs assert four sets of warranty claims: (1) breach of express warranty, (2) breach of the implied warranty of merchantability, (3) violation of the California Song Beverly Consumer Warranty Act, and (4) violation of the federal Magnuson Moss Warranty Act. Huawei moves to dismiss all four causes of action. The Court addresses each in turn.

i. Breach of Express Warranty Plaintiffs bring their first cause of action for breach of express warranty on behalf of a putative nationwide class but do not specify which law governs the claim. CAC ¶ 214. Alternatively, they assert claims for breach of express warranty on behalf of the putative statewide subclasses under the laws of the respective states. Id. ¶ 215.

Huawei provides a written Limited Warranty for phones, tablets, wearables, PCs, and accessories. Huawei Mot., 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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free from material defects, including improper or inferior workmanship, materials, and design, during the designated warranty period . . . when used normally and in accordance with all operating instructions Id., Preamble. For phones, the Id. ¶ 1.

Id. ¶ uninterrupted or error- Id. ¶ ion of the Product during

Id. ¶ 9.

Huawei first contends that, for a handful of Plaintiffs, there are insufficient allegations to establish that Huawei breached the Limited Warranty. Huawei Mot. 10 11. Huawei then asserts a number of inadequacies applicable to different groupings of Plaintiffs. Specifically, Huawei contends that certain Plaintiffs have not adequately alleged that they provided Huawei notice and an opportunity to cure, that they relied on Id. at 11 12. The Court trudges through each of these various grounds for dismissal.

(1) Breach and Unconscionability Huawei contends that it did not breach the Limited Warranty for those Plaintiffs whose phones manifested the defects outside the one-year warranty period and those Plaintiffs who did not notify Huawei of defects during the one-year warranty period. Huawei Mot. 10. Specifically, Plaintiffs Gorbatchev, Christensen, and Tran allege that their phones failed more than a year after purchase. CAC ¶¶ 19, 21 (Gorbatchev), 28 29 (Christensen), 52 53 (Tran). Plaintiffs Berry, Jones, and Leone do not allege that they notified Huawei of any defect before the expiration of one year. Id. ¶¶ 70 78 (Berry), 111 18 (Jones), 128 41 (Leone). Plaintiffs do not dispute that these Plaintiffs fall outside the Limited Warranty but instead argue that the one-year warranty limitation 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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is unconscionable. 4

Because Plaintiffs and Huawei address the unconscionability issue under California law and identify no material differences in other state laws, the Court uses California law as the basis for its analysis. Under California law, a contr unenforceable, only if it is both In re iPhone,

2011 WL 4403963, at *7 (citing Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 690 (Cal. 2000)); see also Pokorny v. Quixtar, Inc., 601 F.3d 987, 996 (9th Cir. 2010) (explaining nconscionability

Aron v. U-Haul Co. of Cal., 49 Cal. Rptr. 3d

terms of the agreement and evaluates whether the - Id. (citation omitted).

At most, Plaintiffs have made a weak showing that -year duration provision is procedurally unconscionable. Plaintiffs contend that the Limited Warranty is unconscionable because Huawei and its customers are in an unequal bargaining position, where customers cannot negotiate warranty terms. CAC ¶¶ 226, 246. The bargaining positions of Huawei and its customers are not as imbalanced as Plaintiffs suggest because Plaintiffs have not adequately alleged that Huawei knew of and concealed the defects at the time of sale. See In re Sony Grand Wega KDF-E A10/A20 Series Rear

Projection HDTV Television Litig., 758 F. Supp. 2d 1077, 1101 (S.D. Cal. 2010) (rejecting argument that defendant had superior bargaining power where plaintiffs had not sufficiently alleged that the defendant knew of the defect before the point of sale). Even if the terms of the Limited Warranty are non-negotiable, Plaintiffs do not plead that they had no meaningful alternatives; they could have purchased other phones or obtained additional warranty protections from Huawei. Davidson v. Apple, Inc., No. 16-CV-04942-LHK,

4 The Court finds 21, because that does not appear to be a ms. 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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2017 WL 976048, at *12 (N.D. Cal. Mar. 14, 2017). Moreover, the CAC does not allege that

mited Warranty online at the time of purchase. See id.

Plaintiffs make no allegations relevant to substantive unconscionability. Courts have rejected substantive unconscionability arguments where, as here, the duration of the express

Marchante v. Sony Corp. of Am., 801 F. Supp. 2d 1013, 1023 (S.D. Cal. 2011); see also Bros. v. Hewlett-Packard Co., No. 06-CV-02254-RMW, 2006 WL 3093685, at *8 (N.D. Cal. Oct. 31,

allegations do not show that the one- -sided results as to not established substantive unconscionability. Aron, 49 Cal. Rptr. 3d at 564 (internal quotation marks and citation omitted).

-year Limited Warranty is not unconscionable, and the Limited Warranty is enforceable. Accordingly, Plaintiffs have not stated a claim for breach of express warranty for Plaintiffs Gorbatchev, Christensen, and Tran whose phone defect manifested after the one-year Limited Warranty expired or for Plaintiffs Berry, Jones, and Leone who did not notify Huawei of a defect within the one-year Limited Warranty period. T ss the express warranty claim of Plaintiffs Gorbatchev, Christensen, Tran, Berry, Jones, and Leone with leave to amend to allege further facts unconscionability argument.

(2) Notice and Opportunity to Cure For many of those same Plaintiffs, Huawei relatedly argues that the failure to give Huawei notice or an opportunity to cure is fatal to their claims. Huawei Mot. 11 12. In particular, Plaintiffs Gorbatchev, Tran, Berry, and Leone do not allege that they contacted Huawei to seek repairs. Id. at 12. Additionally, Plaintiff Beheler does not allege that he allowed Huawei to act on its offer to repair or replace his phone. Id. Due to the variations in state law on this issue, the -law claim individually. 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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(a) California Beyond California lling outside the terms of Huawei Warranty, California law does not supply an independent notice-related bar to his express discovers or should have discovered any breach, notify the seller of breach or be barred from any

2607(3)(A). And it is true that Plaintiff Gorbatchev does not allege that he contacted Huawei to seek repairs. CAC ¶¶ 19 27. But notice is not required in an action Greenman v. Yuba Power Prods., Inc., 377 P.2d 897, 900 (Cal. 1963). Other district courts have applied this exception to the specific notice provision at issue here, § 2607(3)(A). See, e.g., In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prod. Liab. Litig., 754 F. Supp. 2d 1145, 1180 (C.D. Cal. 2010) (denying motion to dismiss for failure to provide § 2607(3)(A) notice); Aaronson v. Vital Pharm., Inc., No. 09-CV-01333-W, 2010 WL 625337, at *5 (S.D. Cal. Feb. 17, 2010) (same).

Here, Plaintiff Gorbatchev asserts his express warranty claim against Huawei. The allegations in the CAC support that Huawei is a manufacturer with whom Plaintiff Gorbatchev has never dealt. Plaintiff Gorbatchev did not purchase his Nexus 6P phone from Huawei; instead, he purchased his phone through the Google Store. CAC ¶ 19. After his phone began exhibiting the Bootloop Defect, he interacted solely with Google in an unsuccessful attempt to secure a new phone under the warranty. Id. ¶¶ 23 24. Because Plaintiff Gorbatchev is not required to provide notice to manufacturer Huawei, his claim cannot be dismissed on this ground.

(b) Illinois

Maldonado v. Creative Woodworking Concepts, Inc., 694 N.E.2d 1021, 1025 (Ill. App. Ct. 1998).

Id. problems is insufficient; to fulfill the notice obligation, the buyer normally must contact the manufacturer directly and inform the manufacturer of the defect in the particular product he purchased. Connick v. Suzuki Motor Co., 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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675 N.E.2d 584, 589 (Ill. 1996). The Illinois Supreme Court has enumerated two exceptions: direct notice is unnecessary (1) when the seller has actual knowledge of the defect of the particular product and (2) when a buyer files a complaint claiming personal injuries. Id. at 590.

The allegations of Illinois Plaintiff Tran do not withstand scrutiny under these standards. As noted above, Plaintiff Tran is not alleged to have informed Huawei of the Bootloop Defect in his phone. Indeed, there is no allegation that he contacted Huawei at all. CAC ¶¶ 52 57. Nor can Plaintiff Tran rely on the first notice exception because the CAC does not aver that other r the See Connick, 675

N.E.2d at 590 is insufficient to fulfill . The second exception also is inapplicable in this consumer defect suit where none of the Plaintiffs, let alone Plaintiff Tran, assert that he or she suffered any personal injury. Accordingly, t Motion to Dismiss Pl

notice from Plaintiff Tran or other circumstances.

(c) Indiana Indiana law, too, requires that the buyer give notice to the seller before bringing suit for breach of warranty. Ind. Code Ann. § 26-1-2-607(3)(a). But unlike similar provisions in other Anderson v. Gulf Stream Coach, Inc., 662 F.3d 775, 782 (7th Cir. 2011); see

also Agrarian Grain Co. v. Meeker required by [the Indiana statute] is satisfied by the actual knowledge there are some

Here, the allegations demonstrate that Huawei knew that Indiana

dissatisfied with the phone. See CAC ¶

Huawei offered to repair or replace the phone and Plaintiff Beheler apparently never responded, 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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id., does not change the analysis, as the Limited Warranty does not explicitly require Plaintiff Beheler to give Huawei a reasonable opportunity to cure. See Anderson only Indiana court to have squarely addressed this issue has concluded that the buyer only has to

give the seller a reasonable opportunity to cure if the terms of the warranty impose that failure to allege notice and an opportunity to cure.

(d) Michigan Under Michigan law, it appears that Eaton Corp. v. Magnavox Co., 581 F. Supp. 1514, 1531 (E.D. Mich. 1984). Plaintiffs do not cite any contrary authority. The CAC does not allege that Michigan Plaintiff Berry provided any notice to Huawei. CAC ¶¶ 70 78. Accordingly, the Court ave to

(e) Pennsylvania notice argument as to Pennsylvania Plaintiff Leone. The Pennsylvania after he discovers or d Cons. Stat. Ann. § 2607(c)(1). However, while many states require pre-suit notice, Pennsylvania appears not to have the same limitation. Pennsylvania state courts have held that the filing of a complaint may satisfy the notice requirement for a breach of warranty claim. See Precision Towers, Inc. v. Nat- Com, Inc. compla ; cf.

Yates v. Clifford Motors, Inc., 423 A.2d 1262, 1270 (Pa. Super. Ct. 1980) (holding that the filing of the complaint constituted adequate notice that the plaintiff consumer was rejecting the truck at issue).

While the timeliness of the notice is a factual issue better resolved at a later stage of the litigation, warranty claim for failure to provide notice. See In re MyFord Touch Consumer Litig., 46 F. Supp. 3d 936, 978 (N.D. Cal. 2014). 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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In sum, the Court GRANTS WITH LEAVE TO AMEND express warranty claim of Plaintiffs Tran and Berry but not Plaintiffs Gorbatchev, Beheler, or Leone for failure to adequately plead notice and an opportunity to cure.

(3) Basis of the Bargain and Reliance Huawei next contends that the Court should dismiss the express warranty claims of certain Plaintiffs who do not plead that they saw or relied on Hu 11. Hua Plaintiffs from California (Makcharoenwoodhi, Gorbatchev, and Christensen), Florida (Martorello), Illinois (Tran), New York (Davydov), North Carolina (Harrison and Himes), Ohio (Servodio), Pennsylvania (Leone), Texas (Poore), and Washington (Johnston). Id.

Code § 2313(1)(a) (b); Fla. Stat. Ann. § 672.313(1)(a) (b); 810 Ill. Comp. Stat. Ann. 5/2-

313(1)(a) (b); N.Y. U.C.C. Law § 2-313(1)(a) (b); N.C. Gen. Stat. Ann. § 25-2-313(1)(a) (b); Ohio Rev. Code Ann. § 1302.26(A)(1) (2); 13 Pa. Stat. and Cons. Stat. Ann. § 2-313(a)(1) (2); Tex. Bus. & Com. Code Ann. § 2.313(a)(1) (2); Wash. Rev. Code Ann. § 62A.2-313(1)(a) (b). The relevant question is whether Plaintiffs must show reliance on the statement or representation Because states are split on the question whether reliance is necessary, the Court analyzes the relevant state laws in turn.

(a) California In adopting the Uniform Commercial C , California has shifted its view of whether a plaintiff must allege reliance on specific promises to sustain express warranty claims. Comment 3 to the analogous UCC provision, UCC § 2-313, provides:

The present section deals with affirmations of fact by the seller, descriptions of the goods or exhibitions of samples, exactly as any other part of a negotiation which ends in a contract is dealt with. No specific intention to make a warranty is necessary if any of these factors is made part of the basis of the bargain. In actual practice affirmations of fact made by the seller about the goods during a bargain are regarded as part of the description of those goods; hence no particular reliance on such statements need be shown in order to weave them into the fabric of the agreement. Rather, any fact which is to take such affirmations, once made, 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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out of the agreement requires clear affirmative proof. The issue normally is one of fact. UCC § 2-313,

cmt. 3 (emphasis added). While pre-UCC California law required proof of reliance on specific promises, comment 3 to UCC § 2-313 expressly signals a departure from that requirement. See Keith v. Buchanan, 220 Cal. Rptr. 392, 397 98 (Ct. App. 1985) (explaining that,

express warranty statute conforms to the UCC, the California Court of Appeal has held that a buyer need not show reliance because the California statute , 103 Cal. Rptr. 3d 614, 626 (Ct. App. 2010). The court reasoned that the statute focuses the seller his or her affirmations, promises, and descriptions of the goods Id. at 627. Therefore, ny affirmation, once made, is part of the agreement unless there that the affirmation has bee Id.

The Court acknowledges that some district court cases continue to indicate that reliance is required after the decision in Weinstat. See, e.g., Nabors v. Google, Inc., No. 10-CV-03897 EJD, 2011 WL 3861893, at *4 (N.D. Cal. Aug. 30, 2011) (dismissing express warranty claims where plaintiff failed to allege reasonable reliance on any specific representations made by the defendant). However, these cases are not dispositive because they are not decisions of the California Supreme Court (or of any California state court) and they do not discuss Weinstat or comment 3 to UCC § 2-313. Moreover, many of the cases are distinguishable because they did not involve written warranties included as part of the sale, as here. In this situation that the warranty [is] not part of the deal between the issuing party and receiving party is far less In re MyFord, 46 F. Supp. 3d at 973. In its reply, Huawei asserts that Weinstat is distinguishable because it involved parties that were in privity with one another. Huawei Reply 8. In support of its argument, Huawei cites a district court case drawing that distinction. See Coleman v. Boston Sci. Corp., No. 10-CV-01968- Weinstat nor Keith supports Although 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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some district courts have reached that conclusion, multiple others have interpreted California law not to require a showing of reliance even if privity is lacking. See, e.g., In re MyFord, 46 F. Supp.]ther courts interpreting California law have not found such a limitation i.e., they McVicar v. Goodman Glob., Inc., 1 F. Supp. 3d 1044, 1057 (C.D. Cal. 2014) (relying on Weinstat in a suit by plaintiffs against an air conditioning manufacturer and holding that the express warranty claim was well-pled even though did not allege that they saw any promises or affirmations of fact prior to purchase In re Toyota Motor Corp., 754 F. Supp. 2d at 1183 n.22 (noting that plaintiffs, in a suit against a car

At least on the facts of this case, the Court follows those cases that have not required reliance as a prerequisite to asserting an express warranty claim. As Weinstat emphasizes, the statute focuses on the seller and looks to the promises and affirmations that the seller made. 103 what the sel See id. Here, in selling the phones to retailers to sell to the public, Huawei provided a written Limited in normal operation. Huawei Mot., Ex. A, Preamble. Although two out of three California Plaintiffs did not purchase directly from Huawei, there is no dispute that Huawei treated the Limited Warranty as

extending to Plaintiffs upon their purchase. See CAC ¶ see also, e.g., id. ¶¶ 44 (alleging that Huawei denied warranty coverage even though Florida Plaintiff Martorello claimed within the warranty period), 242 designed to cover end-users, not retailers). In these circumstances, a privity requirement would have little meaning and would serve only to allow Huawei to evade the promises it made in writing about the Nexus 6P phones. Accordingly, failure to adequately plead reliance is not an appropriate basis on which to dismiss the express warranty claims of Plaintiffs Makcharoenwoodhi, Gorbatchev, and Christensen. (b) Florida 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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seller asserts a fact of which the buyer is ignorant prior to the beginning of the transaction and on Thursby v. Reynolds Metals Co., 466 So. 2d 245, 250 (Fla. Dist. Ct. App. 1984) (citations omitted); see also Royal Typewriter Co. v. Xerographic Supplies Corp., 719 F.2d 1092, 1101 (11th Cir. 1983) (holding absence of reliance will negate the e . Plaintiffs do not cite any contrary authority. Because the sole Florida Plaintiff, Martorello, does

to dismiss this claim with leave to amend to allege relevant facts.

