

United States District Court
Northern District of California

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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 HUAWEI’S
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
GOOGLE’S MOTION TO DISMISS
CONSOLIDATED AMENDED
COMPLAINT**

[Re: ECF 38, 39]

In this putative consumer class action, Plaintiffs Roy Berry, Jonathan Makcharoenwoodhi, Alex Gorbachev, Brian Christensen, Anthony Martorello, Khanh Tran, Edward Beheler, Yuriy Davydov, Rebecca Harrison, Zachary Himes, Taylor Jones, Paul Servodio, Justin Leone, James Poore, Jr., and Kenneth Johnston (collectively, “Plaintiffs”) allege severe defects in their Nexus 6P smartphones. Plaintiffs sued the companies that developed the phone—Huawei Device USA, Inc. (“Huawei”) and Google LLC (“Google”)—for breach of warranty, fraud, and unjust enrichment. Their twenty-three causes of action span a litany of state laws and one federal statute.

Presently before the Court are Huawei’s Motion to Dismiss the Consolidated Amended Complaint and to Strike Class Allegations (“Huawei’s Motion to Dismiss”), Huawei Mot., ECF 38; and Google’s Motion to Dismiss Consolidated Amended Complaint (“Google’s Motion to Dismiss”), Google Mot., ECF 39. In a previous order, the Court granted with leave to amend

1 Huawei's Motion to Dismiss on the ground that the Court lacks personal jurisdiction over Huawei.
2 ECF 113. Here, the Court dives into the merits of Huawei's and Google's Motions to Dismiss,
3 which assert that Plaintiffs have failed to state a claim on which relief can be granted and that
4 Plaintiffs' class allegations should be stricken.

5 The Court held a hearing on these motions on January 18, 2018. The Court has considered
6 the arguments presented at oral argument and in the briefing, as well as the submitted evidence
7 and applicable law. For the reasons that follow, the Court hereby GRANTS WITH LEAVE TO
8 AMEND IN PART, GRANTS WITHOUT LEAVE TO AMEND IN PART, AND DENIES IN
9 PART Huawei's and Google's Motions to Dismiss. The Court DENIES Huawei's and Google's
10 motions to strike Plaintiffs' class allegations.

11 **I. BACKGROUND**

12 The following facts are drawn from the Consolidated Amended Complaint ("CAC"), ECF
13 28. In September 2015, Google unveiled the Nexus 6P, the newest version of its Nexus 6
14 smartphone. CAC ¶ 165. Google and Huawei created the Nexus 6P together, with Google
15 handling software development and Huawei handling device manufacture. *Id.* At the launch
16 event and in advertising, Google touted many of the superior features of the phone. *See id.* ¶¶ 7,
17 169, 171.

18 Unfortunately, according to the CAC, the Nexus 6P suffers from two defects. First, some
19 phones unexpectedly turn off and, upon turning back on, experience an endless bootloop cycle (the
20 "Bootloop Defect"). *Id.* ¶ 174. When the Bootloop Defect manifests, the phone becomes
21 nonoperational and all unsaved data is lost because the phone cannot proceed beyond the start-up
22 screen. *Id.* ¶ 175. Second, some phones prematurely shut off despite showing a battery charge of
23 anywhere from 15–90% (the "Battery Drain Defect"). *Id.* ¶ 177. When the Battery Drain Defect
24 manifests, the phone remains dead until the user reconnects it to power. *Id.* ¶ 178. After some
25 charging, the battery shows the same or similar charge as indicated before the premature shut-off.
26 *Id.*; *see also id.* ¶ 61. Complaints about the Bootloop and Battery Drain Defects began cropping
27 up online as early as September and October 2016. *Id.* ¶¶ 175, 184, 187–88.

28 This putative class action was commenced on April 19, 2017. ECF 1. Plaintiffs filed the

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

6 Plaintiffs bring twenty-three causes of action against both Huawei and Google under a
7 spattering of state laws and one federal law. At the high level, their claims fall into three buckets:
8 (1) warranty claims, (2) fraud claims, and (3) unjust enrichment claims. Their warranty claims
9 consist of claims for (1) breach of express warranty on behalf of the nationwide class or each
10 statewide subclass, (2) breach of the implied warranty of merchantability on behalf of the
11 nationwide class or each statewide subclass, (3) violation of the California Song–Beverly
12 Consumer Warranty Act on behalf of the California subclass, and (4) violation of the federal
13 Magnuson–Moss Warranty Act presumably on behalf of the nationwide class. *Id.* ¶¶ 213–67,
14 284–96. Their fraud claims consist of (1) a common-law claim for deceit and fraudulent
15 concealment on behalf of each statewide subclass and (2) claims for violations of state consumer
16 protection statutes on behalf of the relevant statewide subclass.¹ *Id.* ¶¶ 268–77, 297–535. Finally,
17 their unjust enrichment claims are asserted on behalf of the nationwide class based on the
18 universal principles of equity. *Id.* ¶¶ 278–83.

19 In June 2017, Huawei and Google filed their Motions to Dismiss. Huawei’s argument
20 regarding lack of personal jurisdiction was addressed in a prior order. *See* ECF 113. Here, the
21 Court focuses on the sufficiency of the CAC. Specifically, both Huawei’s and Google’s Motions
22 to Dismiss assert that Plaintiffs have failed to allege sufficient facts entitling them to relief on their
23

24 ¹ Specifically, the state consumer protection statutes are: the California Unfair Competition Law,
25 the California Consumer Legal Remedies Act, the California False Advertising Law, the Florida
26 Deceptive and Unfair Trade Practices Act, the Illinois Consumer Fraud and Deceptive Business
27 Practices Act, the Illinois Uniform Deceptive Trade Practices Act, the Indiana Deceptive
28 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.

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1 claims. Huawei Mot. 9–28; Google Mot. 3–29. Huawei and Google also request that the Court
2 strike Plaintiffs’ class allegations. Huawei Mot. 26–28; Google Mot. 29.

3 **II. LEGAL STANDARD**

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

5 “A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a
6 claim upon which relief can be granted ‘tests the legal sufficiency of a claim.’” *Conservation*
7 *Force v. Salazar*, 646 F.3d 1240, 1241–42 (9th Cir. 2011) (quoting *Navarro v. Block*, 250 F.3d
8 729, 732 (9th Cir. 2001)). When determining whether a claim has been stated, the Court accepts
9 as true all well-pled factual allegations and construes them in the light most favorable to the
10 plaintiff. *Reese v. BP Exploration (Alaska) Inc.*, 643 F.3d 681, 690 (9th Cir. 2011).

11 However, the Court need not “accept as true allegations that contradict matters properly
12 subject to judicial notice” or “allegations that are merely conclusory, unwarranted deductions of
13 fact, or unreasonable inferences.” *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir.
14 2008) (quoting *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001)). While a
15 complaint need not contain detailed factual allegations, it “must contain sufficient factual matter,
16 accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556
17 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is
18 facially plausible when the alleged facts “allow[] the court to draw the reasonable inference that
19 the defendant is liable for the misconduct alleged.” *Id.*

20 **B. Rule 12(f)**

21 Federal Rule of Civil Procedure 12(f) permits a court to “strike from a pleading an
22 insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.” The
23 function of a motion made under this rule is “to avoid the expenditure of time and money that
24 must arise from litigating spurious issues by dispensing with those issues prior to trial.”
25 *Whittlestone, Inc. v. Handi–Craft Co.*, 618 F.3d 970, 973 (9th Cir. 2010) (quoting *Fantasy, Inc. v.*
26 *Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1993), *rev’d on other grounds by Fogerty v. Fantasy, Inc.*,
27 510 U.S. 517 (1994)). “While a Rule 12(f) motion provides the means to excise improper
28 materials from pleadings, such motions are generally disfavored because the motions may be used

1 as delaying tactics and because of the strong policy favoring resolution on the merits.” *Barnes v.*
 2 *AT & T Pension Ben. Plan–Nonbargained Program*, 718 F. Supp. 2d 1167, 1170 (N.D. Cal.
 3 2010).

4 The decision to strike a portion of a party’s pleading is within the sound discretion of the
 5 court. *Nurse v. United States*, 226 F.3d 996, 1000 (9th Cir. 2000). If allegations are stricken,
 6 leave to amend should be freely given when doing so would not cause prejudice to the opposing
 7 party. *See Wyshak v. City Nat’l Bank*, 607 F.2d 824, 826 (9th Cir. 1979) (per curiam).

8 **III. DISCUSSION**

9 Both Huawei and Google contend that Plaintiffs have failed to allege sufficient facts
 10 entitling them to relief on their claims. Before turning to the merits of those arguments, the Court
 11 addresses Google’s request for judicial notice.

12 **A. Request for Judicial Notice**

13 In connection with its Motion to Dismiss, Google seeks judicial notice of two documents:
 14 Google’s U.S. Terms of Sale and the Nexus 6P webpage. ECF 57. Portions of the documents are
 15 referenced in the CAC, and both are capable of accurate and ready determination because they are
 16 publicly available online. These documents are properly subject to judicial notice. *See Fed. R.*
 17 *Evid.* 201(b); *Knieval v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005). Plaintiffs did not formally
 18 object to Google’s request. Accordingly, Google’s request for judicial notice is GRANTED.

19 **B. Motions to Dismiss for Failure to State a Claim**

20 Huawei and Google contend that Plaintiffs’ CAC provides insufficient allegations to
 21 properly plead their causes of action. The Court begins by making some general observations
 22 about changes that should be made to any amended pleading. The Court then addresses the
 23 sufficiency of an allegation important to many of Plaintiffs’ claims—namely, whether Huawei and
 24 Google had knowledge of the defects at the time of sale. Finally, the Court proceeds to analyze
 25 separately the claims asserted against Huawei and the claims asserted against Google.

26 **1. General Observations**

27 The Court starts with a couple general observations about the pleadings. First, in their
 28 twenty-three causes of actions, Plaintiffs often lump Huawei and Google together, alleging

1 conduct by “Defendants” without distinguishing what Huawei did from what Google did. *See,*
 2 *e.g.*, CAC ¶¶ 230 (“Defendants received timely notice of the breaches experienced by Plaintiffs
 3 and Class members. Defendants were provided notice of the Defects by complaints lodged by
 4 consumers before or within a reasonable amount of time after the allegations of the Defects
 5 became public.”), 241 (“Defendants breached the implied warranty of merchantability because the
 6 Phones they sold are not of a merchantable quality, but instead contain a Bootloop Defect and a
 7 Battery Drain Defect.”), 270 (“Defendants concealed and suppressed material facts concerning the
 8 performance and quality of the Phones, and the quality of the Huawei, Google, and Nexus brands.
 9 Specifically, Defendants knew (or in the exercise of reasonable diligence should have known) of
 10 the Defects, but failed to disclose them prior to or at the time they marketed Phones and sold them
 11 to consumers.”). As discussed in more detail below with respect to particular causes of action, this
 12 setup obfuscates what roles Huawei and Google independently played in the alleged harm and
 13 whether either is liable for its own conduct. *See Adobe Sys. Inc. v. Blue Source Grp., Inc.*, 125 F.
 14 Supp. 3d 945, 964 (N.D. Cal. 2015). In an amended pleading, Plaintiffs “must identify what
 15 action each Defendant took that caused Plaintiffs’ harm, without resort to generalized allegations
 16 against Defendants as a whole.” *In re iPhone Application Litig.*, No. 11-MD-02250-LHK, 2011
 17 WL 4403963, at *8 (N.D. Cal. Sept. 20, 2011).

18 Second, Plaintiffs assert claims for breach of express warranty, breach of implied warranty,
 19 and unjust enrichment on behalf of a nationwide class but do not specify what law governs.² As
 20 discussed in more detail below with respect to these individual causes of action, the failure to
 21 identify the relevant law makes it difficult, if not impossible, for the Court to provide a thorough
 22 analysis of Plaintiffs’ claims. Throughout this order, the Court often uses the law that the parties
 23 apply in their briefing without elaborating on other potentially applicable state laws.³ In any

24
 25 ² For the breach of express warranty and breach of implied warranty claims, Plaintiffs alternatively
 26 assert that the claims may proceed under the applicable state law as to each of the twelve statewide
 subclasses. CAC ¶¶ 215, 236.

27 ³ The parties are advised that in future briefing, to the extent they ask the Court to decide matters
 28 on the basis of several states’ 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
 “by failing to acknowledge . . . that the laws in various states were materially different than those

1 amended version of the pleadings, Plaintiffs should clarify what law governs each cause of action.
 2 Additionally, causes of action should not group together multiple sources of law; rather, Plaintiffs
 3 should plead separate causes of actions for each source of law, whether federal or state.

4 **2. Huawei’s and Google’s Knowledge of Defects at the Time of Sale**

5 Whether Huawei and Google had knowledge of the defects at the time that Plaintiffs
 6 purchased their phones is a common thread through many of the Plaintiffs’ claims. Indeed, many
 7 of Plaintiffs’ causes of action either start from the premise or entirely depend on the fact that
 8 Huawei and Google knew, or reasonably should have had known, of the defects at the time of sale.
 9 Therefore, the Court begins by examining the sufficiency of the Plaintiffs’ allegations on that
 10 score, as the answer colors the analysis of many of the Plaintiffs’ claims.

11 At multiple points in the CAC, Plaintiffs allege that “Defendants knew (or exercising due
 12 diligence should have known) that the Phones were defective at the time of sale.” CAC ¶ 246; *see*
 13 *also, e.g., id.* ¶¶ 6, 186, 226, 270, 281, 318, 322, 335, 359. However, that statement is conclusory,
 14 and the CAC does not contain sufficient factual matter to make that inference plausible.

15 The key issue here is timing. The Nexus 6P was released in September 2015. *Id.* ¶ 165.
 16 In the CAC, Plaintiffs provide multiple examples of consumers posting online about the Bootloop
 17 and Battery Drain Defects, but do not provide specific dates for any of those postings. *Id.* ¶ 184.
 18 Plaintiffs do not allege that Huawei ever saw or responded to these online complaints, let alone
 19 that Huawei knew about them *before* Plaintiffs purchased their phones. *See Wilson v. Hewlett-*
 20 *Packard Co.*, 668 F.3d 1136, 1147 (9th Cir. 2012) (“[C]ourts have rejected undated customer
 21 complaints offered as a factual basis for a manufacturer’s knowledge of a defect because they
 22 provide no indication whether the manufacturer was aware of the defect *at the time of sale.*”).

23 Although Plaintiffs allege particular dates for Google’s online responses to the postings,
 24 those responses postdate Plaintiffs’ purchases. Specifically, Plaintiffs allege that a Google
 25 representative responded to customer complaints about the Bootloop Defect in September 2016,
 26

27 in California, and that these variations prevented the court from applying only California law” and
 28 “failing to make a final ruling as to whether the material variations in state law defeated
 predominance under Rule 23(b)(3)”.

1 stating: “We understand that a very small number of users are experiencing a bootloop issue on
2 your device. We are continuing to investigate the situation, but can confirm that this is strictly a
3 hardware related issue.” CAC ¶ 187. Nevertheless, all Plaintiffs who allege that their phones
4 manifested the Bootloop Defect purchased their phones before September 2016. *See id.* ¶¶ 19
5 (Gorbachev: Oct. 2015), 28 (Christensen: Nov. 2015), 38 (Martorello: May 2016), 52 (Tran: Jan.
6 2016), 70 (Berry: Nov. 2015), 119 (Servodio: Mar. 2016).

7 Similarly, Plaintiffs allege that a Google representative responded to customer complaints
8 about the Battery Drain Defect in October 2016, stating: “Just want to let you all know that [the
9 Battery Drain Defect] is something we have been keeping track of, and our team is investigating.
10 . . . [M]any of you are reporting that you have been experiencing abnormal battery drain for
11 multiple days now.” *Id.* ¶ 188. Again, no Plaintiffs who allege that their phones manifested the
12 Battery Drain Defect purchased their phones after the October 2016 statement by Google’s
13 representative. *See id.* ¶¶ 12 (Makcharoenwoodhi: Apr. 2016), 28 (Christensen: Nov. 2015), 38
14 (Martorello: May 2016), 58 (Beheler: July 2016), 70 (Berry: Nov. 2015), 79 (Davydov: Dec.
15 2015), 91 (Harrison: Apr. 2016), 99 (Himes: Mar. 2016), 111 (Jones: Jan. 2016), 130 (Leone: Oct.
16 2015), 142 (Poore: Feb. 2016), 153 (Johnston: Oct. 2016).

17 Without that crucial temporal element, Plaintiffs have not adequately alleged that Huawei
18 or Google knew (or reasonably should have known) of the defects when Plaintiffs purchased their
19 phones. This factual gap is not filled by allegations that some Plaintiffs contacted Huawei and
20 Google about the defects, as most of those conversations took place after October 2016 or are not
21 alleged to have taken place on a specific date. *See id.* ¶¶ 15, 23, 30–31, 33, 54, 63–64, 67, 72–73,
22 83–85, 94, 113, 133, 147, 155. The two Plaintiffs who contacted Huawei and Google before
23 September 2016 are not enough, *see id.* ¶¶ 41–43, 102, because a handful of complaints do not, by
24 themselves, plausibly show that Huawei or Google had knowledge of the defects and concealed
25 the defects from customers. *See Berenblat v. Apple, Inc.*, No. 08-CV-04969-JF, 2010 WL
26 1460297, at *9 (N.D. Cal. Apr. 9, 2010) (reaching the same conclusion and explaining that
27 allegations about “complaints posted on Apple’s consumer website merely establish the fact that
28 some consumers were complaining”); *see also Baba v. Hewlett-Packard Co.*, No. 09-CV-05946-

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1 RS, 2011 WL 317650, at *3 (N.D. Cal. Jan. 28, 2011) (“Awareness of a few customer complaints,
2 however, does not establish knowledge of an alleged defect.”).

3 Perhaps sensing this deficiency, Plaintiffs shift gears in their opposition, positing that
4 “[t]he Nexus 6P phones contain core component flaws that basic product testing would have
5 disclosed at or near the time of manufacture.” Opp’n 42. Whatever the viability of that theory, it
6 finds no basis in the CAC. Contrary to Plaintiffs’ suggestion, the allegation that “Defendants had
7 superior knowledge and access to the relevant facts,” CAC ¶ 272, does not equate to an allegation
8 that straightforward testing would have revealed the defects.

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

13 **3. Claims Asserted Against Huawei**

14 In broad strokes, the CAC asserts three categories of claims against Huawei—warranty
15 claims, fraud claims, and unjust enrichment claims. The Court addresses each of these categories
16 one at a time.

17 **a. Warranty Claims**

18 Plaintiffs assert four sets of warranty claims: (1) breach of express warranty, (2) breach of
19 the implied warranty of merchantability, (3) violation of the California Song–Beverly Consumer
20 Warranty Act, and (4) violation of the federal Magnuson–Moss Warranty Act. Huawei moves to
21 dismiss all four causes of action. The Court addresses each in turn.

22 **i. Breach of Express Warranty**

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

27 Huawei provides a written Limited Warranty for phones, tablets, wearables, PCs, and
28 accessories. Huawei Mot., Ex. A. The Limited Warranty provides: “Huawei Device USA Inc.,

1 ('Huawei') represents and warrants to the original purchaser ('Purchaser') that Huawei's phones
 2 and accessories ('Product') are free from material defects, including improper or inferior
 3 workmanship, materials, and design, during the designated warranty period . . . when used
 4 normally and in accordance with all operating instructions." *Id.*, Preamble. For phones, the
 5 "designated warranty period" is "12 months from the date of purchase." *Id.* ¶ 1.

6 Under the terms of the Limited Warranty, Huawei agrees to "repair or replace at Huawei's
 7 sole option, any parts of the Product that are defective or malfunctioning during normal usage."
 8 *Id.* ¶ 4. However, "Huawei does not warrant that the operation of [the phone] will be
 9 uninterrupted or error-free." *Id.* ¶ 8. Moreover, the Limited Warranty becomes "null and void" if
 10 the Purchaser does not notify Huawei "of the alleged defect or malfunction of the Product during
 11 the applicable warranty period." *Id.* ¶ 9.

12 Huawei moves to dismiss Plaintiffs' express warranty claims. Huawei first contends that,
 13 for a handful of Plaintiffs, there are insufficient allegations to establish that Huawei breached the
 14 Limited Warranty. Huawei Mot. 10–11. Huawei then asserts a number of inadequacies applicable
 15 to different groupings of Plaintiffs. Specifically, Huawei contends that certain Plaintiffs have not
 16 adequately alleged that they provided Huawei notice and an opportunity to cure, that they relied on
 17 Huawei's Limited Warranty, or that they were in privity with Huawei. *Id.* at 11–12. The Court
 18 trudges through each of these various grounds for dismissal.

19 (1) Breach and Unconscionability

20 Huawei contends that it did not breach the Limited Warranty for those Plaintiffs whose
 21 phones manifested the defects outside the one-year warranty period and those Plaintiffs who did
 22 not notify Huawei of defects during the one-year warranty period. Huawei Mot. 10. Specifically,
 23 Plaintiffs Gorbachev, Christensen, and Tran allege that their phones failed more than a year after
 24 purchase. CAC ¶¶ 19, 21 (Gorbachev), 28–29 (Christensen), 52–53 (Tran). Plaintiffs Berry,
 25 Jones, and Leone do not allege that they notified Huawei of any defect before the expiration of one
 26 year. *Id.* ¶¶ 70–78 (Berry), 111–18 (Jones), 128–41 (Leone). Plaintiffs do not dispute that these
 27 Plaintiffs fall outside the Limited Warranty but instead argue that the one-year warranty limitation
 28

1 is unconscionable.⁴

2 Because Plaintiffs and Huawei address the unconscionability issue under California law
 3 and identify no material differences in other state laws, the Court uses California law as the basis
 4 for its analysis. Under California law, a contract provision is “unconscionable, and therefore
 5 unenforceable, only if it is *both* procedurally and substantively unconscionable.” *In re iPhone*,
 6 2011 WL 4403963, at *7 (citing *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669,
 7 690 (Cal. 2000)); *see also Pokorny v. Quixtar, Inc.*, 601 F.3d 987, 996 (9th Cir. 2010) (explaining
 8 that, under California law, “both procedural and substantive unconscionability must be present for
 9 the contract to be declared unenforceable”). “The procedural element of unconscionability
 10 focuses on two factors: oppression and surprise.” *Aron v. U-Haul Co. of Cal.*, 49 Cal. Rptr. 3d
 11 555, 564 (Ct. App. 2006). “The substantive element of unconscionability focuses on the actual
 12 terms of the agreement and evaluates whether they create ‘overly harsh’ or ‘one-sided’ results as
 13 to ‘shock the conscience.’” *Id.* (citation omitted).