(c) Illinois Whether a plaintiff must plead reliance under Illinois law is slightly unclear. Some Illinois courts have suggested that reliance is an invariable requirement for an express warranty claim. See, e.g., , 608 N.E.2d 457, 461 (Ill. Ct. App. 1992) (stating that one necessary element of an Coryell v. Lombard Lincoln-Mercury Merkur, Inc., 544 N.E.2d 1154, 1158 (Ill. Ct. App. 1989) rebuttable presumption of reliance by the buyer so that reliance need not be pled. See, e.g., Felley

v. Singleton, 705 N.E.2d 930, 934 (Ill. Ct. App. 1 epresentations [by the seller] constitute express warranties, regardless of s reliance on them, unless the seller shows by clear affirmative proof that the representations did not become part of the basis of the bargain. Weng v. Allison the buyers . . . were affirmations of fact and descriptions of the [product] that created an express e cases. See Felley, 705 N.E.2d at 934 (citing the above-quoted statement in Coryell

Despite the inconsistency, the legal principles do not seem to be irreconcilable. In particular, the cases can be harmonized based on the presence or absence of privity. When privity is lacking, the background rule mandates pleading and proving reliance. See Regopoulos, 608 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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N.E.2d at 461. In contrast, when the plaintiff is in privity with the defendant, the representations about the product presumptively establish the reliance element. See Felley, 705 N.E.2d at 934; Weng, 678 N.E.2d at 1256. Indeed, one of the cases that Plaintiffs cite explicitly notes the connection

between allegations of privity and allegations of reliance. See In re Rust- Oleum Restore Mktg., Sales Practices & Prods. Liab. Litig., 155 F. Supp. 3d 772, 809 (N.D. Ill. 2016). that between buyer and seller. See s Pet Care Prod., Inc., No. 15-CV-05432, 2016 WL 1011512, at *5 (N.D. Ill. Mar. 15, 2016). Under Illinois law, then, it appears that a plaintiff must plead reliance if he does not adequately allege privity with the defendant.

As discussed in more detail in the privity section below, Illinois Plaintiff Tran does not sufficiently plead that he is in privity with Huawei or that an exception applies. Without an adequate allegation of privity, Plaintiff Tran reliance. Accordingly, to dismiss Plaintiff Tran warranty claim with leave to amend to allege relevant facts.

(d) New York Under New York law, the buyer may bring an action for breach of express warranty Avola v. La.-Pac. Corp., 991 F. Supp. 2d 381, 391

(E.D.N.Y. 2013); see also Horowitz v. Stryker Corp., 613 F. Supp. 2d 271, 286 (E.D.N.Y. 2009) . . reliance on th[e] pr ing CBS Inc. v. Ziff-Davis Pub. Co., 553 N.E.2d 997, 1000 01 (N.Y. 1990))). Plaintiffs do not identify any contrary authority. Because the sole New York

Plaintiff, Davydov, does not allege facts to support the necessary element of reliance, the Court

(e) North Carolina

Eclipse Packaging, Inc. v. Stewarts of Am., Inc., No. 14-CV-00195- 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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RLV, 2016 WL 3619120, at *4 (W.D.N.C. July 6, 2016) (citing Pake v. Byrd, 286 S.E.2d 588, 590 (N.C. Ct. App. 1982)); see also s. v. DJF Enters., Inc., 697 S.E.2d 439, 447 (N.C. Ct. App. 2010) (noting that a claim for breach of express warranty requires that the affirmation was relied upon by the plaintiff in making his decision to purchase (citation omitted)) of reliance can often be inferred from allegations of mere purchase or use if the natural tendency of the representations made is such as to Bernick v. Jurden, 293 S.E.2d 405, 413 (N.C. 1982) (citing Kinlaw v. Long Mfg. N. C., Inc., 259 S.E.2d 552, 557 n.7 (N.C. 1979)).

North Carolina Plaintiffs Harrison and Himes do not argue or allege that the natural tendency o normal operation was to induce them to purchase the phone. This representation stands in stark contrast to the representation at issue in Bernick. There, the North Carolina Supreme Court held Bernick, 293

S.E.2d at 413 14. The court emphasiz Id. at 414. No similar circumstances or facts are alleged in this

case. Accordingly, the Court GRANTS claims of Plaintiffs Harrison and Himes with leave to amend to allege relevant facts.

(f) Ohio In the case of express written warranties, Ohio law follows the same approach as California law namely, that express warranty claims may proceed even in the absence of an allegation of reliance. In Norcold, Inc. v. Gateway Supply Co., the Ohio Court of Appeals rested on comment 3 of UCC § 2-313 and followed decisive majority of courts reliance is not an element in a claim for breach of an express written warranty. 623 24 (Ohio Ct. App. 2003). As the court explained, a written warranty is an integral part of a transaction one party to a contract of the existence of a fact upon which the other party may rely Id. at 624 (quoting Metro. Coal Co. v. Howard, 155 F.2d 780, . . . were part of 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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a written contract, . . . enforcement thereof is not dependant [sic] upon any reliance by [the Id. Although this case does not involve a warranty explicitly written into a contract between the parties, Norcold situation, where the manufacturer has warranted specific terms in writing.

McKinney v. Bayer Corp., 744 F. Supp. 2d 733 (N.D. Ohio 2010), is distinguishable. Although the district court in McKinney was also interpreting Ohio law, the court relied heavily on a Sixth Circuit opinion interpreting Kentucky law and acknowledged as much. Id. at 754 (cit Overstreet v. Norden Labs., Inc., 669 F.2d Notably, the district court in McKinney did not address Norcold at all, likely because the Ohio

Court of Appeals in Norcold 798 N.E.2d at 623, whereas the warranties at issue in McKinney were contained in advertising and

labeling, 744 F. Supp. 2d at 754 55. Because the instant case involves an express written warranty, the Court concludes that Norcold is controlling and plead reliance to state a claim for express warranty under Ohio law. Accordingly, this is not an appropriate basis claim.

(g) Pennsylvania Under Pennsylvania law, there is a rebuttable presumption of reliance. See Cole v. Gen. Motors Corp., 484 F.3d 717, 726 (5th Cir. 2007). Specifically, Pennsylvania law follows the of the seller [become] part of the basis of the bargain unless clear Sessa v. Riegle, 427 F. Supp. 760, 766 (E.D. Pa. 1977), , 568 F.2d 770 (3d Cir. 1978). Accordingly, reliance is not an appropriate basis on which to dismiss Pennsylvania Plaintiff Leone

(h) Texas Texas courts s express warranty law to incorporate a reliance requirement. In Compaq Computer Corp. v. Lapray, the Texas Supreme Court surveyed the states nder Texas law, we [r]eliance is . . . not only relevant to, but an claims 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25

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of breach of express warranty (to a certain extent). 135 S.W.3d 657, 676 (Tex. 2004) (second and third alterations in original) (quoting Henry Schein, Inc. v. Stromboe, 102 S.W.3d 675, 686 (Tex. 2002)); Am. Tobacco Co. v. Grinnell Texas Court of Appeals case stating in a footnote that it is error to include reliance as a necessary element of proof for breach of express warranty, Villalon v. Vollmering, 676 S.W.2d 220, 222 n.1 (Tex. App. 1984), other divisions of the Texas Court of Appeals have reached a different conclusion. In any event, the statement in Villalon cannot override the strong indications by the Texas Supreme Court about reliance. Accordingly, the Court GRANTS claim of Texas Plaintiff Poore with leave to amend to allege relevant facts.

(i) Washington Washington courts sometimes require a form of reliance. For example, in Touchet Valley Grain Growers, Inc. v. Opp & Seibold General Construction, Inc., the Washington Supreme Court explained that knowledge of the r 831 P.2d 724, 731 (Wash. 1992); Baughn v. Honda Motor Co., ations to

However, the Court does not read those cases to require a showing of awareness when the plaintiffs base their claims on an express written warranty, rather than other representations (such as advertising statements), to form the basis of the bargain. See In re Myford Touch Consumer Litig., No. 13-CV-03072-EMC, 2015 WL 5118308, at *6 (N.D. Cal. Aug. 31, 2015) (recognizing that awareness of representations must be shown under Washington law authority identified case involved advertising

on a claim of breach of an express warranty contained in an advertisement, a plaintiff must

Reece v. Good Samaritan Hosp., 953 P.2d 117, 123 (Wash. Ct. App. 1998) (citing Arrow Transp. Co. v. 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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A. O. Smith Co., 454 P.2d 387, 390 (Wash. 1969)). Accordingly, reliance is not an appropriate basis on which to dismiss Washington Plaintiff Johnston

In sum, the Court GRANTS WITH LEAVE TO AMEND express warranty claim of Plaintiffs Martorello, Tran, Davydov, Harrison, Himes, and Poore but not Plaintiffs Makcharoenwoodhi, Gorbatchev, Christensen, Servodio, Leone, or Johnston for failure to adequately plead reliance.

(4) Privity Finally, Huawei contends that the Court should dismiss the express warranty claims of Florida Plaintiff Martorello and Illinois Plaintiff Tran because those Plaintiffs are not in privity of

contract with Huawei. Huawei Mot. 12. of contract with Huawei . . . by virtue of their interactions with 242, is conclusory and does not plausibly allege privity. Thus, the Court must address whether privity of contract is required to state a claim for breach of express warranty under Florida and Illinois law.

(a) Florida Florida courts are split on whether claims for breach of express warranty always require privity. See In re Clorox Consumer Litig., No. 12-CV-00280-SC, 2013 WL 3967334, at *10 (N.D. Cal. July 31, 2013) (summarizing the split). Some courts hold that because express Hill v. Hoover Co., 899 F. Supp. 2d 1259, 1266 (N.D. Fla. 2012) (quoting T.W.M. v. Am. Med.

Sys., Inc., 886 F. Supp. 842, 844 (N.D. Fla. 1995)). Other courts have declined to apply the privity

Smith v. Wm. Wrigley Jr. Co., 663 F. Supp. 2d 1336, 1343 (S.D sense to argue that purchasers of Eclipse gum presumed that the cashier at the local convenience store is familiar with the scientific properties of Even if the Court finds the latter line of cases persuasive, Florida Plaintiff Martorello purchased his phone from Google. CAC ¶ 38. The CAC provides no basis to conclude that Huawei has detailed knowledge about the Nexus 6P that Google does not; to the contrary, the CAC often lumps Huawei and Google together. 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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Accor ss the express warranty claim of Plaintiff Martorello with leave to amend to allege further facts about the privity relationship between Plaintiff Martorello and Huawei or any disparity in knowledge between Huawei and Google regarding the Nexus 6P phone.

(b) Illinois As noted above, generally requires the plaintiff to be in privity with the defendant. Baldonado v. Wyeth, No. 04- CV-04312, 2012 WL 729228, at *4 (N.D. Ill. Mar. 6, 2012). Illinois Plaintiff Tran has not sufficiently alleged privity with Huawei. He purchased his Nexus 6P phone through the Google Store, and he interacted solely with Google when trying to remedy the Bootloop Defect. CAC ¶¶ 52 54 Huawei . . id. ¶ 242, is conclusory and does not plausibly allege privity.

That conclusion does not end the analysis. Where the parties are not in privity, there may be an express warranty if the plaintiff shows that the statement became part of the basis of the bargain. Ampat/Midwest, Inc. v. Ill. Tool Works, Inc., No. 85-CV-10029, 1988 WL 53222, at *3 (N.D. Ill. May 12, 1988). More precisely, Illinois courts have recognized an exception to the privity requirement, holding that Canadian Pac. Ry. Co. v. Williams-Hayward

Protective Coatings, Inc., No. 02-CV-08800, 2005 WL 782698, at *15 (N.D. Ill. Apr. 6, 2005); see also Wheeler v. Sunbelt Tool Co. brochures, and . Although the CAC provides a website to access Huawei , CAC ¶ 219 & n.17, there are no allegations that the warranty was available online at the time that

Plaintiff Tran purchased his Nexus 6P or that he was directed to the online warranty, accessed the warranty online, or otherwise received the warranty before his purchase, id. ¶¶ 52 57. included in every Google Nexus 6P These circumstances do not fit 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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within the privity exception, and Plaintiffs do not even clearly argue that the exception is met in this case. Accordingly, t claim of Plaintiff Tran with leave to amend to allege further facts about the privity relationship

between Plaintiff Tran and Huawei.

In sum, on to Dismiss the express warranty claim of Plaintiffs Martorello and Tran for failure to adequately plead privity.

ii. Breach of Implied Warranty of Merchantability Plaintiffs bring their second cause of action for breach of the implied warranty of merchantability on behalf of a putative nationwide class but do not specify which law governs the claim. CAC ¶ 235. Alternatively, they assert claims for breach of the implied warranty of merchantability on behalf of the putative statewide subclasses under the laws of the respective states. Id. ¶ but failed to keep that promise because

Id. ¶ 239. Huawei seeks dismissal on the grounds that Plaintiffs have not

adequately pled that they were in privity with Huawei, that they provided Huawei notice and an opportunity to cure, and that the phones were unmerchantable. Huawei Mot. 13 16.

(1) Privity and Third-Party Beneficiary Huawei first contends that certain Plaintiffs who did not purchase from Huawei cannot assert implied warranty claims. Huawei Mot. 14. Huawei argues that vertical privity is a necessary element to sustain an implied warranty claim and that these Plaintiffs do not adequately plead privity. Id. With one limited exception, Plaintiffs concede that the relevant states require vertical privity, but they respond that the third-party beneficiary exception applies here and is 31 34.

Preliminarily, Plaintiffs have failed to sufficiently plead privity between the relevant Plaintiffs and Huawei. Specifically, Plaintiffs Makcharoenwoodhi, Gorbatchev, Martorello, Tran, Berry, Davydov, Harrison, Himes, Servodio, and Johnston did not purchase their phones from Huawei. CAC ¶¶ 12 (Makcharoenwoodhi: Best Buy), 19 (Gorbatchev: Google), 38 (Martorello: 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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Google), 52 (Tran: Google), 70 (Berry: Google), 79 (Davydov: Amazon), 91 (Harrison: Amazon), 99 (Himes: Best Buy), 119 (Servodio: Newegg), 153 (Johnston: Best Buy). Moreover, without any supporting factual id. ¶ 242, does not plausibly allege privity. Thus, the Court must address the existence of the vertical privity requirement and the third-party beneficiary exception.

implied-Pack v. Damon Corp., 434 F.3d 810, 820 (6th Cir. 2006); see also

Heritage Res., Inc. v. Caterpillar Fin. Servs. Corp., 774 N.W.2d 332, 343 (Mich. Ct. App. 2009) . . has previously held that for some remote purchasers it is unnecessary in actions for breach of implied warranty to establish privity of contract with the Accordingly, the claim by Michigan Plaintiff Berry is not properly dismissed on this ground.

Huawei cites cases recognizing a vertical privity requirement under California, Illinois, New York, North Carolina, Ohio, and Washington law. See Clemens v. DaimlerChrysler Corp., 534 F.3d 1017, 1023 (9th Cir. 2008) (California); Zaro v. Maserati N. Am., Inc., No. 07-CV- 03565-JWD, 2007 WL 4335431, at *2 (N.D. Ill. Dec. 6, 2007) (Illinois); Kolle v. Mainship Corp., No. 04-CV-00711-TCP, 2006 WL 1085067, at *5 (E.D.N.Y. Apr. 20, 2006) (New York); Traxler v. PPG Indus., Inc., 158 F. Supp. 3d 607, 623 (N.D. Ohio 2016) (North Carolina); McKinney, 744 F. Supp. 2d at 758 (Ohio); Chance v. Richards Mfg. Co., 499 F. Supp. 102, 105 (E.D. Wash. 1980) (Washington). Plaintiffs do not challenge that proposition because they argue that application of the third-party beneficiary exception obviates any need to satisfy the vertical privity requirement.

In its moving papers, Huawei concedes that the relevant states allow plaintiffs to bring implied warranty claims in the absence of privity if the plaintiff shows that he was a beneficiary to a contract between the defendant and a third party. Huawei Mot. 14 (citing In re NVIDIA GPU Litig., No. 08-CV-04312-JW, 2009 WL 4020104, at *6 (N.D. Cal. Nov. 19, 2009)). Because the parties do not identify any material differences among the relevant state laws, the Court uses California law as the rubric for analyzing these arguments. California has codified the third-party 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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1559.

party beneficiary status is a matter of contract interpretation, a person seeking to enforce a contract as a third party beneficiary must plead a contract which was made expressly for his [or her] benefit and one in which it clearly appears that he [or she Schauer v. Mandarin Gems of Cal., Inc., 23 Cal. Rptr. 3d 233, 239 (Ct. App. 2005) (alterations in

original) (internal quotation marks and citation omitted).

With respect to Huawei, Plaintiffs fulfill these pleading requirements. Specifically,

242. That express warranty represents to the original purchaser that the Nexus 6P is free from material defects and that Huawei would repair or replace defective or malfunctioning parts. Id. ¶¶ 218 20. As Plaintiffs allege, the Limited Warranty is designed to benefit only the end users, not the retailers who sell the phones. Id. ¶ 242; see also id. ¶ retailers were not intended to be the ultimate consumers of the Nexus 6P smartphones and have no

rights under the warranty agreements connected with the Nexus 6P smartphones; these agreements were designed for and intended to benefit the end- tions have been held to be sufficient to invoke the third-party beneficiary exception. See, e.g., In re MyFord, 46 F. Supp. 3d at 982 84 & n.15 (finding third-party beneficiary allegations sufficient where Plaintiffs In re Toyota

Motor Corp., 754 F. Supp. 2d at 1185 (finding third-party beneficiary allegations sufficient where Plain

claims for breach of the implied warranty of merchantability.

(2) Notice and Opportunity to Cure In a similar vein to its argument for dismissal of the express warranty claims, Huawei contends that certain 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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these Pla warranty claims. Huawei Mot. 15 16. In particular, Plaintiffs Beheler, Berry, Harrison, Himes, Leone, and Poore do not allege that they provided Huawei notice of their breach of implied warranty claims. Id. at 16. Due to the variations in state law on this issue, the -law claim individually.

(a) Indiana apply equally to implied warranty of merchantability claims. See Anderson, 662 F.3d at 780

(express warranty and implied warranty of merchantability claims); see also Agrarian Grain Co., 526 N.E.2d at 1193 (implied warranty of merchantability claims). Accordingly, for the same reasons discussed above, for failure to allege notice and an opportunity to cure. (b) Michigan

breach-of-warr Gorman v. Am. Honda Motor Co., 839 N.W.2d 223, 229 (Mich. Ct. App. 2013); see also In re Carrier IQ, Inc., 78 F. Supp. 3d 1051, 1104 (N.D. uyer believes that Gorman, 839 N.W.2d at 231. Here, Michigan Plaintiff Berry contacted Google and engaged in various (unsuccessful) troubleshooting options are not sufficient to meet that standard. CAC ¶¶ 72 75. Not only did Plaintiff Berry have no interactions with Huawei, but he did not put Huawei on notice that he believed Huawei to be in

In re Nexus 6P Products Liability Litigation

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Motion to Dismiss Pl with leave to amend to allege further facts about whether he put Huawei on notice that he believed

Huawei to be in breach of the implied warranty of merchantability. (c) North Carolina In North Carolina . . that seasonable notification has been given Maybank v. S. S. Kresge Co., 273 S.E.2d 681, 683 (N.C. 1981); see Phillips v. Rest. Mgmt. of Carolina, L.P., 552 S.E.2d 686, 692 (N.C. Ct. App. 2001) 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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merchantability (quoting Ismael v. Goodman Toyota, 417 S.E.2d 290, 295 (N.C. Ct. App. 1992))). ice given was seasonable is a question of fact and normally must be determined Maybank, 273 S.E.2d at 684 n.1. Moreover, in deciding an appeal from a motion for directed verdict, the North Carolina Supreme Court has held that there may be

Id. hen the plaintiff is a lay consumer and notification is given to the defendant by the filing of an action within the period of the statute of limitations, and when the applicable policies behind the notice requirement have been fulfilled, we hold that the plaintiff is entitled to go to the .

Based on those standards, both North Carolina Plaintiffs have adequately pled notice. Most importantly, Plaintiffs Harrison and Himes are lay consumers who filed this action against Huawei and are not alleged to be untimely. Additionally, both Plaintiffs contacted Huawei about the problems they were experiencing with their Nexus 6P phones and followed up with Huawei when their concerns were not resolved. CAC ¶¶ 94 (Harrison), 103 04 (Himes). Other North Carolina cases have held that repeatedly returning a product can be sufficient to put the defendant on notice. See, e.g., Ismael, 417 S.E.2d at 295 car to defendant for r ; Wright v. T & B Auto Sales, Inc., 325 S.E.2d 493, 495 96 (N.C. Ct. App. 1985) gave Defendant timely notice of the defects by repeatedly returning the car to Defendant from March 1982 through September 1982 complaining that the car was overheating claims cannot be dismissed for failure to allege notice and an opportunity to cure.

(d) Pennsylvania The parties present no reason to conclude that, with regard to notice, express and implied warranty claims should be treated differently under Pennsylvania law. As noted above, there is authority holding that the filing of a complaint can be sufficient to notify the manufacturer of breach. See Precision Towers 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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held to satisfy the notice requirement fo . Although the timeliness of the notice remains an open issue, the filing of this action is sufficient to preclude dismissal of implied warranty claim for failure to provide notice. See In re MyFord, 46 F. Supp. 3d at 978. (e) Texas Although some Texas courts have

held that notice to a manufacturer is not required, Vintage Homes, Inc. v. Coldiron, 585 S.W.2d 886, 888 (Tex. Civ. App. 1979), the weight of authority in Texas favors the position that notice is required in this circumstance, see McKay v. Novartis Pharm. Corp. four Texas courts of appeals which have addressed the issue have held that a buyer is required to give notice , 751 F.3d 694 (5th Cir. 2014). Moreover, unde

of a lawsuit does not satisfy that requirement. U.S. Tire-Tech, Inc. v. Boeran, B.V., 110 S.W.3d 194, 202 (Tex. App. 2003).

Although the CAC states that ¶ 147, it gives no indication that Poore communicated the particular issues that he was having with his phone to Huawei. Contrary to phones. See U.S. Tire-Tech, 110 S.W.3d at 202; see also In re Carrier IQ, 78 F. Supp. 3d at 1104.

Accordingly, the Court GRAN of the implied warranty of merchantability with leave to amend to allege further facts about whether he made Huawei aware of the problems with his Nexus 6P.

Accordingly, the Court GRANTS Hu claims of Plaintiffs Berry and Poore but not Plaintiffs Beheler, Harrison, Himes, or Leone with

leave to amend to allege further facts about whether any of these Plaintiffs provided notice and an opportunity to cure. 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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(3) Merchantability In a particularly weak final argument, Huawei contends that Plaintiffs do not plausibly allege that their Nexus 6P phones were not merchantable. Huawei Mot. unpersuasive.

The implied warranty of merchantability arises by operation of law rather than contract. See, e.g., Hauter v. Zogarts, 534 P.2d 377, 385 (Cal. 1975). It guarantees not that the goods

Am. Suzuki Motor Corp. v. Superior Court, 44 Cal. Rptr. 2d 526, 529 (Ct. App. 1995) (citation omitted) Mexia v. Rinker Boat Co., 95 Cal. Rptr. 3d 285, 289 (Ct. App. 2009) (citation omitted).

, access[ing]

175. Further, the Bootloop and Battery Drain Defects render the phones unfit for those purposes. When the Bootloop Defect manifests, the phone experiences total failure and the customer permanently loses access to any data stored on the phone. Id. ¶¶ 174 75; see also id. ¶ 175 (describing a Nexus

Defect manifests, the phone experiences severe battery drainage with early shut-off. Id. ¶¶ 176 77. The customer may use the phone again only after connecting the phone to power. Id. ¶ 178.

It is no response that some Plaintiffs continued to use their phones after the defects manifested, see Huawei Mot. its ordinary function, the product nonetheless fails in a significant way to perform as a reasonable

In re Carrier IQ, 78 F. Supp. 3d at 1109.

Accordingly, Plaintiffs have adequately pled that the Nexus 6Ps were unmerchantable, and

warranty of merchantability. 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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iii. Song Beverly Consumer Warranty Act The California Plaintiffs cause of action for violations of the Song Beverly Consumer Warranty Act , Cal. Civ. Code §§ 1791.1, 1792, on behalf of the California subclass fails because Plaintiffs do not allege where they purchased their phones. The protections of the Song al. Civ. Code § 1792. The California Plaintiffs do not allege where they purchased their phones, and they seek to represent a class of persons in the state of California who purchased or own at least one Nexus 6P. CAC ¶¶ 205, 285. It is not plausible to infer that any person in California who owns a Nexus 6P purchased the phone in California. See In re Carrier IQ there are actually no allegations in the [complaint] that any of these Plaintiffs purchased their mobile devices in California California. 5

Dismiss the Song Beverly Act claim with leave to amend to assert where the phone purchases took place.

iv. Magnuson Moss Warranty Act eges violations of the Magnuson Moss Warranty Act, 15 U.S.C. § 2301 et seq., presumably on behalf of the nationwide class, though the CAC does not specify. CAC ¶¶ 249 67. The parties agree that, in this case, Moss Act stand or fall with [the] Clemens,

534 F.3d at 1022. The Court has concluded that all of the implied warranty claims survive except those brought by Plaintiffs Berry and Poore under Michigan and Texas law, respectively. The Court has also concluded that the express warranty claims of Plaintiffs Berry and Poore should be dismissed with leave to amend. As it stands, then, the Court GRANTS Huawei

5 Huawei makes an argument in its Motion to Dismiss that the Song Beverly Act requires that the plaintiff deliver a defective product to the manufacturer for repair within the express warranty coverage period. Huawei Mot. 17 18. Plaintiffs respond that the provision Huawei cites is argument

in its reply. Huawei Reply 13. 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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Dismiss the Magnuson Moss Warranty Act claims of Plaintiffs Berry and Poore with leave to Moss Warranty Act claims. 6

b. Fraud and Deceptive Practices Claims Plaintiffs assert various fraud claims against Huawei. Specifically, they bring common- law claims for deceit and fraudulent concealment, CAC ¶¶ 268 77, as well as claims under a number of state consumer fraud statutes, id. ¶¶ 297 535. There are two common theories underlying fraud claims: affirmative misrepresentations and fraudulent omissions. The CAC does not allege that Huawei made any affirmative representations about Nexus 6P phones, other than to treat Huawei and Google as a collective. See, e.g., id. ¶ . . fraudulent misrepresentations . . . regarding the quality of Rather, Plaintiffs rely on Id. ¶¶ 270, 303, 319, 335, 343, 356, 374, 394, 403, 418, 428, 437, 448, 466, 482, 491, 508, 522. Huawei challenges the viability of this fraudulent omissions theory on multiple grounds and then makes additional arguments with regard to some of the statutory claims.

i. No Duty to Disclose Huawei first contends that it had no duty to disclose the defects because Plaintiffs have not plausibly alleged that Huawei had knowledge of the defects prior to the time of sale. Huawei Mot. 19. The Court looks to California law to guide the analysis because Plaintiffs rely solely on California law s arguments and do not identify any material differences 48, 50. California law supports this common-sense notion that a defendant cannot disclose facts of which it was unaware. In re Sony Grand Wega, 758 F. Supp. 2d at 1095. The Ninth Circuit has put it explicitly: to state a claim for fraud based on failure to

6 Moss Warranty Act claims but fails to fully develop the point or explain how the argument differs from the notice arguments under state law. Huawei Mot. 18. 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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Williams v. Yamaha Motor Co., 851 F.3d 1015, 1025 (9th Cir. 2017); see also LiMandri v. Judkins, 60 Cal. Rptr. 2d 539, 543 (Ct. App. 1997) (noting that nondisclosure is actionable in fraud when the defendant had exclusive knowledge of material facts not known to the plaintiff actively conceals a m makes partial representations but also

As explained in detail above, Plaintiffs have not adequately pled that Huawei had knowledge of either the Bootloop Defect or the Battery Drain Defect when the Plaintiffs purchased their Nexus 6Ps. Therefore, Huawei had no duty to disclose the defects. Accordingly, based on a fraudulent

omissions theory with leave to amend to allege facts about

knowledge of the defects at the time of sale.

ii. No Unreasonable Safety Hazard North Carolina, Texas, and Washington law must be dismissed because the CAC does not

plausibly allege that the phone defects posed an unreasonable safety hazard. Huawei Mot. 21. Although Plaintiffs argue that an unreasonable safety hazard is not a necessary element for the statutory fraud claims, the Ninth Circuit recently held that, in the absence of affirmative Williams, 851 F.3d at 1025; see

also id. at 1026 (citing Wilson, 668 F.3d at 1142 holding that where a defendant has not made an affirmative misrepresentation, a plaintiff must allege the existence of an unreasonable cannot help Plaintiffs here because it states that the duty to disclose extends to known to a manufacturer and concealed Rutledge v. Hewlett-Packard Co., 190 Cal. Rptr. 3d 411, 420 (Ct. App. 2015) (emphasis added). Thus, in these circumstances, Plaintiffs are required to plead an unreasonable safety hazard.

such an unreasonable safety hazard. 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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Williams, 851 F.3d at 1028 (quoting Birdsong v. Apple, Inc., 590 F.3d 955, 961 (9th Cir. 2009)). Here, the CAC obliquely stranded on a freezing night after her Phone abruptly died when she was trying to request a ride

from the ride- 180. Not only have Plaintiffs identified only one example, but the safety risk of being stranded with a nonfunctioning phone has been held to be too speculative to amount to an unreasonable safety hazard. See Missaghi v. Apple Inc., No. 13-CV- 02003-GAF, 2013 WL 12114470, at *8 (C.D. Cal. Aug. 28, 2013); see also Smith v. Ford Motor Co., 462 concern that a defective ignition-lock could leave consumers stranded on the side of the road). Similarly, the Ninth Circuit has concluded that the more-egregious risk of fires due to defects in a boat motor were hypothetical where the complaint contained no allegations that any customer had experienced such a fire. Williams, 851 F.3d at 1028 29. Accordingly, the Court GRANTS claims under California, Florida, North Carolina, Texas, and Washington law with leave to amend to allege whether the defects pose an unreasonable safety hazard.

iii. Manifestation of Defect Outside Warranty Huawei separately contends that there can be no fraudulent omissions claims for Plaintiffs Gorbatchev, Christensen, and Tran because their Nexus 6Ps did not allegedly malfunction until after the expiration of the Limited Warranty, CAC ¶¶ 19 21,

28 29, 52 53. Huawei Mot. 22 23. It is true that, as a policy matter, California courts have cabined the scope of the duty to disclose to avoid the unsavory result that manufacturers are on the hook for every product defect that occurs at any time, regardless of any time limits contained in their warranties. See Daugherty v. Am. Honda Motor Co., 51 Cal. Rptr. 3d 118, 122 (Ct App. 2006); see also Williams, 851 F.3d at 1029 ([T]he fact that the alleged defect concerns premature, but usually post-warranty, onset of a natural condition raises concerns about the use of consumer fraud statutes to impermissibly extend . But this policy consideration appears to be a variation on , and Huawei has not fully explained how it independently justifies 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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dismissal of Plai Accordingly, at this stage, the Court does not rely on this basis to dismiss the fraud claims of Plaintiffs Gorbatchev, Christensen, and Tran.

iv. California Consumers Legal Remedies Act The California Plaintiffs bring a claim und 1780, on behalf of the California subclass. CAC ¶ 310. Huawei argues that Plaintiffs have failed to comply with the statutory provision. Huawei Mot. 23. Specifically, under the CLRA, an affidavit stating facts showing that the action has been commenced in a county described in this 1780(d). The statute also provides the appropriate course of action when the plaintiff fails to comply: dismissal without prejudice. Id.