14 At most, Plaintiffs have made a weak showing that the Limited Warranty’s one-year
 15 duration provision is procedurally unconscionable. Plaintiffs contend that the Limited Warranty is
 16 unconscionable because Huawei and its customers are in an unequal bargaining position, where
 17 customers cannot negotiate warranty terms. CAC ¶¶ 226, 246. The bargaining positions of
 18 Huawei and its customers are not as imbalanced as Plaintiffs suggest because Plaintiffs have not
 19 adequately alleged that Huawei knew of and concealed the defects at the time of sale. *See In re*
 20 *Sony Grand Wega KDF-E A10/A20 Series Rear Projection HDTV Television Litig.*, 758 F. Supp.
 21 2d 1077, 1101 (S.D. Cal. 2010) (rejecting argument that defendant had superior bargaining power
 22 where plaintiffs had not sufficiently alleged that the defendant knew of the defect before the point
 23 of sale). Even if the terms of the Limited Warranty are non-negotiable, Plaintiffs do not plead that
 24 they had no meaningful alternatives; they could have purchased other phones or obtained
 25 additional warranty protections from Huawei. *Davidson v. Apple, Inc.*, No. 16-CV-04942-LHK,

26
 27 _____
 28 ⁴ The Court finds it unnecessary at this stage to address Plaintiffs’ contention that Huawei’s
 Limited Warranty fails of its essential purpose, Opp’n 19–21, because that does not appear to be a
 ground on which Huawei argues for dismissal of Plaintiffs’ express warranty claims.

1 2017 WL 976048, at *12 (N.D. Cal. Mar. 14, 2017). Moreover, the CAC does not allege that
2 Plaintiffs were “surprised” by the Limited Warranty’s terms or that they could not or did not
3 access Huawei’s Limited Warranty online at the time of purchase. *See id.*

4 Plaintiffs make no allegations relevant to substantive unconscionability. Courts have
5 rejected substantive unconscionability arguments where, as here, the duration of the express
6 warranty “corresponds to the maximum limit permitted under [state] law” for implied warranties.
7 *Marchante v. Sony Corp. of Am.*, 801 F. Supp. 2d 1013, 1023 (S.D. Cal. 2011); *see also Bros. v.*
8 *Hewlett-Packard Co.*, No. 06-CV-02254-RMW, 2006 WL 3093685, at *8 (N.D. Cal. Oct. 31,
9 2006) (explaining that, in general, “a time limitation, by itself, is not unconscionable”). Plaintiffs’
10 allegations do not show that the one-year duration “create[s] overly harsh or one-sided results as to
11 shock the conscience,” and thus Plaintiffs have not established substantive unconscionability.
12 *Aron*, 49 Cal. Rptr. 3d at 564 (internal quotation marks and citation omitted).

13 Based on the allegations in the CAC, Huawei’s one-year Limited Warranty is not
14 unconscionable, and the Limited Warranty is enforceable. Accordingly, Plaintiffs have not stated
15 a claim for breach of express warranty for Plaintiffs Gorbachev, Christensen, and Tran whose
16 phone defect manifested after the one-year Limited Warranty expired or for Plaintiffs Berry,
17 Jones, and Leone who did not notify Huawei of a defect within the one-year Limited Warranty
18 period. The Court GRANTS Huawei’s Motion to Dismiss the express warranty claim of Plaintiffs
19 Gorbachev, Christensen, Tran, Berry, Jones, and Leone with leave to amend to allege further facts
20 in support of Plaintiffs’ unconscionability argument.

21 (2) Notice and Opportunity to Cure

22 For many of those same Plaintiffs, Huawei relatedly argues that the failure to give Huawei
23 notice or an opportunity to cure is fatal to their claims. Huawei Mot. 11–12. In particular,
24 Plaintiffs Gorbachev, Tran, Berry, and Leone do not allege that they contacted Huawei to seek
25 repairs. *Id.* at 12. Additionally, Plaintiff Beheler does not allege that he allowed Huawei to act on
26 its offer to repair or replace his phone. *Id.* Due to the variations in state law on this issue, the
27 Court proceeds through each Plaintiff’s state-law claim individually.
28

(a) California

Beyond California Plaintiff Gorbachev's falling outside the terms of Huawei's Limited Warranty, California law does not supply an independent notice-related bar to his express warranty claim. As a general matter, a "buyer must, within a reasonable time after he or she discovers or should have discovered any breach, notify the seller of breach or be barred from any remedy." Cal. Com. Code § 2607(3)(A). And it is true that Plaintiff Gorbachev does not allege that he contacted Huawei to seek repairs. CAC ¶¶ 19–27. But notice is not required in an action by consumers "against manufacturers with whom they have not dealt." *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 Gorbachev asserts his express warranty claim against Huawei. The allegations in the CAC support that Huawei is a manufacturer with whom Plaintiff Gorbachev has never dealt. Plaintiff Gorbachev 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 Gorbachev is not required to provide notice to manufacturer Huawei, his claim cannot be dismissed on this ground.

(b) Illinois

Under Illinois law, notice is an "essential element" of a breach of warranty claim. *Maldonado v. Creative Woodworking Concepts, Inc.*, 694 N.E.2d 1021, 1025 (Ill. App. Ct. 1998). Thus, "failure to allege sufficient notice may be a fatal defect in a complaint alleging breach of warranty." *Id.* A manufacturer's general awareness of 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.*,

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

4 The allegations of Illinois Plaintiff Tran do not withstand scrutiny under these standards.
 5 As noted above, Plaintiff Tran is not alleged to have informed Huawei of the Bootloop Defect in
 6 his phone. Indeed, there is no allegation that he contacted Huawei at all. CAC ¶¶ 52–57. Nor can
 7 Plaintiff Tran rely on the first notice exception because the CAC does not aver that other
 8 circumstances put Huawei on notice that there was an issue with Plaintiff Tran’s phone. Under the
 9 cases, Huawei’s alleged general awareness of the defects in Nexus 6P phones is insufficient. *See*
 10 *Connick*, 675 N.E.2d at 590 (“[G]eneralized knowledge about the safety concerns of third parties
 11 is insufficient to fulfill plaintiffs’ UCL notice requirement.”). The second exception also is
 12 inapplicable in this consumer defect suit where none of the Plaintiffs, let alone Plaintiff Tran,
 13 assert that he or she suffered any personal injury. Accordingly, the Court GRANTS Huawei’s
 14 Motion to Dismiss Plaintiff Tran’s express warranty claim with leave to amend to allege further
 15 facts about Huawei’s awareness of the defects in Plaintiff Tran’s phone, either through direct
 16 notice from Plaintiff Tran or other circumstances.

17 (c) **Indiana**

18 Indiana law, too, requires that the buyer give notice to the seller before bringing suit for
 19 breach of warranty. Ind. Code Ann. § 26-1-2-607(3)(a). But unlike similar provisions in other
 20 states, Indiana’s notification law “is satisfied if the seller has ‘actual knowledge’ that the goods are
 21 nonconforming.” *Anderson v. Gulf Stream Coach, Inc.*, 662 F.3d 775, 782 (7th Cir. 2011); *see*
 22 *also Agrarian Grain Co. v. Meeker*, 526 N.E.2d 1189, 1193 (Ind. Ct. App. 1988) (“[T]he notice
 23 required by [the Indiana statute] is satisfied by the [seller’s] actual knowledge there are some
 24 problems with the goods.”). Here, the allegations demonstrate that Huawei knew that Indiana
 25 Plaintiff Beheler’s Nexus 6P phone manifested the Battery Drain Defect and that he was
 26 dissatisfied with the phone. *See* CAC ¶ 64 (alleging that Plaintiff Beheler “called Huawei’s
 27 customer support” and “[a] Huawei representative agreed that the Phone was defective”). That
 28 Huawei offered to repair or replace the phone and Plaintiff Beheler apparently never responded,

1 *id.*, does not change the analysis, as the Limited Warranty does not explicitly require Plaintiff
2 Beheler to give Huawei a reasonable opportunity to cure. *See Anderson*, 662 F.3d at 782 (“[T]he
3 only Indiana court to have squarely addressed this issue has concluded that the buyer only has to
4 give the seller a reasonable opportunity to cure if the terms of the warranty impose that
5 requirement.”). Accordingly, Plaintiff Beheler’s express warranty claim cannot be dismissed for
6 failure to allege notice and an opportunity to cure.

7 **(d) Michigan**

8 Under Michigan law, it appears that “[t]he buyer must provide reasonable notice in order
9 to recover for a breach of warranty.” *Eaton Corp. v. Magnavox Co.*, 581 F. Supp. 1514, 1531
10 (E.D. Mich. 1984). Plaintiffs do not cite any contrary authority. The CAC does not allege that
11 Michigan Plaintiff Berry provided any notice to Huawei. CAC ¶¶ 70–78. Accordingly, the Court
12 GRANTS Huawei’s Motion to Dismiss Plaintiff Berry’s express warranty claim with leave to
13 amend to allege further facts about Plaintiff Berry’s notice to Huawei.

14 **(e) Pennsylvania**

15 The Court rejects Huawei’s notice argument as to Pennsylvania Plaintiff Leone. The
16 Pennsylvania statute says that “the buyer must within a reasonable time after he discovers or
17 should have discovered any breach notify the seller of breach.” 13 Pa. Stat. and Cons. Stat. Ann.
18 § 2607(c)(1). However, while many states require pre-suit notice, Pennsylvania appears not to
19 have the same limitation. Pennsylvania state courts have held that the filing of a complaint may
20 satisfy the notice requirement for a breach of warranty claim. *See Precision Towers, Inc. v. Nat-*
21 *Com, Inc.*, No. 2143, 2002 WL 31247992, at *5 (Pa. Com. Pl. Sept. 23, 2002) (“The filing of a
22 complaint has been held to satisfy the notice requirement for a breach of warranty claim.”); *cf.*
23 *Yates v. Clifford Motors, Inc.*, 423 A.2d 1262, 1270 (Pa. Super. Ct. 1980) (holding that the filing
24 of the complaint constituted adequate notice that the plaintiff consumer was rejecting the truck at
25 issue). While the timeliness of the notice is a factual issue better resolved at a later stage of the
26 litigation, the filing of this action is sufficient to preclude dismissal of Plaintiff Leone’s express
27 warranty claim for failure to provide notice. *See In re MyFord Touch Consumer Litig.*, 46 F.
28 Supp. 3d 936, 978 (N.D. Cal. 2014).

1 In sum, the Court GRANTS WITH LEAVE TO AMEND Huawei’s Motion to Dismiss the
 2 express warranty claim of Plaintiffs Tran and Berry—but not Plaintiffs Gorbachev, Beheler, or
 3 Leone—for failure to adequately plead notice and an opportunity to cure.

4 **(3) Basis of the Bargain and Reliance**

5 Huawei next contends that the Court should dismiss the express warranty claims of certain
 6 Plaintiffs who do not plead that they saw or relied on Huawei’s warranty. Huawei Mot. 11.
 7 Huawei’s argument covers Plaintiffs from California (Makcharoenwoodhi, Gorbachev, and
 8 Christensen), Florida (Martorello), Illinois (Tran), New York (Davydov), North Carolina
 9 (Harrison and Himes), Ohio (Servodio), Pennsylvania (Leone), Texas (Poore), and Washington
 10 (Johnston). *Id.*

11 In all of the relevant states, an express warranty is created only when an “affirmation of
 12 fact or promise” or a “description of the goods” is part of the “basis of the bargain.” Cal. Com.
 13 Code § 2313(1)(a)–(b); Fla. Stat. Ann. § 672.313(1)(a)–(b); 810 Ill. Comp. Stat. Ann. 5/2-
 14 313(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);
 15 Ohio Rev. Code Ann. § 1302.26(A)(1)–(2); 13 Pa. Stat. and Cons. Stat. Ann. § 2-313(a)(1)–(2);
 16 Tex. Bus. & Com. Code Ann. § 2.313(a)(1)–(2); Wash. Rev. Code Ann. § 62A.2-313(1)(a)–(b).
 17 The relevant question is whether Plaintiffs must show reliance on the statement or representation
 18 for it to be considered part of the “basis of the bargain.” Because states are split on the question
 19 whether reliance is necessary, the Court analyzes the relevant state laws in turn.