Plaintiffs do not dispute that none of the California Plaintiffs filed the CLRA affidavit re 50. Instead, Plaintiffs characterize this requirement as a state procedural rule that does not apply in federal court. Id. accurate. -complaint settlements of consumer actions wherever possible and to establish a limited period during which such settlement may be Outboard Marine Corp. v. Superior Court, 124 Cal. Rptr. 852, 859 (Ct. App. 1975). In this way Wehlage v. EmpRes Healthcare Inc., No. 10-CV-05839-CW, 2012 WL 380364, at *7 (N.D. Cal. Feb. 6, 2012). Therefore, this Court and multiple other California district courts have required submission of the CLRA affidavit. See Romero v. Flowers Bakeries, LLC, No. 14-CV-05189- BLF, 2015 WL 2125004, at *8 (N.D. Cal. May 6, 2015); , No. 16-CV-01875-GW, 2016 WL 3277295, at *2 (C.D. Cal. June 6, 2016); McVicar, 1 F. Supp. 3d at 1056; In re Apple In-App Purchase Litig., 855 F. Supp. 2d 1030, 1037 (N.D. Cal. 2012). But see Sandoval v. PharmaCare US, Inc., 145 F. Supp. 3d 986, 999 (S.D. Cal. 2015) (holding on the does not apply to CLRA claims filed in federal court

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Plaintiffs will attach them to an amended com 50. Accordingly, the Court CLRA affidavit.

v. California Unfair Competition & False Advertising Laws The California Plaintiffs assert 17200 et

seq., 17500 et seq., on behalf of the California

subclass. CAC ¶¶ 298, 333. Huawei makes claim-specific arguments for dismissal, and the Court addresses the UCL and FAL claims in turn.

(1) UCL The Court first turns to the UCL claim. us. & Prof. Code § 17200; see also Cel-Tech

, 973 P.2d 527, 539 (Cal. 1999). Because the statute is written in the disjunctive, it applies separately to business practices that are (1) unlawful, (2) unfair, or (3) fraudulent. See Pastoria v. Nationwide Ins., 6 Cal. Rptr. 3d 148, 153 (Ct. App.

argues that the CAC does not adequately allege that its conduct was unlawful, unfair, or fraudulent. Huawei Mot. 24 25.

(a) Unlawful Business Act or Practice eged violation of the Magnuson Moss Warranty Act. See CAC ¶ 300. of the UCL cover any business practice that violate[s] an ind Cel-Tech , 973 P.2d at 549. Because the Court has already concluded that the California Plaintiffs have stated a claim against Huawei under the Magnuson Moss Warranty Act, they have Accordingly, the UCL claim under the unlawful prong.

(b) Unfair Business Act or Practice 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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unfair even if not proscribed by some other law. Korea Supply Co. v. Lockheed Martin Corp., 63 P.3d 937, 943 (Cal. 2003). Th ,proper definition in the consumer context See Lozano v. AT & T Wireless Servs., Inc., 504 F.3d 718, 735 36 (9th Cir. 2007).

unfair prong has not been definitively established, Plaintiffs endorse the balancing test enunciated in South Bay Chevrolet v. General Motors Acceptance Corp., 85 Cal. Rptr. 2d 301 (Ct. App. 1999), or the FTC Act section 5 test employed in Camacho v. Automobile Club of Southern California, 48 Cal. Rptr. 3d 770 (Ct. App. 2006). n 39. Pursuant to the South Bay an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous 85 Cal. Rptr. 2d at 316. the harm to the consumer again Lozano, 504 F.3d at 735

(citing S. Bay, 85 Cal. Rptr. 2d at 315). Under the FTC Act section 5 test, three factors define the injury must not be outweighed by any countervailing benefits to consumers or competition; and (3) it must be an injury that Camacho, 48 Cal. Rptr. 3d at 777. Huawei contends that regardless of the test applied, Plaintiffs fails. Huawei Mot. 24 25; see also Huawei Reply 15 No matter what test is applied, the [CAC] lacks any factual basis to sustain such a claim.

Under any test, Plaintiffs do not allege sufficient facts to establish that Huawei engages in CAC ¶ 302. Specifically, Plaintiffs point to five aspects of

conduct: (1) knowingly sold defective phones, (2) refused to repair or replace phones when the defects manifested outside the warranty period, (3) avoided providing warranty service by blaming minor cosmetic issues, (4) had long wait periods on warranty claims, and (5) provided replacement phones that were also defective. Id. ¶ 301. Although Plaintiffs endorse evaluating this conduct as a whole without testing the sufficiency of each aspect, the problem is that Plaintiffs lump Huawei and Google together u when each aspect does not apply 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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uniformly to both. Therefore, the Court must undertake the difficult endeavor of teasing out which actions the CAC attributes to Huawei alone.

Ground (1) is easily discarded, as it merely parrots the already-rejected contention that Huawei had knowledge of the defects at the time of sale. Ground (2) also falls away because the

Act section 5 test, when the product functions as warranted throughout the term of an express warranty. Daugherty might not, shorten the effective life span of an automobile part that functions precisely as warranted throughout the term of its express warranty . . . does not constitute an unfair practice Ground (3) appears more promising, but Plaintiffs do not provide sufficient facts to support it. Only one California Plaintiff alleges that Huawei denied warranty coverage based on a cosmetic flaw in his phone. See CAC ¶ [Plaintiff] Makcharoenwoodhi that his warranty was voided because his Phone had a small dent by the . 7

One isolated instance where Huawei allegedly did not provide warranty coverage based on a minor cosmetic issue does not rise to the level of an unfair practice of failing to honor its warranties.

Ground (4) asserts months to receive accommodation for warranty claims. CAC ¶ 301.d. However, Plaintiffs have not identified any California Plaintiff who complains about wait times, see id. ¶¶ 65, 85, 122, 156, and Plaintiffs do not argue, by reference to allegations in the CAC, that there is a basis to infer that Moreover, the failure to provide timely responses to warranty claims might amount to poor customer service but, standing alone, cannot fairly be characterized as immoral, unethical, oppressive, or unscrupulous. Finally, based on the present allegations, ground (5) does not apply to Huawei at all: Google is the only actor alleged to have provided certain Plaintiffs with a defective replacement phone. Id. ¶¶ 49, 75, 113 14, 136.

7 Plaintiffs separately point to the allegations by Ohio Plaintiff Servodio. Even if those allegations could be relevant for a California claim under California law, they state only that Huawei noted a

small dent in the side of his phone and determined that his phone was ineligible for warranty coverage, not that Huawei denied coverage because of the dent. Id. ¶¶ 122, 124. 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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motion to dismiss stage.

California public policy, legislatively declared in the Song Beverly Consumer Warranty Act, requiring a manufacturer to ensure that goods it places on the market are fit for their ordinary and Id. ¶ 301. Even if that description of the Song Beverly Act accurately captures the general thrust of the statute, it fails to account for the Song circumscribed geographic reach to sales of consumer goods in California. See Cal. Civ. Code § 1792. At a minimum, the Song unmerchantab under the Song does not allege that the California Plaintiffs purchased their phones in California.

UCL claim under the unfair prong with leave to amend to allege relevant facts.

(c) Fraudulent Business Act or Practice In the CAC, Plaintiffs identify three fraudulent acts on the part of Huawei and Google: (1)

and not possessing defects that 303.

Putting aside the fact that the allegations do not distinguish between Huawei and Google, all three at the time of sale to the California likewise characterizes the claim under the UCL fraud prong as turning on the exus 6Ps core defects, failure to disclose them, and portrayal of these phones 40. As the Court has repeatedly reiterated, Plaintiffs have not adequately alleged that Huawei had knowledge of the defects when the California Plaintiffs purchased their phones. Accordingly, the Court GRANTS UCL claim under the fraud prong with leave to amend to 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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allege that Huawei had knowledge of the defects at the time that the California Plaintiffs purchased their phones.

(2) FAL The Court next addresses the FAL claim. In relevant part, the statutory provision provides: It is unlawful for any . . . corporation . . . with intent directly or indirectly to dispose of real or personal property or to perform services, professional or otherwise, or anything of any nature whatsoever or to induce the public to enter into any obligation relating thereto, to make or disseminate or cause to be made or disseminated . . . from this state before the public in any state, in any newspaper or other publication, or any advertising device, . . . or in any other manner or means whatever, including over

the Internet, any statement, concerning that real or personal property or those services, professional or otherwise, or concerning any circumstance or matter of fact connected with the proposed performance or disposition thereof, which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading. Cal. Bus. & Prof. Code § 17500. because they fail to allege actual reliance on an advertisement by Huawei. Huawei Mot. 23. Huawei is correct. As reflected in the statutory language quoted above, an FAL claim requires an advertising statement. See Norcia v. Samsung Telecommunications Am., LLC, No. 14- CV-00582-JD, 2015 VP Racing Fuels, Inc. v. Gen. Petroleum Corp., 673 F. im is

made an advertising statement. The only allegation for the FAL claim regarding advertisements is [statements] through advertising, marketing and

conduct and the CAC otherwise refers only to advertising statements by Google. Therefore, Plaintiffs cannot plead actual reliance on any advertising statement by Huawei because they have not identified any statement by Huawei. actual reliance on an advertising statement made by Huawei. 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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vi. Ohio Trade Deceptive Practices Act Plaintiff Servodio asserts a claim under the Ohio Deceptive Trade Practices Act f of the Ohio subclass. CAC ¶¶ 461 75. This claim must be dismissed because Servodio, as a consumer, lacks standing to sue under the ODTPA.

Although the Ohio Supreme Court has not addressed this question, the Ohio Court of Appeals has held that the ODTPA affords no relief to consumers because the statute is designed to protect commercial actors against objectionable commercial conduct. Dawson v. Blockbuster, Inc., 2006-Ohio-1240, ¶ 24. It is well settled that Ohio courts look to the interpretation of the analogous federal Lanham Act when interpreting the ODTPA, Healthcare All., Inc., 709 N.E.2d 190, 195 (Ohio Ct. App. 1997), and all five circuits to address

the issue have held that consumers have no standing to sue under the Lanham Act, see 5 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition § 27:39 (5th ed. 2017) (citing the holdings of the Second, Third, Fourth, Seventh, and Ninth Circuits). Although at least f federal courts and all lower state courts to address the issue have concluded that relief under the [ODTPA] is not Phillips v. Philip Morris Cos., 290 F.R.D. 476, 482 (N.D. Ohio 2013).

Plaintiffs cite a case where the District Court of New Hampshire deferred deciding the ODTPA standing issue at the motion for certification stage. In re Dial Complete Mktg. & Sales Practices Litig., 320 F.R.D. 326, 328 n.1 (D.N.H. 2017). Although the court stated that Ohio law

Id. Here, in contrast, the parties have sufficiently briefed the issue, and Plaintiffs have not provided

authority outweighing the many cases that go against their position.

tion to Dismiss the ODTPA claim. Because consumers cannot bring the ODTPA claim as a matter of law, the Court dismisses this claim without leave to amend.

c. Unjust Enrichment Claim final cause of action is for unjust enrichment. CAC ¶¶ 278 83. Relying on Astiana v. Hain Celestial Group, Inc., 783 F.3d 753, 762 (9th Cir. 2015), this Court has held that, 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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under California law, a claim alleging unjust enrichment states a claim for relief as a quasi- contract claim for restitution. Romero, 2015 WL 2125004, at *9; see also ESG Capital Partners, LP v. Stratos on the availability of such a cause of action, th[e Ninth] Circuit has construed the common law to allow an unjust enrichment cause of action through quasi- the notion that unjust enrichment claims should be dismissed at the pleadings stage even if they are duplicative of other claims. See Romero, 2015 WL 2125004, at *9 (citing Fed. R. Civ. P. 8(d)(2)).

behalf of the nationwide Class based upon universal principles in equity 279. As this Romero v.

Flowers Bakeries, LLC, No. 14-CV-05189-BLF, 2016 WL 469370, at *12 (N.D. Cal. Feb. 8, 2016); In re TFT-LCD (Flat Panel) Antitrust Litig., 781 F. Supp. 2d 955, 966 (N.D. Cal. 2011) under which it brings an unj Court to determine whether

the unjust enrichment claim has been adequately pled, Plaintiff must allege the applicable law.

claim with leave to amend to assert which state law applies.

4. Claims Asserted Against Google In broad strokes, the CAC asserts three categories of claims against Google warranty claims, fraud claims, and unjust enrichment claims. The Court first addresses an argument about -of-law clause that cuts across these three categories for the non-California Plaintiffs who purchased from Google, then addresses each category individually. a. -of-Law Clause Google first seeks dismissal of claims under out-of-state laws for five non-California Plaintiffs who purchased their Nexus 6Ps from Google. Google Mot. 3. Specifically, Plaintiffs Tran, Berry, and Leone purchased their Nexus 6Ps through the Google Store, and Plaintiffs 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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Martorello and Jones purchased theirs directly from Google. CAC ¶¶ 38, 52, 70, 111, 130. Under Googl he laws of California, U.S.A. apply to these Terms, excluding Terms. Google argues that this

choice-of-law clause should be enforced against the out-of-state

Plaintiffs attempting to assert non-California based causes of action, Google Mot. 3 4, and Plaintiffs offer no meaningful response. The Court briefly examines choice-of-law clause.

One issue is whether these out-of- s Terms of Sale, a question which implicates the law of Internet-based contract formation. As the Ninth ors: -

are generally posted on the website via Nguyen v. Barnes & Noble Inc., 763 F.3d 1171, 1175 76 (9th Cir. 2014). Google submits evidence that its Terms of Sale fall in the former category because, for online purchases, customers must click a button which indicates that the customer agrees to the Terms of Sale. Gotuaco Decl. ¶ 3, ECF No. 57-2. Plaintiffs do not argue to the contrary. characteriz Nguyen, 763 F.3d at

1176; see also, e.g., Nevarez v. Forty Niners Football Co., LLC, No. 16-CV-07013-LHK, 2017 WL 3492110, at *8 (N.D. Cal. Aug. 15, 2017). The Court sees no reason to depart from those cases here, and Plaintiffs provide none.

Another issue is whether to enforce the contractual choice-of-law provision. California - of- Nedlloyd Lines B.V. v. Superior Court, 834 P.2d 1148, 1149 (Cal. 1992). Typically, choice-of-law provisions will be enforced in California unless (1) the chosen 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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state has no substantial relationship to the parties or the transaction or (2) application of the chosen would be contrary to a fundamental policy of another interested state. Id. at 1151. Neither of those exceptions is applicable in the instant case.