20 **(a) California**

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

24 The present section deals with affirmations of fact by the seller, descriptions of
 25 the goods or exhibitions of samples, exactly as any other part of a negotiation
 26 which ends in a contract is dealt with. No specific intention to make a warranty is
 27 necessary if any of these factors is made part of the basis of the bargain. In actual
 28 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 out of the agreement requires clear affirmative proof. The issue normally is one
2 of fact.

3 UCC § 2-313, cmt. 3 (emphasis added). While pre-UCC California law required proof of reliance
4 on specific promises, comment 3 to UCC § 2-313 expressly signals a departure from that
5 requirement. *See Keith v. Buchanan*, 220 Cal. Rptr. 392, 397–98 (Ct. App. 1985) (explaining that,
6 under the UCC, “the concept of reliance has been purposefully abandoned”). Because California’s
7 express warranty statute conforms to the UCC, the California Court of Appeal has held that a
8 buyer need not show reliance because the California statute “creates a presumption that the seller’s
9 affirmations go to the basis of the bargain.” *Weinstat v. Dentsply Int’l, Inc.*, 103 Cal. Rptr. 3d 614,
10 626 (Ct. App. 2010). The court reasoned that the statute focuses not on the buyer’s actions, but on
11 “the seller’s behavior and obligation—his or her affirmations, promises, and descriptions of the
12 goods—all of which help define what the seller ‘in essence’ agreed to sell.” *Id.* at 627. Therefore,
13 “[a]ny affirmation, once made, is part of the agreement unless there is ‘clear affirmative proof’
14 that the affirmation has been taken out of the agreement.” *Id.*

15 The Court acknowledges that some district court cases continue to indicate that reliance is
16 required after the decision in *Weinstat*. *See, e.g., Nabors v. Google, Inc.*, No. 10-CV-03897 EJD,
17 2011 WL 3861893, at *4 (N.D. Cal. Aug. 30, 2011) (dismissing express warranty claims where
18 plaintiff failed to allege reasonable reliance on any specific representations made by the
19 defendant). However, these cases are not dispositive because they are not decisions of the
20 California Supreme Court (or of any California state court) and they do not discuss *Weinstat* or
21 comment 3 to UCC § 2-313. Moreover, many of the cases are distinguishable because they did
22 not involve written warranties included as part of the sale, as here. In this situation, “an assertion
23 that the warranty [is] not part of the deal between the issuing party and receiving party is far less
24 persuasive.” *In re MyFord*, 46 F. Supp. 3d at 973.

25 In its reply, Huawei asserts that *Weinstat* is distinguishable because it involved parties that
26 were in privity with one another. Huawei Reply 8. In support of its argument, Huawei cites a
27 district court case drawing that distinction. *See Coleman v. Boston Sci. Corp.*, No. 10-CV-01968-
28 OWW, 2011 WL 3813173, at *4 (E.D. Cal. Aug. 29, 2011) (“Neither *Weinstat* nor *Keith* supports
Plaintiff’s erroneous contention that reliance is not required where privity is absent.”). Although

1 some district courts have reached that conclusion, multiple others have interpreted California law
 2 not to require a showing of reliance even if privity is lacking. *See, e.g., In re MyFord*, 46 F. Supp.
 3 3d at 973 (“[O]ther courts interpreting California law have not found such a limitation—*i.e.*, they
 4 have not required reliance where the parties are not in privity.”); *McVicar v. Goodman Glob., Inc.*,
 5 1 F. Supp. 3d 1044, 1057 (C.D. Cal. 2014) (relying on *Weinstat* in a suit by plaintiffs against an air
 6 conditioning manufacturer and holding that the express warranty claim was well-pled even though
 7 plaintiffs “did not allege that they saw any promises or affirmations of fact prior to purchase”); *In*
 8 *re Toyota Motor Corp.*, 754 F. Supp. 2d at 1183 n.22 (noting that plaintiffs, in a suit against a car
 9 manufacturer, “are not required to allege reliance”).

10 At least on the facts of this case, the Court follows those cases that have not required
 11 reliance as a prerequisite to asserting an express warranty claim. As *Weinstat* emphasizes, the
 12 statute focuses on the seller and looks to the promises and affirmations that the seller made. 103
 13 Cal. Rptr. 3d at 627. The ultimate question is “what the seller ‘in essence’ agreed to sell.” *See id.*
 14 Here, in selling the phones to retailers to sell to the public, Huawei provided a written Limited
 15 Warranty that the Nexus 6P phones are “free from material defects” in normal operation. Huawei
 16 Mot., Ex. A, Preamble. Although two out of three California Plaintiffs did not purchase directly
 17 from Huawei, there is no dispute that Huawei treated the Limited Warranty as extending to
 18 Plaintiffs upon their purchase. *See* CAC ¶ 15 (alleging that “Huawei informed [California
 19 Plaintiff] Makcharoenwoodhi that his warranty was voided,” not that it did not apply to him); *see*
 20 *also, e.g., id.* ¶¶ 44 (alleging that Huawei denied warranty coverage even though Florida Plaintiff
 21 Martorello claimed within the warranty period), 242 (alleging that Huawei’s Limited Warranty is
 22 designed to cover end-users, not retailers). In these circumstances, a privity requirement would
 23 have little meaning and would serve only to allow Huawei to evade the promises it made in
 24 writing about the Nexus 6P phones. Accordingly, failure to adequately plead reliance is not an
 25 appropriate basis on which to dismiss the express warranty claims of Plaintiffs
 26 Makcharoenwoodhi, Gorbachev, and Christensen.

27 **(b) Florida**

28 Under Florida law, “an express warranty is generally considered to arise only where the

1 seller asserts a fact of which the buyer is ignorant prior to the beginning of the transaction and on
 2 which the buyer justifiably relies as part of the ‘basis of the bargain.’” *Thursby v. Reynolds*
 3 *Metals Co.*, 466 So. 2d 245, 250 (Fla. Dist. Ct. App. 1984) (citations omitted); *see also Royal*
 4 *Typewriter Co. v. Xerographic Supplies Corp.*, 719 F.2d 1092, 1101 (11th Cir. 1983) (holding
 5 that, under Florida law, “absence of reliance will negate the existence of an express warranty”).
 6 Plaintiffs do not cite any contrary authority. Because the sole Florida Plaintiff, Martorello, does
 7 not allege facts to support the necessary element of reliance, the Court GRANTS Huawei’s motion
 8 to dismiss this claim with leave to amend to allege relevant facts.

9 **(c) Illinois**

10 Whether a plaintiff must plead reliance under Illinois law is slightly unclear. Some Illinois
 11 courts have suggested that reliance is an invariable requirement for an express warranty claim.
 12 *See, e.g., Regopoulos v. Waukegan P’ship*, 608 N.E.2d 457, 461 (Ill. Ct. App. 1992) (stating that
 13 one necessary element of an express warranty claim is that “the purchaser actually relied upon the
 14 warranty”); *Coryell v. Lombard Lincoln-Mercury Merkur, Inc.*, 544 N.E.2d 1154, 1158 (Ill. Ct.
 15 App. 1989) (“[T]he buyer must show reliance on the seller’s representations in order for an
 16 express warranty to exist.”). Other Illinois courts have held that a seller’s representations create a
 17 rebuttable presumption of reliance by the buyer so that reliance need not be pled. *See, e.g., Felley*
 18 *v. Singleton*, 705 N.E.2d 930, 934 (Ill. Ct. App. 1999) (“[R]epresentations [by the seller] constitute
 19 express warranties, regardless of the buyer’s reliance on them, unless the seller shows by clear
 20 affirmative proof that the representations did not become part of the basis of the bargain.”); *Weng*
 21 *v. Allison*, 678 N.E.2d 1254, 1256 (Ill. Ct. App. 1997) (“In this matter, the seller’s statements to
 22 the buyers . . . were affirmations of fact and descriptions of the [product] that created an express
 23 warranty.”). These courts have acknowledged the tension in the cases. *See Felley*, 705 N.E.2d at
 24 934 (citing the above-quoted statement in *Coryell* and “recogniz[ing] that Illinois courts have not
 25 always consistently stated these principles”).

26 Despite the inconsistency, the legal principles do not seem to be irreconcilable. In
 27 particular, the cases can be harmonized based on the presence or absence of privity. When privity
 28 is lacking, the background rule mandates pleading and proving reliance. *See Regopoulos*, 608

1 N.E.2d at 461. In contrast, when the plaintiff is in privity with the defendant, the defendant’s
 2 representations about the product presumptively establish the reliance element. *See Felley*, 705
 3 N.E.2d at 934; *Weng*, 678 N.E.2d at 1256. Indeed, one of the cases that Plaintiffs cite explicitly
 4 notes the connection between allegations of privity and allegations of reliance. *See In re Rust-*
 5 *Oleum Restore Mktg., Sales Practices & Prods. Liab. Litig.*, 155 F. Supp. 3d 772, 809 (N.D. Ill.
 6 2016). And Plaintiffs’ other case involved the quintessential privity relationship—that between
 7 buyer and seller. *See Bietsch v. Sergeant’s Pet Care Prod., Inc.*, No. 15-CV-05432, 2016 WL
 8 1011512, at *5 (N.D. Ill. Mar. 15, 2016). Under Illinois law, then, it appears that a plaintiff must
 9 plead reliance if he does not adequately allege privity with the defendant.

10 As discussed in more detail in the privity section below, Illinois Plaintiff Tran does not
 11 sufficiently plead that he is in privity with Huawei or that an exception applies. Without an
 12 adequate allegation of privity, Plaintiff Tran’s claim must be dismissed for failure to plead
 13 reliance. Accordingly, the Court GRANTS Huawei’s motion to dismiss Plaintiff Tran’s express
 14 warranty claim with leave to amend to allege relevant facts.

15 **(d) New York**

16 Under New York law, the buyer may bring an action for breach of express warranty
 17 against a manufacturer only if “the buyer relied [on the manufacturer’s statements] when
 18 contracting with his immediate seller.” *Avola v. La.-Pac. Corp.*, 991 F. Supp. 2d 381, 391
 19 (E.D.N.Y. 2013); *see also Horowitz v. Stryker Corp.*, 613 F. Supp. 2d 271, 286 (E.D.N.Y. 2009)
 20 (holding that, under New York law, “an action for breach of express warranty requires . . . reliance
 21 on th[e] promise or representation” (citing *CBS Inc. v. Ziff-Davis Pub. Co.*, 553 N.E.2d 997, 1000–
 22 01 (N.Y. 1990))). Plaintiffs do not identify any contrary authority. Because the sole New York
 23 Plaintiff, Davydov, does not allege facts to support the necessary element of reliance, the Court
 24 GRANTS Huawei’s motion to dismiss this claim with leave to amend to allege relevant facts.

25 **(e) North Carolina**

26 The same result obtains under North Carolina law. As Plaintiffs’ own authority provides,
 27 “[a] plaintiff must have relied upon the warrantor’s statement in order to establish an express
 28 warranty and its breach.” *Eclipse Packaging, Inc. v. Stewarts of Am., Inc.*, No. 14-CV-00195-

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

9 North Carolina Plaintiffs Harrison and Himes do not argue or allege that the natural
 10 tendency of Huawei’s representation that the Nexus 6P phones are “free from material defects” in
 11 normal operation was to induce them to purchase the phone. This representation stands in stark
 12 contrast to the representation at issue in *Bernick*. There, the North Carolina Supreme Court held
 13 that the defendants’ statement that their hockey mouthguard offered “maximum protection to the
 14 lips and teeth” would naturally tend to induce a mother to purchase one for her son. *Bernick*, 293
 15 S.E.2d at 413–14. The court emphasized the “family purpose of the mother’s purchase.” *Id.* at
 16 414. No similar circumstances or facts are alleged in this case. Accordingly, the Court GRANTS
 17 Huawei’s motion to dismiss the express warranty claims of Plaintiffs Harrison and Himes with
 18 leave to amend to allege relevant facts.

19 (f) **Ohio**

20 In the case of express written warranties, Ohio law follows the same approach as
 21 California law—namely, that express warranty claims may proceed even in the absence of an
 22 allegation of reliance. In *Norcold, Inc. v. Gateway Supply Co.*, the Ohio Court of Appeals rested
 23 on comment 3 of UCC § 2-313 and followed the “decisive majority of courts” that have held that
 24 “reliance is not an element in a claim for breach of an express written warranty.” 798 N.E.2d 618,
 25 623–24 (Ohio Ct. App. 2003). As the court explained, a written warranty is an integral part of a
 26 transaction whose purpose is to assure “one party to a contract of the existence of a fact upon
 27 which the other party may rely.” *Id.* at 624 (quoting *Metro. Coal Co. v. Howard*, 155 F.2d 780,
 28 784 (2d Cir. 1946)). Thus, in that case, the court held that “because the warranties . . . were part of

1 a written contract, . . . enforcement thereof is not dependant [sic] upon any reliance by [the
2 plaintiff].” *Id.* Although this case does not involve a warranty explicitly written into a contract
3 between the parties, *Norcold*’s reasoning applies in this situation, where the manufacturer has
4 warranted specific terms in writing.

5 Huawei’s cited authority, *McKinney v. Bayer Corp.*, 744 F. Supp. 2d 733 (N.D. Ohio
6 2010), is distinguishable. Although the district court in *McKinney* was also interpreting Ohio law,
7 the court relied heavily on a Sixth Circuit opinion interpreting Kentucky law and acknowledged as
8 much. *Id.* at 754 (citing Sixth Circuit’s decision in *Overstreet v. Norden Labs., Inc.*, 669 F.2d
9 1286 (6th Cir. 1982), and noting that the Sixth Circuit was “applying analogous Kentucky law”).
10 Notably, the district court in *McKinney* did not address *Norcold* at all, likely because the Ohio
11 Court of Appeals in *Norcold* limited its holding to “the context of an express written warranty,”
12 798 N.E.2d at 623, whereas the warranties at issue in *McKinney* were contained in advertising and
13 labeling, 744 F. Supp. 2d at 754–55. Because the instant case involves an express written
14 warranty, the Court concludes that *Norcold* is controlling and Ohio Plaintiff Servodio’s need not
15 plead reliance to state a claim for express warranty under Ohio law. Accordingly, this is not an
16 appropriate basis on which to dismiss Plaintiff Servodio’s express warranty claim.

17 **(g) Pennsylvania**

18 Under Pennsylvania law, there is a rebuttable presumption of reliance. *See Cole v. Gen.*
19 *Motors Corp.*, 484 F.3d 717, 726 (5th Cir. 2007). Specifically, Pennsylvania law follows the
20 approach that “all statements of the seller [become] part of the basis of the bargain unless clear
21 affirmative proof is shown to the contrary.” *Sessa v. Riegle*, 427 F. Supp. 760, 766 (E.D. Pa.
22 1977), *aff’d*, 568 F.2d 770 (3d Cir. 1978). Accordingly, reliance is not an appropriate basis on
23 which to dismiss Pennsylvania Plaintiff Leone’s express warranty claim.

24 **(h) Texas**

25 Texas courts have interpreted Texas’s express warranty law to incorporate a reliance
26 requirement. In *Compaq Computer Corp. v. Lapray*, the Texas Supreme Court surveyed the states
27 that have and have not adopted the reliance requirement and noted that “[u]nder Texas law, we
28 have said that ‘[r]eliance is . . . not only relevant to, but an element of proof of, plaintiffs’ claims

1 of breach of express warranty (to a certain extent).” 135 S.W.3d 657, 676 (Tex. 2004) (second
 2 and third alterations in original) (quoting *Henry Schein, Inc. v. Stromboe*, 102 S.W.3d 675, 686
 3 (Tex. 2002)); *Am. Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 436 (Tex. 1997) (“[A]n express
 4 warranty claim also requires a form of reliance.”). Although Plaintiffs identify a Texas Court of
 5 Appeals case stating in a footnote that it is error to include reliance as a necessary element of proof
 6 for breach of express warranty, *Villalon v. Vollmering*, 676 S.W.2d 220, 222 n.1 (Tex. App. 1984),
 7 other divisions of the Texas Court of Appeals have reached a different conclusion. In any event,
 8 the statement in *Villalon* cannot override the strong indications by the Texas Supreme Court about
 9 reliance. Accordingly, the Court GRANTS Huawei’s motion to dismiss the express warranty
 10 claim of Texas Plaintiff Poore with leave to amend to allege relevant facts.

11 (i) **Washington**

12 Washington courts sometimes require a form of reliance. For example, in *Touchet Valley*
 13 *Grain Growers, Inc. v. Opp & Seibold General Construction, Inc.*, the Washington Supreme Court
 14 explained that “[r]ecovery for breach of an express warranty is contingent on a plaintiff’s
 15 knowledge of the representation.” 831 P.2d 724, 731 (Wash. 1992); *Baughn v. Honda Motor Co.*,
 16 727 P.2d 655, 669 (Wash. 1986) (“Although the UCC does not require a plaintiff to show reliance
 17 on the manufacturer’s statements, he or she must at least be aware of such representations to
 18 recover for their breach.”). However, the Court does not read those cases to require a showing of
 19 awareness when the plaintiffs base their claims on an express written warranty, rather than other
 20 representations (such as advertising statements), to form the basis of the bargain. *See In re Myford*
 21 *Touch Consumer Litig.*, No. 13-CV-03072-EMC, 2015 WL 5118308, at *6 (N.D. Cal. Aug. 31,
 22 2015) (recognizing that awareness of representations must be shown under Washington law
 23 “where the representations are used by the plaintiff to define the scope of the warranty”).
 24 Huawei’s authority is to the same effect, as Huawei’s identified case involved advertising
 25 statements and cited a Washington Supreme Court case for the proposition that “before recovering
 26 on a claim of breach of an express warranty contained in an advertisement, a plaintiff must
 27 demonstrate that he or she justifiably relied on a statement contained in the advertisement.” *Reece*
 28 *v. Good Samaritan Hosp.*, 953 P.2d 117, 123 (Wash. Ct. App. 1998) (citing *Arrow Transp. Co. v.*

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

3 In sum, the Court GRANTS WITH LEAVE TO AMEND Huawei’s Motion to Dismiss the
4 express warranty claim of Plaintiffs Martorello, Tran, Davydov, Harrison, Himes, and Poore—but
5 not Plaintiffs Makcharoenwoodhi, Gorbachev, Christensen, Servodio, Leone, or Johnston—for
6 failure to adequately plead reliance.

7 (4) Privity

8 Finally, Huawei contends that the Court should dismiss the express warranty claims of
9 Florida Plaintiff Martorello and Illinois Plaintiff Tran because those Plaintiffs are not in privity of
10 contract with Huawei. Huawei Mot. 12. Huawei properly asserts that the CAC’s bare allegation
11 that all Plaintiffs “were in privity of contract with Huawei . . . by virtue of their interactions with
12 Huawei,” CAC ¶ 242, is conclusory and does not plausibly allege privity. Thus, the Court must
13 address whether privity of contract is required to state a claim for breach of express warranty
14 under Florida and Illinois law.

15 (a) Florida

16 Florida courts are split on whether claims for breach of express warranty always require
17 privity. *See In re Clorox Consumer Litig.*, No. 12-CV-00280-SC, 2013 WL 3967334, at *10
18 (N.D. Cal. July 31, 2013) (summarizing the split). Some courts hold that because express
19 warranty claims are contractual, “the plaintiff must be in privity of contract with the defendant.”
20 *Hill v. Hoover Co.*, 899 F. Supp. 2d 1259, 1266 (N.D. Fla. 2012) (quoting *T.W.M. v. Am. Med.*
21 *Sys., Inc.*, 886 F. Supp. 842, 844 (N.D. Fla. 1995)). Other courts have declined to apply the privity
22 requirement when the seller is unlikely to have knowledge about the manufacturer’s product.
23 *Smith v. Wm. Wrigley Jr. Co.*, 663 F. Supp. 2d 1336, 1343 (S.D. Fla. 2009) (“[I]t defies common
24 sense to argue that purchasers of Eclipse gum presumed that the cashier at the local convenience
25 store is familiar with the scientific properties of MBE.”). Even if the Court finds the latter line of
26 cases persuasive, Florida Plaintiff Martorello purchased his phone from Google. CAC ¶ 38. The
27 CAC provides no basis to conclude that Huawei has detailed knowledge about the Nexus 6P that
28 Google does not; to the contrary, the CAC often lumps Huawei and Google together.

1 Accordingly, the Court GRANTS Huawei’s Motion to Dismiss the express warranty claim of
2 Plaintiff Martorello with leave to amend to allege further facts about the privity relationship
3 between Plaintiff Martorello and Huawei or any disparity in knowledge between Huawei and
4 Google regarding the Nexus 6P phone.

5 (b) Illinois

6 As noted above, Illinois’s law on privity is congruous with its law on reliance. Illinois
7 generally requires the plaintiff to be in privity with the defendant. *Baldonado v. Wyeth*, No. 04-
8 CV-04312, 2012 WL 729228, at *4 (N.D. Ill. Mar. 6, 2012). Illinois Plaintiff Tran has not
9 sufficiently alleged privity with Huawei. He purchased his Nexus 6P phone through the Google
10 Store, and he interacted solely with Google when trying to remedy the Bootloop Defect. CAC
11 ¶¶ 52–54. The CAC’s unsupported allegation that all Plaintiffs “were in privity of contract with
12 Huawei . . . by virtue of their interactions with Huawei,” *id.* ¶ 242, is conclusory and does not
13 plausibly allege privity.