As to the first exception, California has a substantial relationship to defendant Google because Google has its principal place of business in California and seeks to apply California law to its sales transactions. See CAC ¶ 161. Courts have reached the same conclusion on nearly identical choice-of-law provisions being applied in nearly the same manner. See Rojas-Lozano v. Google, Inc. -of-law California has a substantial relationship to Google exception, this Court has not located or been directed to any authority where a court in Florida, Illinois, Michigan, North Dakota, or Pennsylvania has declined to apply California consumer law for public policy reasons. In fact, a court in Pennsylvania has even agreed to apply California law in ference of Bar Examiners v. Multistate

Legal Studies, Inc., 413 F. Supp. 2d 485, 488 (E.D. Pa. 2005). Without any argument to the contrary from Plaintiffs, the Court agrees with Google that its choice-of-law clause may properly be enforced against the out-of-state Plaintiffs.

implied warranty, and fraud claims of Plaintiffs Martorello, Tran, Berry, Jones, and Leone to the

extent those claims are premised on Florida, Illinois, Michigan, North Dakota, and Pennsylvania law the related state-law statutory claims namely, Plaintiff Trade Practices Act , Fla. Stat. § 501.204 et seq., CAC ¶¶ 340 51; claims under the Illinois Consumer Fraud and Deceptive Business Practices Act , 815 Ill. Comp. Stat. § 505/1 et seq., and the Illinois Uniform Deceptive Trade Practices Act , 815 Ill. Comp. Stat. § 510/1 et seq., CAC ¶¶ 352 the Michigan Consumer Protection Act , Mich. Comp. Laws § 445.903 et. seq., CAC

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N.D. Cent. Code § 51-15-01 et seq., CAC ¶¶ 444 Pennsylvania Unfair Trade Practices and Consumer Protection Law , Pa. Stat. Ann. § 201-1 et seq., CAC ¶¶ 488 Dismiss these claims with leave to amend. b. Warranty Claims Plaintiffs assert four sets of warranty claims: (1) breach of express warranty, (2) breach of the implied warranty of merchantability, (3) violation of the California Song Beverly Consumer Warranty Act, and (4) violation of the federal Magnuson Moss Warranty Act. Google moves to dismiss all four causes of action. The Court addresses each in turn.

i. Breach of Express Warranty Plaintiffs bring their first cause of action for breach of express warranty on behalf of a putative nationwide class but do not specify which law governs the claim. CAC ¶ 214. Alternatively, they assert claims for breach of express warranty on behalf of the putative statewide subclasses under the laws of the respective states. Id. ¶ 215.

Unlike with Huawei, Plaintiffs do not plead that the Nexus 6P is accompanied by an express written warranty from Google. Rather, Plaintiffs turn to statements that Google made in advertising for the Nexus 6P. In particular, the Google webpage for the Nexus 6P states that 227.a; RJN, Ex. 1. Plaintiffs also identify two other potentially relevant statements. First, the website also provides tha 227.c; RJN, Ex. 1. keeps you going all day and into 7, 227.b. 8

According to Plaintiffs, those statements are concrete promises that give rise to Pla

8 Management Director Sabrina Ellis that, under the Nexus Protect insurance package, consumers s 170, 227.d. express warranty claims because no California Plaintiff alleges purchasing the Nexus Protect insurance package. Google Mot. 6. Plaintiffs offer no response in their opposition. The Court agrees with Google that there is no express warranty based on this statement for Plaintiffs without a Nexus Protect insurance package. 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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express warranty claims 24. Google responds that none of its statements are sufficiently specific to create an express warranty, and thus the express warranty claims of all Plaintiffs should be dismissed. Google Mot. 5 9. If the express warranty claims are not dismissed on this ground, Google provides various bases applicable to different classes of Plaintiffs. As to all Plaintiffs, Google contends t advertising statements. Id. at 6 9. As to Plaintiffs that bought from Google, Google contends that Id. at 5. As to Plaintiffs that did not purchase from Google, Google contends that the lack of privity defeats their claims. Id. at 5, 8 9. Finally, as to an undefined grouping of Plaintiffs, Google claims that they did not give Google notice and an opportunity to cure. Id. at 5; Google Reply 5. The Court sorts through this tangled series of arguments by taking them one at a time.

(1) Actionable Misrepresentations Google does not dispute that an express warranty claim may be based on advertising statements. See Rice v. Sunbeam Prods., Inc., No. 12-CV-07923-CAS, 2013 WL 146270, at *11 (C.D. Cal. Jan. 7, 2013). Instead, Google contends that none of the identified statements amounts to a specific and unequivocal representation regarding the Nexus 6P. Google Mot. 5 6. Under California law, which Google asserts as representative of the other states and Plaintiffs rely on exclusively for this issue, no express warranty is created when the defendant makes [g]eneralized, vague, and unspecified assertions Azoulai v. BMW of N. Am. LLC, No. 16-CV- 00589-BLF, 2017 WL 1354781, at *8 (N.D. Cal. Apr. 13, 2017) (citation omitted); Cal. Com. Code §

constitute an actionable Azoulai, 2017 WL 1354781, at *8 (citing Southland Sod Farms v. Stover Seed Co., 108 F.3d 1134, 1145 (9th Cir. 1997)).

numerical figures with a set meaning and defines the relationship between them specifically, if 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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Google counters with a footnote hanging off its statement, which says that ife claims are approximate and based on an average mixed use profile that includes see also id. depends on many factors . . . That footnote does not undermine the specificity of the get up but merely clarifies that the contemplates normal use of the phone. In other words, a consumer who continuously streams movies on his phone should not be upset if he is unable to watch for seven hours after charging for ten minutes. But that does not preclude a consumer who engages in normal usage from reasonably expecting to get up to seven hours of use after ten minutes of charging.

Measurability is not defeated by the lies closer to that a car manufacturer did not create an express warranty in advertising language, which stated that the powertrain in its trucks - Acedo v. DMAX, Ltd., No. 15-CV-02443-MMM, 2015 WL 12696176, at *24 (C.D. Cal. Nov. 13, 2015). its conclusion on that basis alone. Id. The statement also specified that the 680-mile cluded a footnote expressly

indicating that each individual driv s . Id. hedging language. Moreover, in Acedo . Id. rranty that their phones would not experience sudden shutdowns from battery failure, not that their phones would consistently get exactly seven hours or almost seven hours of use.

In In re Toyota Motor Corp. ents convey[ed] that [the] [d] technology in their vehicles . . 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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was that the use of the advanced technology was actually contributing to the danger of sudden Id. In this way, the plaintiffs plausibly alleged breach of express warranty because the pleaded facts tatements. Id.

allegations about sudden shutdowns from battery failures. See, e.g., CAC ¶¶ [Plaintiff Makcharoenwoodhi] connected the Phone to a charger and fully charged the Phone, it would turn back on and the battery would operate for approximately 10 minutes before the battery would run out and the Phone would turn off again Phone would go from a fully charged battery to shutting down, despite being

owser the only open application). to and measurable.

By contrast, the statements that the battery life keeps you talking, texting and are not adequate to create express warranties. For one thing, neither statement discusses what length of time of charging or what level of battery charge is envisioned. Equally important, t the rest of the statement. Such vague product superiority claims cannot reasonably be interpreted

by consumers as reliable factual claims about the battery life and performance of the Nexus 6P. See Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911 F.2d 242, 246 (9th Cir. 1990) is not

puffery, including that a consumer . Punian v. Gillette Co., No. 14-CV-05028-LHK, 2016 WL 1029607, at *9 (N.D. Cal. Mar. 15, 2016).

keeps you talking, te constitute express warranties, whether taken individually or collectively. See Elias v. Hewlett- Packard Co., 95 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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o the statement, they are not properly dismissed as inactionable puffery.

(2) Basis of the Bargain and Reliance Google next contends that the Court should dismiss the express

warranty claims of all Plaintiffs because they do not adequatel Google Mot. 6 9. Like with Huawei, the relevant question is whether Plaintiffs must show

under each states express warranty law. Cal. Com. Code § 2313(1)(a) (b); Ind. Code Ann. § 26-1-2-313(1)(a) (b); N.Y. U.C.C. Law § 2-313(1)(a) (b); N.C. Gen. Stat. Ann. § 25-2-313(1)(a) (b); Ohio Rev. Code Ann. § 1302.26(A)(1) (2); Tex. Bus. & Com. Code Ann. § 2.313(a)(1) (2);

Wash. Rev. Code Ann. § 62A.2-313(1)(a) (b). That analysis plays out somewhat differently in the context of advertising statements ritten warranty.

In particular, authority from each of the pertinent states supports the proposition that, at a minimum, the plaintiff must plead that he was aware of the advertising statements, though some cases state that principle more explicitly than others. See Osborne v. Subaru of Am., Inc., 243 Cal. Rptr. 815, 824 (Ct. App. 1988) (California); Royal Bus. Machs., Inc. v. Lorraine Corp., 633 F.2d 34, 44 & n.7 (7th Cir. 1980) (Indiana); CBS Inc., 553 N.E.2d at 1001 (New York); Harbor Point, 697 S.E.2d at 447 (North Carolina); Rogers v. Toni Home Permanent Co., 147 N.E.2d 612, 615 16 (Ohio 1958) (Ohio); Lapray, 135 S.W.3d at 676 (Texas); Reece, 953 P.2d at 123 (citing Arrow

Transp., 454 P.2d at 390) (Washington). There is a logical basis for states to have different standards for written warranties and advertising representation e.g., advertising statements) form

part of the express warranty; i.e., where the representations are used by the plaintiff to define the In re MyFord, 2015 WL 5118308, at *6 (emphasis deleted) (interpreting Washington law).

Plaintiffs challenge this conclusion only with respect to California law, arguing that 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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Although, as described above, the California Weinstat makes clear that a plaintiff need not plead reliance on individual representations, California law still requires the plaintiff to plead exposure to the advertising. See Rosales v. FitFlop USA, LLC, 882 F. Supp. 2d 1168, 1178 (S.D. Cal. 2012) oes require . Indeed, o authorities explains that, at the motion to dismiss stage, plaintiffs need not allege reliance but must aware of the statements made in a national advertising In re Toyota Motor Corp., 754 F. Supp. 2d at 1182 83 & n.22.

Thus, the operative question is whether Plaintiffs have adequately alleged that they became exposure to its advertising. Plaintiffs do not clear that hurdle simply by alleging in a conclusory manner Class members were exposed to - an

228. The Court must s actionable promotional promises. For convenience, the Court groups Plaintiffs by controlling state law.

(a) California The three California Plaintiffs and the five out-of-state Plaintiffs who purchased from Google (Plaintiffs Martorello, Tran, Berry, Jones, and Leone) are subject to California law. Six of these Plaintiffs Plaintiffs Makcharoenwoodhi, Gorbatchev, Christensen, Martorello, Berry, and Jones do not allege that they saw any advertising statements; instead, they merely allege that they purchased the Nexus 6P. CAC ¶¶ 12 51, 70 78, 111 18. The remaining two Plaintiffs plead facts about advertising, but those allegations still are insufficient. Though the CAC alleges that

9 sertions with respect to the other states because, in -California Plaint out-of-state Plaintiffs who purchased from Google and are subject to the choice-of-law provision See Google Mot. 3 4, 6. 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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le Nexus 6P had a superior id. ¶ 52, it does not identify which advertisements he observed. That fact matters because the tatement is sufficiently specific and measurable at this stage to create an express warranty. As to Plaintiff Leone, the

th Id. ¶ 129. But Plaintiffs do

Accordingly, the Court G express warranty claims of Plaintiffs Makcharoenwoodhi, Gorbatchev, Christensen, Martorello, Tran, Berry, Jones, and Leone with leave to amend to allege which advertisements they saw.

(b) Indiana Indiana Plaintiff on this ground. The CAC states [Plaintiff] to purchase this Phone. 59. But the CAC does not present is not alleged that Plaintiff Beheler received that information from advertising at all, let alone the

to amend to allege which advertisements he saw.

(c) New York The CAC does not allege that New York Plaintiff Davydov saw or relied on the advertising . CAC ¶¶ 79 89.

Plaintiff Davydov with leave to amend to allege which advertisements he saw.

(d) North Carolina Like with New York Plaintiff Davydov, the CAC does not allege that North Carolina 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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express warranty claims. CAC ¶¶ 99 110. The allegations with respect to the other North Carolina Plaintiff, Harrison, are more detailed but still unsatisfactory. Specifically, Plaintiff wing of

-of-the- Id. ¶ 91. Nonetheless, that language does not appear in the . Nor does the CAC otherwise nail down what particular advertising or statements Plaintiff Harrison encountered. Accordingly, Plaintiffs Harrison and Himes with leave to amend to allege which advertisements they saw.

(e) Ohio The CAC does not allege that Ohio Plaintiff Servodio saw or relied on the advertising . CAC ¶¶ 119 27.

Plaintiff Servodio with leave to amend to allege which advertisements he saw.

(f) Texas Like with Ohio Plaintiff Servodio, the CAC does not allege that Texas Plaintiff Poore saw claims. CAC ¶¶ 142 express warranty claim of Plaintiff Poore with leave to amend to allege which advertisements he

saw.

(g) Washington Finally, the CAC alleges that Washington

ed the Phone in part on the basis of 153. For many of the same reasons noted above, that allegation is not enough. Because the CAC does not pinpoint which advertisements Plaintiff Johnston has seen, there is no way to tell whether they 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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Motion to Dismiss the express warranty claim of Plaintiff Johnston with leave to amend to allege which advertisements he saw.

In sum, the Court GRA express warranty claims with leave to amend.

(3) Disclaimer In its motion to dismiss, Google appears to separately contend that Plaintiffs who purchased from Google namely, Plaintiffs Gorbatchev, Martorello, Tran, Berry, Jones, and Leone, CAC ¶¶ 19, 38, 52, 70, 111, 130 are barred from pursuing an express warranty claim based ale. Google Mot. 5.

. . EXPRESSLY DISCLAIM[S] ALL WARRANTIES AND CONDITIONS OF

is incorrect.

uct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but . . . negation or limitation is inoperative to the extent that such const 2316(1). . . is inconsistent with an express warranty, words of disclaimer . . . give way to words of warranty unless some clear agreement between the parties dictates the contrary relati Hauter, 534 P.2d at 386; see also Arroyo v. TP-Link USA Corp., No. 14-CV-04999- EJD, 2015 WL 5698752, at *10 (N.D. Cal. Sept. 29, 2015). In its reply, Google appears to ition is that it sufficiently specific and measurable at this stage of the proceedings to create an express warranty,

these Plaintiffs may rely on that statement to support their express warranty claim. 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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(4) Privity Google next makes a species of privity argument in favor of dismissing the express warranty claims of all Plaintiffs who did not purchase from Google. Google Mot. 5, 8 9. In particular, Google suggests that it is not covered by the state statutory language requiring an . Code § 2313(1)(a); Ind. Code Ann. § 26-1-2-313(1)(a); N.Y. U.C.C. Law § 2-313(1)(a); N.C. Gen. Stat. Ann. § 25-2-313(1)(a); Tex. Bus. & Com. Code Ann. § 2.313(a)(1); Wash. Rev. Code Ann. § 62A.2-313(1)(a). Because Google develops this argument only with respect to California and Indiana law, see Google Mot. 5, 9; Google Reply 4, the Court performs the analysis under these state laws.

(a) California As a general matter, California law requires privity of contract in an action for breach of express warranty. Burr v. Sherwin Williams Co., 268 P.2d 1041, 1048 (Cal. 1954); Blanco v. Baxter Healthcare Corp., 70 Cal. Rptr. 3d 566, 582 (Ct. App. 2008) (stating that privity of

sell Burr, 268 P.2d at Id. at 1049. The California courts appear to fit many

cases within Hauter, 534 P.2d at 383 n.8 (citing Seely v. White Motor Co., 403 P.2d 145, 148 (Cal. 1965)); Cardinal Health 301, Inc. v. Tyco Elecs. Corp., 87 Cal. Rptr. 3d 5, 27

deemed fair to impose responsibility on one who makes affirmative claims as to the merits of the

allegations are sufficient to invoke the privity exception with respect to Google. The CAC alleges that Google and Huawei worked together to create the Nexus 6P and that Google developed the software. CAC ¶ 165. Moreover, Google released the phone for pre-order and sold the phone through its own Google Store. Id. ¶¶ 166, 193. Finally, Google made claims about the phone at 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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the launch event, id. ¶ 169, and made specific statements about the phone in advertising on its website, id. ¶ 227. It is of no moment that the examples cited in Burr all involved statements by a manufacturer in labels or advertising material. 268 P.2d at 1049. The justification for the

to impose responsibility on one who makes affirmative claims as to the merits of the product, upon Cardinal Health 301, 87 Cal. Rptr. 3d at 27.

about the phone, the Court sees no convincing reason to absolve Google of all liability for express warranties to non-purchasers. Accordingly, this is not an appropriate basis on which to dismiss

(b) Indiana Although the default rule under Indiana law privity is required Atkinson v. P & G-Clairol, Inc., 813 F. Supp. 2d 1021, 1026 (N.D. Ind. 2011), that rule is not absolute. In Prairie Production, Inc. v. Agchem Division- Pennwalt Corp., 514 N.E.2d 1299, 1302 (Ind. Ct. App. 1987), the Indiana Court of Appeals held that, on the facts of the case, the plaintiff was not precluded from suing the defendant for breach of express warranty even though the parties were not in privity. In particular, the court permitted the plaintiff to sue the remote manufacturer where the manufacturer had made affirmations about the products in advertising. Id. at 1303. The court explained that discarding the privity requirement was justified in these circu quality of their products in . .

Id. at 1302 03. More recently, the Indiana Supreme Court relatedly ruled that vertical privity is not a necessary condition for a consumer to bring an implied warranty of merchantability claim against a manufacturer. See Hyundai Motor Am., Inc. v. Goodin, 822 N.E.2d 947, 959 (Ind. 2005).

warranty claim is not barred by failure to adequately plead privity. Like the manufacturer in Prairie Production, Google here made affirmations about the Nexus 6P in advertising. The Court 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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has already determined that one of those statements was a specific and measurable promise. Even if the CAC does not sufficiently plead that Google is a manufacturer, the rationale of Prairie Production extends to this case. The CAC establishes that Google had significant involvement in the development of the Nexus 6P and advertised the virtues of the phone on its website in statements directed to consumers to induce them to buy the product. CAC ¶¶ 165 66, 169, 193, 227. On these facts, it is proper to discard the privity requirement. Accordingly, this is not an

(5) Notice and Opportunity to Cure

in the [California] Plaintiffs do not allege reliance or pre-suit notice, as the law requ equally

unilluminating, stating that the letters of certain Plaintiffs were insufficient to put Google on notice. Google Reply 5. In these filings, Google nowhere indicates what law should apply, provides the relevant contours of the legal landscape, or clearly states which Plaintiffs are affected. Given the potential variances among the states and Plaintiffs (as indicated by the analysis with respect to Huawei) s bare assertion that notice provides

ii. Breach of Implied Warranty of Merchantability on behalf of a putative nationwide class under an unspecified law or, alternatively, on behalf of the

putative statewide subclasses under the laws of the respective states. CAC ¶¶ 235 ones were of a merchantable live up to that guarantee Id. ¶

arguments are split between Plaintiffs who purchased from Google and Plaintiffs who did not. For the former group, Google contends that these Plaintiffs are barred by the explicit disclaimer of the implied warranty of merchantability in its Terms of Sale. Google Mot. 5. For the latter, Google contends that these Plaintiffs have failed to adequately plead privity. Id. at 11 13. 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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(1) Disclaimer and Unconscionability Google first contends that the implied warranty claims of Plaintiffs Gorbatchev, Martorello, Tran, Berry, Jones, and Leone who purchased their Nexus 6Ps from Google, CAC ¶¶ 19, 38, 52, 70, 111, 130 are barred erms of Sale. Google Mot. 5. In relevant part, state . . . EXPRESSLY DISCLAIM[S] ALL WARRANTIES AND CONDITIONS OF ANY KIND, WHETHER EXPRESS OR IMPLIED, REGARDING ANY DEVICES, INCLUDING ANY IMPLIED WARRANTIES OF MERCHANTABILITY actual or constructive notice of G adequately

29. Neither argument is persuasive.

First, Plaintiffs suggest that Google has not carried its burden of establishing that the affirmative defense of disclaimer applies. Id. at 27 28. But Sale demonstrates a valid disclaimer, and Plaintiffs have not identified any allegation in the CAC

that undercuts its application to this set of Plaintiffs. Under California law, a written disclaimer of the implied warranty of merchantability must mention merchantability and be conspicuous. Cal. Com. Code § merchantability in accordance with California law because Defects; the Terms provide in clear language and capitalized

expr The disclaimer is in all capital letters while the surrounding text is in lower case font of the same size, and the disclaimer is one of only two places in the entirety of the Terms of Sale that uses capitalized lettering. In these circumstances, the Court concludes that the disclaimer is conspicuous.

See Cal. Com. Code § . . . in contrasting type, font, or

. . in contrasting type, font, or color to the surrounding text of the same size, or set off from surrounding text of the same size by symbols or Courts in this district have found that very 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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similar disclaimers barred implied warranty claims. See Minkler v. Apple, Inc., 65 F. Supp. 3d 810, 819 (N.D. Cal. 2014) (barring an implied warranty claim b ALL STATUTORY AND IMPLIED WARRANTIES, INCLUDING WITHOUT LIMITATION, WARRANTIES OF MERCHANTABILITY In re Google Phone Litig., No. 10-CV-01177- EJD, 2012 WL 3155571, at *8 (N.D. Cal. Aug. 2, 2012) (barring an implied warranty claim based ALL WARRANTIES AND CONDITIONS OF ANY KIND, WHETHER EXPRESS OR IMPLIED, REGARDING ANY DEVICES, INCLUDING ANY IMPLIED WARRANTIES OF MERCHANTABILITY

Plaintiffs attempt to overcome this conclusion by challenging whether Plaintiffs had actual a disclaimer is valid only if Burr, 268 P.2d at 1047. The problem conflicts requires

ny disclaimer of implied warranties by Google was unconscionable are consistent with Googl evidence, which provides that customers had to click a button to complete their online purchases and that, next to the button, there was language advising that customer that clicking indicated Decl. ¶ 3. Plaintiffs do not otherwise allege that they did not see or understand the disclaimer. Thus, this case is unlike the one cited by Plaintiffs where the allegations established that the plaintiff did not have a reasonable opportunity to view the disclaimer prior to purchase. See Clark v. LG Elecs. U.S.A., Inc., No. 13-CV-00485-JM, 2013 been no way for Plaintiff to have noticed the disclaimer prior to receiving the product manual

Second, Plaintiffs contend that, even if the disclaimer is binding, the CAC adequately pleads that the disclaimer is unconscionable. As explained earlier, under California law, a contract 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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both procedurally and In re iPhone, 2011 WL 4403963, at *7 (citing Armendariz, 6 P.3d at 690). The procedural element focuses on oppression and surprise, while the substantive element examines whether the terms of the agreement are so overly harsh or one-sided as to shock the conscience. Aron, 49 Cal. Rptr. 3d at 564.

Plaintiffs contend that the disclaimer is unconscionable because Google and its customers are in an unequal bargaining position 261. On the latter point, the Court has alrea

allegations are insufficient. That conclusion significantly weakens the former point that Google had superior bargaining power. See In re Sony Grand Wega, 758 F. Supp. 2d at 1101 (rejecting argument that defendant had superior bargaining power where plaintiffs had not sufficiently alleged that the defendant knew of the defect before the point of sale). Even if the terms of the disclaimer are non-negotiable, Plaintiffs do not plead that they had no meaningful alternatives; they could have purchased other phones or obtained an additional warranty from Google. Davidson, 2017 WL 976048, at *12. Moreover, the CAC does not allege that Plaintiffs were disclaimer G Sale online at the time of purchase. See id.

Plaintiffs make no further allegations to support their claim of substantive unconscionability. Plaintiffs repeat and reemphasize that Google knew of and concealed the defects at the time that 29; CAC ¶ a defective product without disclosing the Defects, while affirmatively misrepresenting purported . Again, Plain allegations are insufficient to establish that conclusion. In their opposition, Plaintiffs also slightly change course from their complaint, asserting that a disclaimer may be substantively unconscionable any time a product is unfit for its intende Clark, 2013 WL 5816410, at *13, inability to use the LG refrigerator for its intended purpose suggests that substantive unconscionability may exist 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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somewhat odd, as it works to invalidate a disclaimer of the implied warranty whenever the -sided results as to

Aron, 49 Cal. Rptr. 3d at 564 (internal quotation marks and citation omitted).

Based on the allegations in the CAC, is not unconscionable, and the disclaimer is enforceable. Accordingly, Plaintiffs have not stated a claim for breach of the implied warranty of merchantability for express warranty for Plaintiffs Gorbatchev, Martorello, Tran, Berry, Jones, and Leone. The Court GRANTS Google implied warranty claim of Plaintiffs Gorbatchev, Martorello, Tran, Berry, Jones, and Leone with leave to amend to lack of notice and unconscionability arguments.

(2) Privity For the remaining Plaintiffs who did not purchase from Google namely, Plaintiffs Makcharoenwoodhi, Christensen, Beheler, Davydov, Harrison, Himes, Servodio, Poore, and Johnston, CAC ¶¶ 12, 28, 58, 79, 91, 99, 119, 142, 153 Google argues that their claims must be dismissed for failure to plead privity. Google Mot. 11 13. Even for the states that do not require a strict showing of privity, Google draws on the common-sense notion that, because an implied warranty of merchantability is e[] sale [of goods] if the seller is a merchant with respect to goods 2-314(1), a defendant cannot be liable unless it has sold the goods in question. Google Mot. 11. claims may be sustained under the third-party beneficiary exception to the privity requirement. 33.

Most of the relevant states require privity of contract to state a claim for breach of the implied warranty of merchantability. See, e.g., Clemens, 534 F.3d at 1024; Curl v. Volkswagen of Am., Inc., 871 N.E.2d 1141, 1147 (Ohio 2007); Tex Enters., Inc. v. Brockway Standard, Inc., 66 lanket assertion that s were in privity of contract with . . . Google by virtue of their interactions with . . . Google, 242, is not plausible when some of the relevant Plaintiffs are 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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not alleged to have had any interactions with Google. See, e.g., id. ¶¶ 12 18 (alleging that Plaintiff Makcharoenwoodhi contacted Huawei but not Google), 90 98 (alleging that Plaintiff Harrison contacted Huawei but not Google).

Even for the states that have abandoned the privity requirement for implied warranty claims, see, e.g., Pack, 434 F.3d at 820 (Michigan); Goodin, 822 N.E.2d at 959 (Indiana), Google notes that the defendants in those cases had sold the products at some point in the distribution chain, see, e.g., Gared Holdings, LLC v. Best Bolt Prod., Inc., 991 N.E.2d 1005, 1016 (Ind. Ct. App. 2013) (emphasizing that the defendant had made multiple sales and was willing to sell to prospective buyers). The requirement that the defendant has sold the product at issue flows naturally from the statutory language, which provides that an implied warranty of merchantability claim arises in a contract for the sale of goods by a merchant seller of those goods. See UCC § 2- 314(1); see also Ind. Code Ann. § 26-1-2-314(1) (same); Mich. Comp. Laws Ann. § 440.2314(1) (same). The CAC does not satisfy this requirement because it nowhere provides that Google sold the Nexus 6Ps to the retailers from whom Plaintiffs purchased. Although the CAC states that . CAC ¶ 168, it fails to distinguish between Google and Huawei. Indeed, without more factual

detail, it would be implausible to conclude that both Google and Huawei sold the same physical phones through retailers. See Garcia v. M-F Athletic Co., No. 11-CV-02430-WBS, 2012 WL

Plaintiffs attempt to steer around these roadblocks by resort to the third-party beneficiary exception to the privity requirement. CAC ¶ 242; 33. As noted above, the third-party beneficiary exception allows a plaintiff to enforce a contract made expressly for his or her benefit. See Cal. Civ. Code § 1559. Nevertheless, the plaintiff must identify and plead a contract between the defendant and a third party which was expressly made for the benefit of the plaintiff. See Schauer, 23 Cal. Rptr. 3d at 239; Cartwright v. Viking Indus., Inc., 249 F.R.D. 351, 356 (E.D. Cal. 2008). Plaintiffs have failed to do so here. 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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Specifically, Plaintiffs plead that they -party beneficiaries of the implied warranties ¶ 242. Even

shelving the ever-persisting issue of lumping Google with Huawei, Plaintiffs do not

plead that Google had contracts to sell the Nexus 6P to retailers, such as Best Buy, Newegg, and Amazon. The sole But Plaintiffs cannot use that warranty as an agreement with Google to benefit customers.

Because Plaintiffs have not done so, they have not pleaded sufficient facts to make use of the third-party beneficiary exception.

ty of merchantability claims of Plaintiffs Makcharoenwoodhi, Christensen, Beheler, Davydov, Harrison, Himes, Servodio, Poore, and Johnston with leave to amend to allege further facts about a privity relationship or an agreement between Google and a third-party that is intended for the benefit of these Plaintiffs.

iii. Song Beverly Consumer Warranty Act The California Plaintiffs assert a cause of action under the Song Beverly Act, Cal. Civ. Code §§ 1791.1, 1792, on behalf of the California subclass. CAC ¶¶ 284 96. As to individual Plaintiffs, Google

claim should be dismissed because he has not plausibly alleged unmerchantability. Google Mot. 13. Google also puts forward a basis on which the claim should be dismissed that applies to all three California Plaintiffs namely, that Plaintiffs do not allege that they purchased their phones in California. Id. The Court marches through each of these three arguments.

(1) Manufacturer or Retail Seller because they did not purchase from Google. The Song Beverly Act generates an implied

warranty of merchantability by manufacturers and retail sellers. Cal. Civ. Code § 1792. Google argues that the CAC does not establish that Google counts as either a manufacturer or retail seller 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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of the Nexus 6P as to Plaintiffs Makcharoenwoodhi and Christensen. Google Mot. 13 14.

esent allegations, Google is neither manufacturer retail Plaintiffs Makcharoenwoodhi and Christensen. individual, partnership, corporation, association, or other legal relationship that manufactures,

Cal. Civ. Code § 1791(j). At multiple places in the CAC (including the section asserting the Song Beverly Act claim), the CAC labels Huawei as the See CAC ¶¶ manufacturer of the Nexus 6P smartphones within the meaning of Cal. Civ. Code § make any such allegations as to Google and

does Plaintiffs

Id. ¶ 165.

Makcharoenwoodhi and Christensen. retail , partnership, corporation, association, or other legal relationship that engages in the business of selling or leasing consumer goods to retail buyers. Cal. Civ. Code § 1791(l). Dagher v. Ford Motor Co., 190 Cal. Rptr. 3d 261, 269 (Ct. App. 2015) (citation omitted). Although Google and Huawei both

165, 168, Google did not sell the Nexus 6P to the end consumers at issue here. Rather, Plaintiff Makcharoenwoodhi bought from Best Buy, and Plaintiff Christensen bought from Huawei. Id. ¶¶ 12, 28. Plaintiffs make no other

Accord Beverly Act claims of Plaintiffs Makcharoenwoodhi and Christensen with leave to amend to allege further 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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(2) Merchantability Google next challenges the sufficiency of the allegations as to the unmerchantability of warranty of merchantability Am. Suzuki, 44 Cal. Rptr. 2d at 529 (citation omitted). The key inquiry Mexia, 95 Cal. Rptr. 3d at 289 (citation omitted). Under that test, an alleged defect must const In re Carrier IQ, 78 F. Supp. 3d at 1108; see also Mocek v. Alfa Leisure, Inc. reach of the implied warranty of merchantability means the product did not possess even the most basic degree

meet these requirements. The CAC first alleges th Gorbatchev regularly experienced incidents in which it would suddenly shut down and restart

20. The CAC then goes on to say that, on Ma Gorbatchev was trying to call an Uber, his phone froze and restarted, then cycled through this

process for the rest of the day without ever proceeding beyond the Google logo screen. Id. ¶ 21. again. Id. ¶ was unfit for ordinary use. After the Bootloop Defect manifested, Plaintiff Gorbatchev could not

use any of the basic functions of his phone, such as placing calls, sending texts, or using apps. Id. ¶ 175. Accordingly, failure to plead unmerchantability is not an appropriate basis on which to dismiss the express warranty claim of Plaintiff Gorbatchev.