14 That conclusion does not end the analysis. Where the parties are not in privity, there may
15 be an express warranty if the plaintiff shows that the statement became part of the basis of the
16 bargain. *Ampat/Midwest, Inc. v. Ill. Tool Works, Inc.*, No. 85-CV-10029, 1988 WL 53222, at *3
17 (N.D. Ill. May 12, 1988). More precisely, Illinois courts have recognized an exception to the
18 privity requirement, holding that “manufacturer documents given directly to the buyer prior to a
19 purchase may give rise to an express warranty.” *Canadian Pac. Ry. Co. v. Williams-Hayward*
20 *Protective Coatings, Inc.*, No. 02-CV-08800, 2005 WL 782698, at *15 (N.D. Ill. Apr. 6, 2005);
21 *see also Wheeler v. Sunbelt Tool Co.*, 537 N.E.2d 1332, 1341 (Ill. Ct. App. 1989) (“Documents,
22 brochures, and advertisements [from the manufacturer] may constitute express warranties.”).
23 Although the CAC provides a website to access Huawei’s Limited Warranty, CAC ¶ 219 & n.17,
24 there are no allegations that the warranty was available online at the time that Plaintiff Tran
25 purchased his Nexus 6P or that he was directed to the online warranty, accessed the warranty
26 online, or otherwise received the warranty before his purchase, *id.* ¶¶ 52–57. While Plaintiffs’
27 opposition suggests that Huawei’s Limited Warranty was “included in every Google Nexus 6P
28 box,” Opp’n 17, there is no corresponding allegation in the CAC. These circumstances do not fit

1 within the privity exception, and Plaintiffs do not even clearly argue that the exception is met in
 2 this case. Accordingly, the Court GRANTS Huawei's Motion to Dismiss the express warranty
 3 claim of Plaintiff Tran with leave to amend to allege further facts about the privity relationship
 4 between Plaintiff Tran and Huawei.

5 In sum, the Court GRANTS WITH LEAVE TO AMEND Huawei's Motion to Dismiss the
 6 express warranty claim of Plaintiffs Martorello and Tran for failure to adequately plead privity.

7 **ii. Breach of Implied Warranty of Merchantability**

8 Plaintiffs bring their second cause of action for breach of the implied warranty of
 9 merchantability on behalf of a putative nationwide class but do not specify which law governs the
 10 claim. CAC ¶ 235. Alternatively, they assert claims for breach of the implied warranty of
 11 merchantability on behalf of the putative statewide subclasses under the laws of the respective
 12 states. *Id.* ¶ 236. Specifically, Plaintiffs' cause of action alleges that Huawei "impliedly
 13 warranted that the Phones were of a merchantable quality" but failed to keep that promise because
 14 the Nexus 6Ps "were not in merchantable condition and are not fit for the ordinary purpose for
 15 which phones are used." *Id.* ¶ 239. Huawei seeks dismissal on the grounds that Plaintiffs have not
 16 adequately pled that they were in privity with Huawei, that they provided Huawei notice and an
 17 opportunity to cure, and that the phones were unmerchantable. Huawei Mot. 13–16.

18 **(1) Privity and Third-Party Beneficiary**

19 Huawei first contends that certain Plaintiffs who did not purchase from Huawei cannot
 20 assert implied warranty claims. Huawei Mot. 14. Huawei argues that vertical privity is a
 21 necessary element to sustain an implied warranty claim and that these Plaintiffs do not adequately
 22 plead privity. *Id.* With one limited exception, Plaintiffs concede that the relevant states require
 23 vertical privity, but they respond that the third-party beneficiary exception applies here and is
 24 adequately pled. Opp'n 31–34.

25 Preliminarily, Plaintiffs have failed to sufficiently plead privity between the relevant
 26 Plaintiffs and Huawei. Specifically, Plaintiffs Makcharoenwoodhi, Gorbachev, Martorello, Tran,
 27 Berry, Davydov, Harrison, Himes, Servodio, and Johnston did not purchase their phones from
 28 Huawei. CAC ¶¶ 12 (Makcharoenwoodhi: Best Buy), 19 (Gorbachev: Google), 38 (Martorello:

1 Google), 52 (Tran: Google), 70 (Berry: Google), 79 (Davydov: Amazon), 91 (Harrison: Amazon),
2 99 (Himes: Best Buy), 119 (Servodio: Newegg), 153 (Johnston: Best Buy). Moreover, without
3 any supporting factual content, the conclusory statement that all Plaintiffs “were in privity of
4 contract with Huawei . . . by virtue of their interactions with Huawei,” *id.* ¶ 242, does not
5 plausibly allege privity. Thus, the Court must address the existence of the vertical privity
6 requirement and the third-party beneficiary exception.

7 First, Plaintiffs correctly note that “Michigan has abandoned the privity requirement for
8 implied-warranty claims.” *Pack v. Damon Corp.*, 434 F.3d 810, 820 (6th Cir. 2006); *see also*
9 *Heritage Res., Inc. v. Caterpillar Fin. Servs. Corp.*, 774 N.W.2d 332, 343 (Mich. Ct. App. 2009)
10 (“[The Michigan] Supreme Court . . . has previously held that for some remote purchasers it is
11 unnecessary in actions for breach of implied warranty to establish privity of contract with the
12 manufacturer.”). Huawei does not counter that precedent. Accordingly, the claim by Michigan
13 Plaintiff Berry is not properly dismissed on this ground.

14 Huawei cites cases recognizing a vertical privity requirement under California, Illinois,
15 New York, North Carolina, Ohio, and Washington law. *See Clemens v. DaimlerChrysler Corp.*,
16 534 F.3d 1017, 1023 (9th Cir. 2008) (California); *Zaro v. Maserati N. Am., Inc.*, No. 07-CV-
17 03565-JWD, 2007 WL 4335431, at *2 (N.D. Ill. Dec. 6, 2007) (Illinois); *Kolle v. Mainship Corp.*,
18 No. 04-CV-00711-TCP, 2006 WL 1085067, at *5 (E.D.N.Y. Apr. 20, 2006) (New York); *Traxler*
19 *v. PPG Indus., Inc.*, 158 F. Supp. 3d 607, 623 (N.D. Ohio 2016) (North Carolina); *McKinney*, 744
20 F. Supp. 2d at 758 (Ohio); *Chance v. Richards Mfg. Co.*, 499 F. Supp. 102, 105 (E.D. Wash. 1980)
21 (Washington). Plaintiffs do not challenge that proposition because they argue that application of
22 the third-party beneficiary exception obviates any need to satisfy the vertical privity requirement.

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

1 beneficiary exception: “A contract, made expressly for the benefit of a third person, may be
2 enforced by him at any time before the parties thereto rescind it.” Cal. Civ. Code § 1559.
3 “Because third party beneficiary status is a matter of contract interpretation, a person seeking to
4 enforce a contract as a third party beneficiary must plead a contract which was made expressly for
5 his [or her] benefit and one in which it clearly appears that he [or she] was a beneficiary.”
6 *Schauer v. Mandarin Gems of Cal., Inc.*, 23 Cal. Rptr. 3d 233, 239 (Ct. App. 2005) (alterations in
7 original) (internal quotation marks and citation omitted).

8 With respect to Huawei, Plaintiffs fulfill these pleading requirements. Specifically,
9 Plaintiffs point to Huawei’s Limited Warranty as the contract which is made expressly for
10 Plaintiffs’ benefit. CAC ¶ 242. That express warranty represents to the original purchaser that the
11 Nexus 6P is free from material defects and that Huawei would repair or replace defective or
12 malfunctioning parts. *Id.* ¶¶ 218–20. As Plaintiffs allege, the Limited Warranty is designed to
13 benefit only the end users, not the retailers who sell the phones. *Id.* ¶ 242; *see also id.* ¶ 294 (“The
14 retailers were not intended to be the ultimate consumers of the Nexus 6P smartphones and have no
15 rights under the warranty agreements connected with the Nexus 6P smartphones; these agreements
16 were designed for and intended to benefit the end-users only.”). Similar allegations have been
17 held to be sufficient to invoke the third-party beneficiary exception. *See, e.g., In re MyFord*, 46 F.
18 Supp. 3d at 982–84 & n.15 (finding third-party beneficiary allegations sufficient where Plaintiffs
19 alleged that the retailers “ha[d] no rights under the warranty agreements” and “the warranty
20 agreements were designed for and intended to benefit the ultimate consumers only”); *In re Toyota*
21 *Motor Corp.*, 754 F. Supp. 2d at 1185 (finding third-party beneficiary allegations sufficient where
22 Plaintiffs alleged that they “were the intended consumers” who bought from “a network of dealers
23 who are agents of Defendants”).

24 Accordingly, lack of privity is not an appropriate basis on which to dismiss Plaintiffs’
25 claims for breach of the implied warranty of merchantability.

26 (2) Notice and Opportunity to Cure

27 In a similar vein to its argument for dismissal of the express warranty claims, Huawei
28 contends that certain Plaintiffs’ failure to give Huawei notice or an opportunity to cure is fatal to

1 these Plaintiffs’ implied warranty claims. Huawei Mot. 15–16. In particular, Plaintiffs Beheler,
 2 Berry, Harrison, Himes, Leone, and Poore do not allege that they provided Huawei notice of their
 3 breach of implied warranty claims. *Id.* at 16. Due to the variations in state law on this issue, the
 4 Court proceeds through each Plaintiff’s state-law claim individually.

5 **(a) Indiana**

6 The cases cited with respect to Indiana’s notice requirement for express warranty claims
 7 apply equally to implied warranty of merchantability claims. *See Anderson*, 662 F.3d at 780
 8 (express warranty and implied warranty of merchantability claims); *see also Agrarian Grain Co.*,
 9 526 N.E.2d at 1193 (implied warranty of merchantability claims). Accordingly, for the same
 10 reasons discussed above, Indiana Plaintiff Beheler’s implied warranty claim cannot be dismissed
 11 for failure to allege notice and an opportunity to cure.

12 **(b) Michigan**

13 Under Michigan law, a “plaintiff’s failure to give defendants reasonable notice of her
 14 breach-of-warranty claims” justifies dismissal. *Gorman v. Am. Honda Motor Co.*, 839 N.W.2d
 15 223, 229 (Mich. Ct. App. 2013); *see also In re Carrier IQ, Inc.*, 78 F. Supp. 3d 1051, 1104 (N.D.
 16 Cal. 2015). More specifically, “the seller must be given actual notice that the buyer believes that
 17 the seller is in breach.” *Gorman*, 839 N.W.2d at 231. Here, the CAC’s allegations that Michigan
 18 Plaintiff Berry contacted Google and engaged in various (unsuccessful) troubleshooting options
 19 are not sufficient to meet that standard. CAC ¶¶ 72–75. Not only did Plaintiff Berry have no
 20 interactions with Huawei, but he did not put Huawei on notice that he believed Huawei to be in
 21 breach of the implied warranty of merchantability. Accordingly, the Court GRANTS Huawei’s
 22 Motion to Dismiss Plaintiff Berry’s claim for breach of the implied warranty of merchantability
 23 with leave to amend to allege further facts about whether he put Huawei on notice that he believed
 24 Huawei to be in breach of the implied warranty of merchantability.

25 **(c) North Carolina**

26 In North Carolina, “the burden of pleading . . . that seasonable notification has been given
 27 is on the buyer.” *Maybank v. S. S. Kresge Co.*, 273 S.E.2d 681, 683 (N.C. 1981); *see Phillips v.*
 28 *Rest. Mgmt. of Carolina, L.P.*, 552 S.E.2d 686, 692 (N.C. Ct. App. 2001) (listing “timely notice to

1 the seller” as an essential element to establish a claim for breach of the implied warranty of
 2 merchantability (quoting *Ismael v. Goodman Toyota*, 417 S.E.2d 290, 295 (N.C. Ct. App. 1992))).
 3 “Whether the notice given was seasonable is a question of fact and normally must be determined
 4 by the trier of fact.” *Maybank*, 273 S.E.2d at 684 n.1. Moreover, in deciding an appeal from a
 5 motion for directed verdict, the North Carolina Supreme Court has held that there may be
 6 compliance with the notice requirement where “the plaintiff is a lay consumer and notification is
 7 given to the defendant by the filing of an action within the period of the statute of limitations.” *Id.*
 8 at 685 (“When the plaintiff is a lay consumer and notification is given to the defendant by the
 9 filing of an action within the period of the statute of limitations, and when the applicable policies
 10 behind the notice requirement have been fulfilled, we hold that the plaintiff is entitled to go to the
 11 jury on the issue of seasonable notice.”).

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

24 **(d) Pennsylvania**

25 The parties present no reason to conclude that, with regard to notice, express and implied
 26 warranty claims should be treated differently under Pennsylvania law. As noted above, there is
 27 authority holding that the filing of a complaint can be sufficient to notify the manufacturer of
 28 breach. *See Precision Towers*, 2002 WL 31247992, at *5 (“The filing of a complaint has been

1 held to satisfy the notice requirement for a breach of warranty claim.”). Although the timeliness
2 of the notice remains an open issue, the filing of this action is sufficient to preclude dismissal of
3 Plaintiff Leone’s implied warranty claim for failure to provide notice. *See In re MyFord*, 46 F.
4 Supp. 3d at 978.

5 (e) Texas

6 Although some Texas courts have held that notice to a manufacturer is not required,
7 *Vintage Homes, Inc. v. Coldiron*, 585 S.W.2d 886, 888 (Tex. Civ. App. 1979), the weight of
8 authority in Texas favors the position that notice is required in this circumstance, *see McKay v.*
9 *Novartis Pharm. Corp.*, 934 F. Supp. 2d 898, 912 (W.D. Tex. 2013) (“Three out of the four Texas
10 courts of appeals which have addressed the issue have held that a buyer is required to give notice
11 of an alleged breach of warranty to a remote as well as an immediate seller/manufacturer.”), *aff’d*,
12 751 F.3d 694 (5th Cir. 2014). Moreover, under Texas law, “[t]he manufacturer must be made
13 aware of a problem with a particular product purchased by a particular buyer” and commencement
14 of a lawsuit does not satisfy that requirement. *U.S. Tire-Tech, Inc. v. Boeran, B.V.*, 110 S.W.3d
15 194, 202 (Tex. App. 2003).

16 Although the CAC states that Texas Plaintiff Poore “contacted Huawei to request that his
17 Phone be repaired or replaced,” CAC ¶ 147, it gives no indication that Poore communicated the
18 particular issues that he was having with his phone to Huawei. Contrary to Plaintiffs’ suggestion,
19 Opp’n 26, Plaintiff Poore cannot rely on Huawei’s generalized knowledge of concerns about the
20 phones. *See U.S. Tire-Tech*, 110 S.W.3d at 202; *see also In re Carrier IQ*, 78 F. Supp. 3d at 1104.
21 Accordingly, the Court GRANTS Huawei’s Motion to Dismiss Plaintiff Poore’s claim for breach
22 of the implied warranty of merchantability with leave to amend to allege further facts about
23 whether he made Huawei aware of the problems with his Nexus 6P.

24 Accordingly, the Court GRANTS Huawei’s Motion to Dismiss the implied warranty
25 claims of Plaintiffs Berry and Poore—but not Plaintiffs Beheler, Harrison, Himes, or Leone—with
26 leave to amend to allege further facts about whether any of these Plaintiffs provided notice and an
27 opportunity to cure.

1 (3) Merchantability

2 In a particularly weak final argument, Huawei contends that Plaintiffs do not plausibly
3 allege that their Nexus 6P phones were not merchantable. Huawei Mot. 16. Huawei’s argument is
4 unpersuasive.

5 The implied warranty of merchantability arises by operation of law rather than contract.
6 *See, e.g., Hauter v. Zogarts*, 534 P.2d 377, 385 (Cal. 1975). It guarantees not that the goods
7 “precisely fulfill the expectation of the buyer,” but instead that the goods meet “a minimum level
8 of quality.” *Am. Suzuki Motor Corp. v. Superior Court*, 44 Cal. Rptr. 2d 526, 529 (Ct. App. 1995)
9 (citation omitted). “The core test of merchantability is fitness for the ordinary purpose for which
10 such goods are used.” *Mexia v. Rinker Boat Co.*, 95 Cal. Rptr. 3d 285, 289 (Ct. App. 2009)
11 (citation omitted).

12 Plaintiffs’ allegations easily satisfy these requirements. The CAC identifies some of the
13 basic functions of a smartphone, including “mak[ing] calls, send[ing] text messages, access[ing]
14 the internet,” and storing “photographs, videos, text messages, and contact lists.” CAC ¶ 175.
15 Further, the Bootloop and Battery Drain Defects render the phones unfit for those purposes. When
16 the Bootloop Defect manifests, the phone experiences total failure and the customer permanently
17 loses access to any data stored on the phone. *Id.* ¶¶ 174–75; *see also id.* ¶ 175 (describing a Nexus
18 6P with the Bootloop Defect as “essentially an expensive paperweight”). When the Battery Drain
19 Defect manifests, the phone experiences severe battery drainage with early shut-off. *Id.* ¶¶ 176–
20 77. The customer may use the phone again only after connecting the phone to power. *Id.* ¶ 178.
21 It is no response that some Plaintiffs continued to use their phones after the defects manifested, *see*
22 Huawei Mot. 16, as “the implied warranty can be breached when, although capable of performing
23 its ordinary function, the product nonetheless fails in a significant way to perform as a reasonable
24 consumer would expect.” *In re Carrier IQ*, 78 F. Supp. 3d at 1109.

25 Accordingly, Plaintiffs have adequately pled that the Nexus 6Ps were unmerchantable, and
26 this is not an appropriate basis on which to dismiss Plaintiffs’ claims for breach of the implied
27 warranty of merchantability.
28

1 **iii. Song–Beverly Consumer Warranty Act**

2 The California Plaintiffs’ cause of action for violations of the Song–Beverly Consumer
 3 Warranty Act (“Song–Beverly Act”), Cal. Civ. Code §§ 1791.1, 1792, on behalf of the California
 4 subclass fails because Plaintiffs do not allege where they purchased their phones. The protections
 5 of the Song–Beverly Act extend only to “sale[s] of consumer goods that are sold at retail in this
 6 state [California].” Cal. Civ. Code § 1792. The California Plaintiffs do not allege where they
 7 purchased their phones, and they seek to represent a class of persons in the state of California who
 8 purchased or own at least one Nexus 6P. CAC ¶¶ 205, 285. It is not plausible to infer that any
 9 person in California who owns a Nexus 6P purchased the phone in California. *See In re Carrier*
 10 *IQ*, 78 F. Supp. 3d at 1107 (“[W]hile Plaintiffs allege a number of Plaintiffs reside in California
 11 there are actually no allegations in the [complaint] that any of these Plaintiffs purchased their
 12 mobile devices *in California*.”). Plaintiffs must allege whether the phone purchases took place in
 13 California.⁵

14 Accordingly, the Court GRANTS Huawei’s Motion to Dismiss the Song–Beverly Act
 15 claim with leave to amend to assert where the phone purchases took place.

16 **iv. Magnuson–Moss Warranty Act**

17 Plaintiffs’ third cause of action alleges violations of the Magnuson–Moss Warranty Act, 15
 18 U.S.C. § 2301 *et seq.*, presumably on behalf of the nationwide class, though the CAC does not
 19 specify. CAC ¶¶ 249–67. The parties agree that, in this case, “the claims under the Magnuson–
 20 Moss Act stand or fall with [the] express and implied warranty claims under state law.” *Clemens*,
 21 534 F.3d at 1022. The Court has concluded that all of the implied warranty claims survive except
 22 those brought by Plaintiffs Berry and Poore under Michigan and Texas law, respectively. The
 23 Court has also concluded that the express warranty claims of Plaintiffs Berry and Poore should be
 24 dismissed with leave to amend. As it stands, then, the Court GRANTS Huawei’s Motion to
 25

26 _____
 27 ⁵ Huawei makes an argument in its Motion to Dismiss that the Song–Beverly Act requires that the
 28 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
 applicable only to assistive devices for disabled persons. Opp’n 36. Huawei does not repeat the
 argument in its reply. Huawei Reply 13.

1 Dismiss the Magnuson–Moss Warranty Act claims of Plaintiffs Berry and Poore with leave to
 2 amend, but otherwise DENIES Huawei’s Motion to Dismiss Plaintiffs’ Magnuson–Moss Warranty
 3 Act claims.⁶

4 **b. Fraud and Deceptive Practices Claims**

5 Plaintiffs assert various fraud claims against Huawei. Specifically, they bring common-
 6 law claims for deceit and fraudulent concealment, CAC ¶¶ 268–77, as well as claims under a
 7 number of state consumer fraud statutes, *id.* ¶¶ 297–535. There are two common theories
 8 underlying fraud claims: affirmative misrepresentations and fraudulent omissions. The CAC does
 9 not allege that Huawei made any affirmative representations about Nexus 6P phones, other than to
 10 treat Huawei and Google as a collective. *See, e.g., id.* ¶ 275 (“Plaintiffs and Class members relied
 11 to their detriment upon Defendants’ . . . fraudulent misrepresentations . . . regarding the quality of
 12 Phones and the Defects in deciding to purchase their Phones.”). Rather, Plaintiffs rely on
 13 Huawei’s failure to notify consumers of the alleged Bootloop and Battery Drain Defects. *Id.*
 14 ¶¶ 270, 303, 319, 335, 343, 356, 374, 394, 403, 418, 428, 437, 448, 466, 482, 491, 508, 522.
 15 Huawei challenges the viability of this fraudulent omissions theory on multiple grounds and then
 16 makes additional arguments with regard to some of the statutory claims.

17 **i. No Duty to Disclose**

18 Huawei first contends that it had no duty to disclose the defects because Plaintiffs have
 19 not plausibly alleged that Huawei had knowledge of the defects prior to the time of sale. Huawei
 20 Mot. 19. The Court looks to California law to guide the analysis because Plaintiffs rely solely on
 21 California law in responding to Huawei’s arguments and do not identify any material differences
 22 with other state laws. Opp’n 41–48, 50. California law supports this common-sense notion that a
 23 defendant cannot “disclose facts of which it was unaware.” *In re Sony Grand Wega*, 758 F. Supp.
 24 2d at 1095. The Ninth Circuit has put it explicitly: to state a claim for fraud based on failure to
 25 disclose under California law, the plaintiff must allege that “the manufacturer knew of the defect
 26

27 _____
 28 ⁶ Huawei also claims a separate notice issue with respect to Plaintiffs’ Magnuson–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 at the time a sale was made.” *Williams v. Yamaha Motor Co.*, 851 F.3d 1015, 1025 (9th Cir.
2 2017); *see also LiMandri v. Judkins*, 60 Cal. Rptr. 2d 539, 543 (Ct. App. 1997) (noting that
3 nondisclosure is actionable in fraud when the defendant “had exclusive knowledge of material
4 facts not known to the plaintiff,” “actively conceals a material fact from the plaintiff,” or “makes
5 partial representations but also suppresses some material facts”).

6 As explained in detail above, Plaintiffs have not adequately pled that Huawei had
7 knowledge of either the Bootloop Defect or the Battery Drain Defect when the Plaintiffs
8 purchased their Nexus 6Ps. Therefore, Huawei had no duty to disclose the defects. Accordingly,
9 the Court GRANTS Huawei’s Motion to Dismiss Plaintiffs’ fraud claims to the extent they are
10 based on a fraudulent omissions theory with leave to amend to allege facts about Huawei’s
11 knowledge of the defects at the time of sale.