(3) Location of Purchases As discussed above with respect to Huawei, the California Beverly Act claim must be dismissed because Plaintiffs have failed to allege the necessary element of whether 1 2

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to Dismiss the Song Beverly Act claim with leave to amend to assert where the phone purchases took place.

iv. Magnuson Moss Warranty Act Moss Warranty Act, 15 U.S.C. § 2301 et seq., presumably on behalf of the nationwide class. CAC ¶¶ 249 67. With one caveat, t r the Magnuson Moss Act stand or fall with [the] Clemens, 534 F.3d at 1022. As for the caveat, Plaintiffs contend that where a state-law breach of implied warranty claim insufficiently alleges privity, an implied warranty claim under the Magnuson Moss Warranty Act may proceed inapplicable because Plaintiffs have not alleged that Google issued a written warranty that complies with the requirements of the Magnuson Moss Warranty Act. See Szajna v. Gen. Motors Corp. Moss written warranty has been given, Magnuson Moss has no effect upon State-law privity requirements . . Magnuson Moss Warranty Act survive only if the

underlying state-law express or implied warranty claims do.

The Court has dismissed all of the express and implied warranty claims against Google. Accordingly, the Court GRANTS Google Moss Warranty Act claims of all Plaintiffs with leave to amend.

c. Fraud and Deceptive Practices Claims Plaintiffs assert a common-law claim for deceit and fraudulent concealment and fraud claims under various state statutes. The Court first addresses the common-law claim, then analyzes each of the remaining state statutory claims.

i. Deceit and Fraudulent Concealment Plaintiffs assert a cause of action for deceit and fraudulent concealment on behalf of each of the twelve statewide subclasses. CAC ¶ 269. opposition, every state-law regarding the Nexus 6P because Google 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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reasonable diligence should have known) of the Defects, but failed to disclose them prior to or at Id. ¶ reasons already stated, the CAC does not sufficiently plead that Google had knowledge of the Bootloop or Battery Drain Defect at the time that Plaintiffs acquired their Nexus 6Ps. Accordingly, the Court udulent concealment claims with leave to

ii. California Consumers Legal Remedies Act The California Plaintiffs bring a claim under the CLRA, Cal. Civ. Code § 1780, on behalf of the California subclass. CAC ¶ 310. Google seeks dismissal on a procedural ground namely, the failure to submit the affidavit under § 1780(d) and on substantive

grounds namely, failure to state a claim. Google Mot. 15 18. The Court addresses these grounds in turn.

(1) Procedural Ground Courts must dismiss without prejudice CLRA claims that are unaccompanied by affidavit stating facts showing that the action has been commenced in a county described in this

section as a proper place for the trial of the action. Cal. Civ. Code § 1780(d). As noted above, this Court requires the submission of such an affidavit. See Romero, 2015 WL 2125004, at *8. the Court GRANTS Google affidavit.

(2) Substantive Grounds

practices undertaken by any person in a transaction intended to result or that results in the sale . . . e § 1770(a). The CAC advances two distinct First, the CAC charges that Google committed fraud by omission because it had a duty to disclose its knowledge of the defects. CAC ¶¶ 318 19. Second, the CAC avows that Google affirmatively misrepresented the qualities of the Nexus 6P despite knowing of the defects. Id. ¶¶ 321 awareness of the defects at the time of sale, which Plaintiffs have not adequately pled. 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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Accordingly, the Cour amend to allege further facts about Goog

The Court also briefly addresses Google other arguments that neither the fraudulent omissions theory nor the affirmative misrepresentation theory is well-pled. Google Mot. 16 17.

(a) Fraudulent Omissions fraudulent omissions theory avers that Defects because Huawei and Google had exclusive knowledge of the Defects prior to making sales

of Phones and because Defendants made partial representations about the quality of the Phones, but failed to fully disclose the Defects 319. As the claim for failing to disclose a defect, a party must allege . . . the existence of an unreasonable

Williams, 851 F.3d at 1025. Plaintiffs do not offer unreasonable-safety-hazard allegations specific to Google that go beyond those alleged as to Huawei. For the same reasons stated the Court GRANTS Google claim to the extent it is

predicated on a fraudulent omissions theory with leave to amend to allege whether the defects pose an unreasonable safety hazard.

(b) Affirmative Misrepresentation that Google made false statements about the Nexus 6P even though Google was aware that the phones were suffering from the Bootloop and Battery Drain Defects. CAC ¶ 322. Plaintiffs point to the same three statements that the Court analyzed above for Plai t keeps you talking, te statement, and the go Id. ¶ 321. Although Google asserts that these three statements are not actionable, Google Mot. 16, the standard under the CLRA is identical to the standard for an express warranty. See Azoulai, 2017 WL 1354781, at *8 (analyzing CLRA and express warranty statement is adequately specific and measurable holds here.

and ultimately meritorious challenge is that Plaintiffs fail to 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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plaintiff must allege that h as a result. See Sateriale v. R.J. Reynolds Tobacco Co., 697 F.3d 777, 794 (9th Cir. 2012)

onsumers seeking to recover damages under the CLRA based on a fraud theory must prove actual reliance on the misrepresentation and harm. citation omitted)); Durell v. Sharp Healthcare, 108 Cal. Rptr. 3d 682, 697 (Ct. App. 2010) (concluding that complaint was properly relied on any representation by Furthermore, when CLRA claims are premised on misleading advertising statements, the pleading standard in particular circumstance Kearns v. Ford Motor Co., 567 F.3d In re Arris Cable Modem Consumer Litig., No. 17-CV-

01834-LHK, 2018 WL 288085, at *8 (N.D. Cal. Jan. 4, 2018).

Plaintiffs do not come close to fulfilling that high burden here. The CAC does not allege that any of the California Plaintiffs saw any advertising about the Nexus 6P at all, let alone that t 12 37. Generally, an account of the time, place, and specific content of the false representations as well as the identities of the part Swartz v. KPMG LLP, 476 F.3d 756, 764 (9th Cir. 2007) (internal quotation marks and citation omitted); Vess v. Ciba-Geigy Corp. USA

mi

actually saw and relied upon.

iii. California Unfair Competition & False Advertising Laws The California Plaintiffs assert claims under the UCL, Cal. Bus. & Prof. Code § 17200 et seq., and under the FAL, Cal. Bus. & Prof. Code § 17500 et seq., on behalf of the California 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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subclass. CAC ¶¶ 298, 333. Google first contends that Plaintiffs cannot sustain either the UCL or FAL claim because they have not shown entitlement to equitable relief. Google Mot. 20 21. Google then makes arguments specific to the UCL and FAL claims. Id. at 21 24. The Court first arguments about each individual claim.

(1) Entitlement to Equitable Relief The only forms of relief that a private individual may pursue under the UCL and FAL are the equitable remedies of restitution and injunctive relief. Korea Supply Co., 63 P.3d at 943 (UCL); Chern v. Bank of Am., 544 P.2d 1310, 1315 (Cal. 1976) (FAL). Google presses three arguments that Plaintiffs have not adequately pled entitlement to these equitable remedies. First, Google argues that none of the California Plaintiffs has standing to seek injunctive relief. Google Mot. 21. Second, Google argues that Plaintiffs Makcharoenwoodhi and Christensen have not adequately pled entitlement to restitution. Id. Third, Google argues that Plaintiffs have not shown that there is no adequate remedy at law available. Id. at 20. The Court proceeds through each of these arguments.

(a) Standing to Seek Injunctive Relief Article III standing to seek injunctive relief. issued a decision bearing on the question. In Davidson v. Kimberly-Clark Corp., 873 F.3d 1103,

1107 (9th Cir. 2017), the defendants marketed and sold pre-moistened wipes as suitable for flushing down a toilet, but the The plaintiff brought UCL and FAL claims, which sought both restitution and an injunction. Id. at

1108. The district court dismissed the claims for injunctive relief, finding that the plaintiff lacked standing because she was unlikely to purchase the wipes in the future. Id. at 1109.

The Ninth Circuit reversed. The court resolved the open question deceived consumer who brings a false advertising claim can allege that her inability to rely on the

advertising in the future is an injury sufficient to grant her Article III standing to seek injunctive Id. at 1113. Specifically, the court held that consumers can have standing to pursue 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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injunctive relief in at least two circumstances:

in the future, and so will not purchase the product although she would like to. In other cases, t that she might purchase the product in the future, despite the fact it was once marred by false advertising or labeling, as she may reasonably, but incorrectly, assume the product was improved. Id. at 1115. that she wanted to purchase the defendants flushable wipes in the future but that she could not rely on the defendants representation with any confidence. Id. at 1116.

guidance in Davidson, it will come as no allegations are deficient. The CAC does not fit either of the two scenarios countenanced by the Ninth Circuit because there is no pleading that the California Plaintiffs would

might purchase in the future on the belief that the product has been improved. See CAC ¶¶ 12 37, 297 308, 332 39 even concedes that their allegations are lacking on the latter point Because Davidson was unavailable at the time that Plaintiffs were drafting their CAC and writing their opposition, they also have not presented any other theory about how 873 F.3d at 1115 (quoting Summers v. Earth Island Inst., 555 U.S. 488, 493 (2009)). In their

amended allegations, Plaintiffs will have the opportunity to make that showing.

claims for injunctive relief with leave to amend to allege further facts about Plainti non- speculative threat of future harm.

(b) Entitlement to Restitution Google contends that Plaintiffs Makcharoenwoodhi and Christensen, who did not purchase from Google, have not adequately pled entitlement to restitution because the CAC does not allege

Mot. 21. 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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from a defendant with whom the plaintiff did not deal dir Shersher v. Superior Court, 65 Cal. Rptr. 3d 634, 640 (Ct. App. 2007); see also Cty. of Solano v. Vallejo Redevelopment Agency,

money be paid directl to recover from a defendant from whom the plaintiff did not purchase, the plaintiff must trace his See Shersher, 65 Cal.

money); Cheverez v. Plains All Am. Pipeline, LP, No. 15-CV-04113-PSG, 2016 WL 4771883, at *3 (C.D. Cal. Mar. 4, 2016).

These standards compel dismissal of Plaintiffs Makcharoenwoodhi and Christensen claims for restitution. The allegations as to Plaintiff Christensen clearly fall flat. The CAC alleges that Plaintiff Christensen purchased his Nexus 6P directly from Huawei. CAC ¶ 28. The CAC makes no further effort to identify how that money came into Google as a result of Plaintiff s purchase. The allegations as to Plaintiff Makcharoenwoodhi come closer but do not warrant a different conclusion. According to the CAC, Plaintiff Makcharoenwoodhi purchased his Nexus 6P from Best Buy. Id. ¶ 12. Google is alleged to have a ants sell the Phones to consumers . . . through authorized retailers, including . . Id. ¶ 168. While it may be plausible to see Shersher, 65 Cal. Rptr. 3d at 641, the waters

are more muddied here. In particular, by treating Google and Huawei as a single unit without elevant actor. In these circumstances,

Christensen has adequately pled entitlement to restitution.

Accordingly, Plaintiffs Makcharoenwoodhi and Christensen claims for restitution with leave to amend to allege further 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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facts about

(c) Adequate Remedy at Law , and broadest, contention is that Plaintiffs cannot seek equitable remedies because they have available an adequate remedy at law namely, compensatory damages for the same alleged conduct. Google Mot. 20. Of course, it is axiomatic that a plaintiff seeking equitable relief must establish that he has no adequate legal remedy. Philpott v. Superior Court, 36 P.2d 635, 638 (Cal. 1934); Prudential Home Mortg. Co. v. Superior Court, 78 Cal. Rptr. 2d 566, 573 (Ct. App. 1998) (applying these fundamental equitable principles in the context of a UCL claim). to fail, the Court concludes that dismissal is proper at this juncture.

In addition to retrospective 308. That

injunctive relief is asserted on behalf of the class and, if granted, would accrue to the benefit of the public at large. See id. ¶¶ 208(h) (requesting injunctive relief for Plaintiffs and class members), Class members, making final injunctive relief . . . appropriate with respect to the Class as a

award of damages. See Cal. Bus. & Prof. Code §§ 17203 (allowing plaintiff to pursue representative claims for injunctive relief on behalf of similarly situated individuals), 17205 (noting that UCL remedies are cumulative . . . to the remedies or penalties available under all e public unless he is individually entitled to such relief. See Hodgers-Durgin v. de la Vina, 199 F.3d 1037,

injunctive relief, they may not represent a class see Rhynes v. Stryker Corp., No. 10-CV-05619-SC, 2011 WL 2149095, at *4 (N.D. Cal. May 31, 2011). Because the Court has presently determined that the California Plaintiffs have not adequately pled standing to seek injunctive relief, their prayer for injunctive relief on behalf of the entire class must also fail.

Accordingly, the Court 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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UCL and FAL claims with leave to amend to allege further facts about Plaintiffs standing to seek injunctive relief.

(2) UCL Having considered the arguments applicable to both the UCL and FAL claims, the Court next addresses the UCL claim. As noted above, the UCL provides three distinct grounds for liability: a business practice cannot be (1) unlawful, (2) unfair, or (3) fraudulent. See Cal. Bus. & Prof. Code § 17200; Pastoria, 6 Cal. Rptr. 3d at 153. Plaintiffs contend that Google violated all three prongs. CAC ¶¶ 300 01, 303. Google, however, argues that the CAC does not adequately allege that its conduct was unlawful, unfair, or fraudulent. Google Mot. 21 24.

(a) Unlawful Business Act or Practice Google of the Magnuson Moss Warranty Act, the Song Beverly Act, the CLRA, and the FAL and on . CAC ¶ 300. ws and treats them as unlawful practices that Wilson, 668 F.3d at 1140 (quoting Cel- , 973 P.2d at 539 40). Because the Court concludes that the California Plaintiffs have not stated a claim against Google under any of these statutes or causes of action, they have not stated a claim against Google Accordingly, the Court GRANTS Google unlawful prong with leave to amend.

(b) Unfair Business Act or Practice that is not limited to business practices that are proscribed by some other law. Korea Supply Co., 63 P.3d at 943. As noted ab Lozano, 504 F.3d at 735 36. Plaintiffs advocate for the South Bay balancing test or the FTC Act

Google contends that Plaintiffs m fails under either test. Google Mot. 22; see also [N]one of the five acts [California] Plaintiffs identify as the 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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balancing test . . .

302, fails

knowingly sold defective phones, (2) refused to repair or replace phones when the defects

manifested outside the warranty period, (3) avoided providing warranty service by blaming minor cosmetic issues, (4) had long wait periods on warranty claims, and (5) provided replacement phones that were also defective. Id. ¶ 301. Again, due to the melding of Google and Huawei unravel which actions the CAC attributes solely to Google. 10

For the same reasons discussed with respect to Huawei, grounds (1) and (2) alleging knowledge of the defects and unwillingness to fix out-of-warranty phones are unsustainable. Ground (3) is even weaker with respect to Google. No California Plaintiff alleges that Google denied warranty coverage by

pointing to cosmetic damage. CAC ¶¶ 12 37. Although Pennsylvania Plaintiff Leone pleads that Google rejected warra id. ¶¶ 133 34, that allegation even

if relevant for a California claim under California law to turn down warranty coverage on these grounds. Ground (4) is inapplicable to Google because the allegations about long wait times for warranty claims all relate to Huawei. See id. ¶¶ 65, 85, 122, 156. Finally, the CAC accuses Google of providing some non-California Plaintiffs with defective replacement phones. Id. ¶¶ 49, 75, 113 14, 136. No California Plaintiff was allegedly affected by this conduct, and Plaintiffs provide no argument that such an inference is reasonable based on the allegations. Moreover, Plaintiffs do not identify any authority holding that a defendant who provides a defective product on more than one occasion has committed an unfair business practice. Hence Google scrutiny at the motion to dismiss stage.

10 In the future, if Plaintiffs combine the allegations against Google and Huawei, the Court will not try to unwind them in the same fashion but will simply dismiss. 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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preventing unmerchantable products from reaching consumers, id. ¶ 301, fares no better. As noted with respect to Huawei, B extends beyond California state lines. See Cal. Civ. Code § 1792. Plaintiffs therefore cannot rely

on the Song Plaintiffs purchased their phones.

Accordingly, the Court GRANTS Google UCL claim under the unfair prong with leave to amend to allege relevant facts.

(c) Fraudulent Business Act or Practice The analysis with respect to Google and Huawei under the UCL fraud prong is identical because the CAC depends on the same three fraudulent acts for both companies. See CAC ¶ 303. admits the defects at the time of sale to the California Plaintiffs. The Court has previously explained at length that Plaintiffs have not adequately alleged that Google had knowledge of the defects when the California Plaintiffs purchased their phones. Accordingly, the Court GRANTS Google Motion to Dismiss UCL claim under the fraud prong with leave to amend to allege that Google had knowledge of the defects at the time that the California Plaintiffs purchased their phones.

(2) False Advertising Law L claim requires little explanation because the analysis is substantively identical to that under the UCL fraud prong. Indeed, this Court and other courts in this district have treated FAL claims together with the UCL fraud prong, Singh v. Google Inc., No. 16-CV-03734-BLF, 2017 WL 2404986, at *4 5 (N.D. Cal. June 2, 2017); Chacanaca v. Quaker Oats Co., 752 F. Supp. 2d 1111,

1124 26 (N.D. Cal. 2010), and both Google and Plaintiffs e allegations underlying the FAL claim are also defects, see CAC ¶ 335, Plaintiffs have failed to state a claim upon which relief can be granted. Accordingly, miss P FAL claim with leave to 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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amend to allege that Google had knowledge of the defects at the time that the California Plaintiffs purchased their phones.

iv. Indiana Deceptive Consumer Sales Act Indiana Plaintiff Beheler asserts a claim under the Indiana Deceptive Consumer Sales Act , Ind. Code § 24-5-0.5-1 et seq., on behalf of the Indiana subclass. CAC ¶¶ 384 96. Under the IDCSA, . . incurable deceptive act may bring an action for the damages actually suff § 24-5-0.5-4(a). The IDCSA in turn Id. § 24-5-

0.5-2(a)(8). alleged misrepresentation that the - 390, 395.

Plaintiffs do not ch 55. Plaintiffs are incorrect.

to CAC ¶ 59, but does not indicate whether Plaintiff Beheler received this information other means, such as word of mouth from a friend or a technical review written by another

company. This is insufficient to support saw and

specify the advertisements and the content of the advertisements that Plaintiff Beheler relied upon in purchasing his Nexus 6P. 11

11 give Google written notice. Google Mot. 25. As Google indicated in its Motion to Dismiss, that Id. In their opposition, Plaintiffs make clear that 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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v. New York General Business Law New York Plaintiff Davydov asserts claims under N.Y. Gen. Bus. Law §§ 349 350 on behalf of the New York subclass. CAC ¶¶ 415 32. N.Y. Gen. Bus. Law § 349 makes unlawful eceptive acts or practices in the conduct of any business 350 alse advertising in the conduct of any business under §§ 349 and 350 should be dismissed for failure to plead causation. Google Mot. 25.

s claim is not sufficiently pled Goldemberg v. Johnson

& Johnson Consumer Cos, 8 F. Supp. 3d 467, 480 (S.D.N.Y. 2014).

, Plaintiff Davydov allegations here do not clear that hurdle. To be sure, other cases have allowed claims under §§ 349 and 350 to proceed past a motion to dismiss on relatively thin allegations. For example, in Dash v. Seagate Technology (U.S.) Holdings, Inc., the court concluded that there was a reasonable inference that the plaintiff purchased the product at issue as a result of seeing the misleading n detail the allegedly misleading and deceptive

The court drew the same inference in Goldemberg where the plaintiff in particular the allegedly misleading advertising and misrepresentations . . . ha[d] already deceived and misled Plaintiff 480.

The allegations here superficially fit that mold. The CAC first details the allegedly misleading statements by Google. CAC ¶ 227. Then, the CAC alleges that Phones, [Plaintiff] Davydov . . . relied on the misrepresentations and/or omissions of Defendants

Plaintiff Davydov would not have purchased the phone in the absence of those misrepresentations. Id. ¶ 430. The problem is that, by referring to the Google and Huawei together without denoting 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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misleading statements in purchasing his Nexus 6P. Without more, it is not plausible that Plaintiff Davydov saw every relevant misrepresentation made by Google. Accordingly, the Court GRANTS Google N.Y. Gen. Bus. Law §§ 349 350 claims with leave to amend to assert whether he viewed before he purchased his phone.

vi. North Carolina Unfair and Deceptive Trade Practices Act North Carolina Plaintiffs Harrison and Himes assert a claim under the North Carolina Unfair and Deceptive Trade Practices Act , N.C. Gen. Stat. § 75-1.1 et seq., on behalf of the North Carolina subclass. CAC ¶¶ 433 43. To state a claim under the NCUDTPA, a action in question was in or affecting commerce, and (3) the act proximately caused injury to the

Dalton v. Camp, 548 S.E.2d 704, 711 (N.C. 2001); see also N.C. Gen. Stat. Ann. §§ 75-1.1(a) 75-16 (creating private right of action for perso First, it states that

[Plaintiff] Harrison, [Plaintiff] Himes, and North Carolina Subclass members Phones with the Defects, refused to honor warranties, required consumers to wait several weeks to several months on warranty claims, and 437. Second, the CAC also goes on to say that the Nexus 6P in advertising. Id. ¶ 439. Neither is well-pled.

le

fail to plausibly plead that Google had knowledge at the time of sale, but the CAC admits that Google did not sell to Plaintiffs Harrison and Himes at all they purchased their phones from Amazon and Best Buy, respectively. Id. ¶¶ 91, 99. The rest of the allegations relate to warranty problems, but neither Plaintiff Harrison nor Plaintiff Himes submitted a warranty claim to Google. id. ¶ 94, and Plaintiff Himes 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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made no warranty claim at all, despite contacting both Google and Huawei, id. ¶¶ 102 04.

Carolina Su -1.1 stemming from an alleged misrepresentation does indeed require a plaintiff to demonstrate reliance on the Bumpers v. Cmty. Bank of N. Va., 747 S.E.2d 220, 226 (N.C. 2013). For essentially the same reasons discussed with respect to their breach of express warranty claims, Plaintiffs Harrison and Himes have both failed to s.

Accordingly, the Court GRANTS Plaintiffs Harrison and Himes with leave to amend to allege further facts.

vii. Ohio Deceptive Trade Practices Act Ohio Plaintiff Servodio asserts a claim under the ODTPA on behalf of the Ohio subclass. CAC ¶¶ 461 75. As discussed above with respect to Huawei, this claim must be dismissed without leave to amend because, as a legal matter, consumers lack standing to sue under the ODTPA. Accordingly, the Court GRANTS WITHOUT LEAVE TO AMEND Google n to Dismiss the ODTPA claim.

viii. Ohio Consumer Sales Practices Act Ohio Plaintiff Servodio asserts a claim under the Ohio Consumer Sales Practices Act 1345.01 et seq., on behalf of the Ohio subclass. CAC ¶¶ 476 87. The OCSPA provides a private right of action to consumers 1345.02(A), 1345.09(A). ualify for class-action certification under [the

Ohio court decision holding such deceptive conduct unlawful. Marrone v. Philip Morris USA,

Inc. that violate the Id. at 36. 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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Plaintiffs do not adequately allege that Google was put on notice by an Ohio court

was deceptive, unfair, or uncons 482. More importantly, Plaintiffs do not identify any cases where, for example, a court has held that selling a defective product constitutes a deceptive act under the

OCSPA. Rather, as the CAC admits, the cases cited therein failing to honor express and implied warranties violates the OCSPA. Id. ¶ 483 (citing Nee v. State Indus., Inc., 3 N.E.3d 1290, 1306 (Ohio Ct. App. 2013); Brown v. Decorator Carpets of Canton, Inc., 1979 WL 185083, at *2 (Ohio Ct. Com. Pl. Nov. 5, 1979); and Mason v. Mercedes-Benz USA, LLC, 2005 WL 1995087 at *5 (Ohio Ct. App. Aug. 18, 2005)). Given that Plaintiffs have not pled that Google failed to honor Plaintiff 119 27, or that Google breached any express or implied warranty at the OCSPA.

Although the Court agrees with Google on the substance of its argument, the Court parts

OCSPA claim is appropriate. Google Mot. 27. But the cases do not support that view. The principal authority on which Google relies, the Ohio Supreme Court decision in Marrone, concerns the prerequisites for [to] qualify for class-action certification under [the OCSPA] 850 N.E.2d at 33. under the OCSPA may be dismissed at the pleadings stage. See Gascho v. Glob. Fitness

Holdings, LLC, 863 F. Supp. 2d 677, 693 (S.D. Ohio 2012). Because Google has identified no be dismissed.

Acc s OCSPA class claims with leave to amend to allege further facts about whether Google was on f 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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ix. Texas Deceptive Trade Practices Act Texas Plaintiff Poore asserts a claim under the Texas Deceptive Trade Practices Act , Tex. Bus. & Com. Code § 17.41 et seq., on behalf of the Texas subclass. CAC ¶¶ 501 17. A consumer may bring an action under the TDTPA when the defendant employs a deceptive act or practice enumerated in Tex. Bus. & Com. Code § 17.46(b) that 17.50(a)(1). Although

the CAC lists violations of multiple subsections of § 17.46(b), CAC ¶ confirms that its claim is that Google ran afoul of § 17.46(b)(24) That subsection proscribes erning goods or services which was known at the time of the transaction if such failure to disclose such information was intended to induce the consumer into a transaction into which the consumer would not have entered had the information Tex. Bus. & Com. Code § 17.46(b)(24).

his subsection, the TDTPA claim fails for familiar reasons. Google cannot violate § . . which was known at the tim As even the most cursory reader will have gleaned by this point, Plaintiffs have not adequately pled that Google had knowledge of the defects at the time that ns do not establish that Plaintiff Poore is entitled to relief on the TDTPA claim.

-suit notice, Google Mot.

in his Phone in satisfaction of Tex. Bus. & Com. Code § 17.505 517. Google concedes this point in its reply. Google Reply 18.

Accordingly, the Court GRANTS claim with leave to amend to allege that Google had knowledge of the defects at the time that he purchased his phone.

x. Washington Consumer Protection Act Washington Plaintiff Johnston asserts a claim under the Washington Consumer Protection 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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Act , Wash. Rev. Code § 19.86 et. seq., on behalf of the Washington subclass. CAC ¶¶ 518 35. The WCPA authorize [a]ny person who is injured in his or her business or property by a violation of [the WCPA] . . . [to] bring a civil action . . . to enjoin further violations [or] to 19.86.090. One such violation occurs when a defendant commits Id. § 19.86.020.

fashion as the now-dismissed NCUDTPA s WCPA claim falters on the

knowingly sold [Plaintiff] Johnston and Washington Subclass members Phones with the Defects, refused to honor warranties, required consumers to wait several weeks to several months on 522. Google did not do any of those things with respect to Plaintiff Johnston, who bought his Nexus 6P from Best Buy and did not submit a warranty claim to Google. Id. ¶¶ 152 59. Second, the CAC states Nexus 6P in advertising. Id. ¶ 524. Like with his breach of express warranty claim, Plaintiff

Johnston has failed to adequately identify which Google advertisements he saw.

Accordingly, the Court GRANTS Motion to Dismiss Plaintiff John claim with leave to amend to allege further facts.

d. Unjust Enrichment Claim Plaintiffs assert a cause of action for unjust enrichment. CAC ¶¶ 278 83. As discussed above with respect to Huawei, although a claim alleging unjust enrichment may state a claim for relief as a quasi-contract claim for restitution, Romero, 2015 WL 2125004, at *9 failure to allege which state law governs, Romero, 2016 WL 469370, at *12. Accordingly, the Court GRANTS Google with leave to amend to assert which state law applies.

C. Motions to Strike 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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Civil Procedure 12(f). Huawei Mot. 26 ct as to whether a motion to strike class action allegations may be entertained at the motion to dismiss Ogola v. Chevron Corp., No. 14-CV-00173-SC, 2014 WL 4145408, at *2 (N.D. Cal. Aug. 21, 2014). Even courts that have been willing to entertain such a motion early in the proceedings Id.

under no set of ci Id. (internal quotation marks and citation omitted).

Huawei and Google contend that the putative nationwide class and the statewide subclasses are facially overbroad because they include individuals who never experienced problems with their Nexus 6Ps. Huawei Mot. 26 27; Google Mot. 29. Moreover, Huawei and Google assert that a class action will be unmanageable because the suit requires adjudicating various claims under differing state laws and resolving individualized inquiries. Huawei Mot. 27 28; Google Mot. 29.

are more appropriately addressed at a later stage of the proceedings when the issues have been more fully developed and sharpened. At the hearing, the Court indicated its inclination to defer these issues to the class certification stage. The Court remains convinced that it would be premature to resolve the issues at the pleading stage. See Los Gatos Mercantile, Inc v. E.I. DuPont De Nemours & Co., No. 13-CV-01180-BLF, 2015 WL 4755335, at *33 (N.D. Cal. Aug. 11, 2015).

Accordingly, the Court DENIES otions to strike class allegations without prejudice to raising the arguments presented in those motions at a later stage of the proceedings. IV. ORDER For the foregoing reasons, IT IS HEREBY ORDERED that and G Motions to Dismiss are GRANTED WITH LEAVE TO AMEND IN PART, GRANTED WITHOUT LEAVE TO AMEND IN PART, AND DENIED IN PART. Specifically, with respect to Huawei, the Court rules as follows: 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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ss the

express warranty claims of Plaintiffs Gorbatchev, Christensen, Martorello, Tran, Berry,

Dismiss the express warranty claims of all remaining Plaintiffs. The Court GRANTS

Dismiss the implied warranty claims of all remaining Plaintiffs. Dismiss the

Song Beverly Act claim. Magnuson Moss Warranty Act claims of Plaintiffs Berry and Poore and DENIES

Moss Warranty Act claims of all remaining Plaintiffs. The Court GRANTS WITH LEAVE TO AMEND

fraud claims to the extent they are based on a fraudulent omissions theory. The Court GRANTS WITH LEAVE TO AMEND the

California . The Court GRANTS WITH LEAVE TO AMEND the

California and fraudulent prongs and DENIES the California Plaint prong. The Court GRANTS WITH LEAVE TO AMEND the

claim. The Court GRANTS WITHOUT LEAVE TO AMEND Ohio

m.

enrichment claims of all Plaintiffs. Specifically, with respect to Google, the Court rules as follows: 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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warranty claims of all Plaintiffs. implied warranty claims of all Plaintiffs.

Beverly Act claim.

Magnuson Moss Warranty Act claims of all Plaintiffs.

and fraudulent concealment claims of all Plaintiffs.

T

The Court GRANTS WITH LEAVE TO AMEND Google the

California . The Court GRANTS WITH LEAVE TO AMEND Google to Dismiss the

claim. The Court GRANTS

FDUTPA claim. The Court GRANTS

ICFDBPA and IUDTPA claims. The Court GRANTS WITH LEAVE TO AMEND Google Indiana

The Court GRANTS Michigan

MCPA claim. The Court GRANTS WITH LEAVE TO AMEND Google New York

349 350. The Court GRANTS WITH LEAVE TO AMEND Google North 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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The Court GRANTS WITH LEAVE TO AMEND Google North

Dakota NDCFA claim. The Court GRANTS WITHOUT LEAVE TO AMEND Google Ohio

The Court GRANTS WITH LEAVE TO AMEND Google Ohio

class claims and DENIES Google Ohio Plain claim. The Court GRANTS WITH LEAVE TO AMEND Google

Pennsylvania PUTPCPL claim. The Court GRANTS WITH LEAVE TO AMEND Google Texas

Plaintiff Poore TDTPA claim. The Court GRANTS WITH LEAVE TO AMEND Google

Washington Plaintiff Johnston WCPA claim. The Court GRANTS WITH LEAVE TO AMEND Google the unjust

enrichment claims of all Plaintiffs. Finally, with respect to Huawei and Google, the Court DENIES their class allegations. An amended complaint shall be filed on or before June 8, 2018. Plaintiffs may request additional time, if needed, to accommodate the jurisdictional discovery schedule set forth in a separate order.

Dated: March 5, 2018 _____

BETH LABSON FREEMAN United States District Judge