12 **ii. No Unreasonable Safety Hazard**

13 Huawei next contends that Plaintiffs’ statutory fraud claims under California, Florida,
14 North Carolina, Texas, and Washington law must be dismissed because the CAC does not
15 plausibly allege that the phone defects posed an unreasonable safety hazard. Huawei Mot. 21.
16 Although Plaintiffs argue that an unreasonable safety hazard is not a necessary element for the
17 statutory fraud claims, the Ninth Circuit recently held that, in the absence of affirmative
18 misrepresentations, “[t]o state a claim for failing to disclose a defect, a party must allege,” among
19 other things, “the existence of an unreasonable safety hazard.” *Williams*, 851 F.3d at 1025; *see*
20 *also id.* at 1026 (citing *Wilson*, 668 F.3d at 1142–43, as “holding that where a defendant has not
21 made an affirmative misrepresentation, a plaintiff must allege the existence of an unreasonable
22 safety hazard”). Even Plaintiffs’ California authority cannot help Plaintiffs here because it states
23 that the duty to disclose extends to “material information *known* to a manufacturer and concealed
24 from a consumer.” *Rutledge v. Hewlett-Packard Co.*, 190 Cal. Rptr. 3d 411, 420 (Ct. App. 2015)
25 (emphasis added). Thus, in these circumstances, Plaintiffs are required to plead an unreasonable
26 safety hazard.

27 The Court disagrees with Plaintiffs’ contention that the CAC adequately alleges such an
28 unreasonable safety hazard. “[A] party’s allegations of an unreasonable safety hazard must

1 describe more than merely ‘conjectural and hypothetical’ injuries.” *Williams*, 851 F.3d at 1028
 2 (quoting *Birdsong v. Apple, Inc.*, 590 F.3d 955, 961 (9th Cir. 2009)). Here, the CAC obliquely
 3 claims that “the Defects raise serious safety concerns” based on one user who “was temporarily
 4 stranded on a freezing night after her Phone abruptly died when she was trying to request a ride
 5 from the ride-sharing app Uber.” CAC ¶ 180. Not only have Plaintiffs identified only one
 6 example, but the safety risk of being stranded with a nonfunctioning phone has been held to be too
 7 speculative to amount to an unreasonable safety hazard. *See Missaghi v. Apple Inc.*, No. 13-CV-
 8 02003-GAF, 2013 WL 12114470, at *8 (C.D. Cal. Aug. 28, 2013); *see also Smith v. Ford Motor*
 9 *Co.*, 462 F. App’x 660, 663 (9th Cir. 2011) (rejecting as too speculative the safety concern that a
 10 defective ignition-lock could leave consumers stranded on the side of the road). Similarly, the
 11 Ninth Circuit has concluded that the more-egregious risk of fires due to defects in a boat motor
 12 were hypothetical where the complaint contained no allegations that any customer had
 13 experienced such a fire. *Williams*, 851 F.3d at 1028–29. Accordingly, the Court GRANTS
 14 Huawei’s Motion to Dismiss Plaintiffs’ statutory fraud claims under California, Florida, North
 15 Carolina, Texas, and Washington law with leave to amend to allege whether the defects pose an
 16 unreasonable safety hazard.

17 **iii. Manifestation of Defect Outside Warranty**

18 Huawei separately contends that there can be no fraudulent omissions claims for Plaintiffs
 19 Gorbachev, Christensen, and Tran because their Nexus 6Ps did not allegedly malfunction until
 20 after the expiration of the Limited Warranty, CAC ¶¶ 19–21, 28–29, 52–53. Huawei Mot. 22–23.
 21 It is true that, as a policy matter, California courts have cabined the scope of the duty to disclose to
 22 avoid the unsavory result that manufacturers are on the hook for every product defect that occurs
 23 at any time, regardless of any time limits contained in their warranties. *See Daugherty v. Am.*
 24 *Honda Motor Co.*, 51 Cal. Rptr. 3d 118, 122 (Ct App. 2006); *see also Williams*, 851 F.3d at 1029
 25 (“[T]he fact that the alleged defect concerns premature, but usually post-warranty, onset of a
 26 natural condition raises concerns about the use of consumer fraud statutes to impermissibly extend
 27 a product’s warranty period.”). But this policy consideration appears to be a variation on
 28 Huawei’s arguments above, and Huawei has not fully explained how it independently justifies

1 dismissal of Plaintiffs' fraud claims. Accordingly, at this stage, the Court does not rely on this
 2 basis to dismiss the fraud claims of Plaintiffs Gorbachev, Christensen, and Tran.

3 **iv. California Consumers Legal Remedies Act**

4 The California Plaintiffs bring a claim under California's Consumers Legal Remedies Act
 5 ("CLRA"), Cal. Civ. Code § 1780, on behalf of the California subclass. CAC ¶ 310. Huawei
 6 argues that Plaintiffs have failed to comply with the statutory provision. Huawei Mot. 23.
 7 Specifically, under the CLRA, "concurrently with the filing of the complaint, the plaintiff shall file
 8 an affidavit stating facts showing that the action has been commenced in a county described in this
 9 section as a proper place for the trial of the action." Cal. Civ. Code § 1780(d). The statute also
 10 provides the appropriate course of action when the plaintiff fails to comply: dismissal without
 11 prejudice. *Id.*

12 Plaintiffs do not dispute that none of the California Plaintiffs filed the CLRA affidavit
 13 required by the statute. Opp'n 50. Instead, Plaintiffs characterize this requirement as a state
 14 procedural rule that does not apply in federal court. *Id.* Plaintiffs' characterization is inaccurate.
 15 "The clear intent of the [CLRA] is to provide and facilitate pre-complaint settlements of consumer
 16 actions wherever possible and to establish a limited period during which such settlement may be
 17 accomplished." *Outboard Marine Corp. v. Superior Court*, 124 Cal. Rptr. 852, 859 (Ct. App.
 18 1975). In this way, "compliance with the [notice] requirement is necessary to state a claim."
 19 *Wehlage v. EmpRes Healthcare Inc.*, No. 10-CV-05839-CW, 2012 WL 380364, at *7 (N.D. Cal.
 20 Feb. 6, 2012). Therefore, this Court and multiple other California district courts have required
 21 submission of the CLRA affidavit. *See Romero v. Flowers Bakeries, LLC*, No. 14-CV-05189-
 22 BLF, 2015 WL 2125004, at *8 (N.D. Cal. May 6, 2015); *see also Rossetti v. Stearn's Prods., Inc.*,
 23 No. 16-CV-01875-GW, 2016 WL 3277295, at *2 (C.D. Cal. June 6, 2016); *McVicar*, 1 F. Supp.
 24 3d at 1056; *In re Apple In-App Purchase Litig.*, 855 F. Supp. 2d 1030, 1037 (N.D. Cal. 2012). *But*
 25 *see Sandoval v. PharmaCare US, Inc.*, 145 F. Supp. 3d 986, 999 (S.D. Cal. 2015) (holding on the
 26 facts of the case that the notice requirement "does not apply to CLRA claims filed in federal
 27 court").

28 In their opposition, Plaintiffs state that "[s]hould the Court require venue affidavits here,

1 Plaintiffs will attach them to an amended complaint.” Opp’n 50. Accordingly, the Court
 2 GRANTS Huawei’s Motion to Dismiss Plaintiffs’ CLRA claim with leave to file the necessary
 3 CLRA affidavit.

4 **v. California Unfair Competition & False Advertising Laws**

5 The California Plaintiffs assert a claim under California’s Unfair Competition Law
 6 (“UCL”), Cal. Bus. & Prof. Code § 17200 *et seq.*, and a claim under California’s False
 7 Advertising Law (“FAL”), Cal. Bus. & Prof. Code § 17500 *et seq.*, on behalf of the California
 8 subclass. CAC ¶¶ 298, 333. Huawei makes claim-specific arguments for dismissal, and the Court
 9 addresses the UCL and FAL claims in turn.

10 **(1) UCL**

11 The Court first turns to the UCL claim. The UCL prohibits any “unlawful, unfair or
 12 fraudulent business act or practice.” Cal. Bus. & Prof. Code § 17200; *see also Cel-Tech*
 13 *Commc’ns, Inc. v. L.A. Cellular Tel. Co.*, 973 P.2d 527, 539 (Cal. 1999). Because the statute is
 14 written in the disjunctive, it applies separately to business practices that are (1) unlawful, (2)
 15 unfair, or (3) fraudulent. *See Pastoria v. Nationwide Ins.*, 6 Cal. Rptr. 3d 148, 153 (Ct. App.
 16 2003). Plaintiffs contend that Huawei’s conduct has violated all three prongs. Huawei, however,
 17 argues that the CAC does not adequately allege that its conduct was unlawful, unfair, or
 18 fraudulent. Huawei Mot. 24–25.

19 **(a) Unlawful Business Act or Practice**

20 Plaintiffs predicate their claim under the “unlawful” prong in part on Huawei’s alleged
 21 violation of the Magnuson–Moss Warranty Act. *See* CAC ¶ 300. The “unlawful” prong of the
 22 UCL covers “any business practice that violate[s] an independent statutory duty.” *Cel-Tech*
 23 *Commc’ns*, 973 P.2d at 549. Because the Court has already concluded that the California
 24 Plaintiffs have stated a claim against Huawei under the Magnuson–Moss Warranty Act, they have
 25 also stated a claim against Huawei for violation of the UCL “unlawful” prong. Accordingly, the
 26 Court DENIES Huawei’s Motion to Dismiss Plaintiffs’ UCL claim under the unlawful prong.

27 **(b) Unfair Business Act or Practice**

28 The “unfair” prong of the UCL creates a cause of action for a business practice that is

1 unfair even if not proscribed by some other law. *Korea Supply Co. v. Lockheed Martin Corp.*, 63
2 P.3d 937, 943 (Cal. 2003). The UCL does not define the term “unfair,” and the proper definition
3 in the consumer context is “currently in flux” among California courts. *See Lozano v. AT & T*
4 *Wireless Servs., Inc.*, 504 F.3d 718, 735–36 (9th Cir. 2007).

5 Although the precise test for the UCL’s “unfair” prong has not been definitively
6 established, Plaintiffs endorse the balancing test enunciated in *South Bay Chevrolet v. General*
7 *Motors Acceptance Corp.*, 85 Cal. Rptr. 2d 301 (Ct. App. 1999), or the FTC Act section 5 test
8 employed in *Camacho v. Automobile Club of Southern California*, 48 Cal. Rptr. 3d 770 (Ct. App.
9 2006). Opp’n 39. Pursuant to the *South Bay* balancing test, a practice is “unfair” “when it offends
10 an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous
11 or substantially injurious to consumers.” 85 Cal. Rptr. 2d at 316. “This test involves balancing
12 the harm to the consumer against the utility of the defendant’s practice.” *Lozano*, 504 F.3d at 735
13 (citing *S. Bay*, 85 Cal. Rptr. 2d at 315). Under the FTC Act section 5 test, three factors define
14 unfairness: “(1) the consumer injury must be substantial; (2) the injury must not be outweighed by
15 any countervailing benefits to consumers or competition; and (3) it must be an injury that
16 consumers themselves could not reasonably have avoided.” *Camacho*, 48 Cal. Rptr. 3d at 777.
17 Huawei contends that regardless of the test applied, Plaintiffs’ claim fails. Huawei Mot. 24–25;
18 *see also* Huawei Reply 15 (“No matter what test is applied, the [CAC] lacks any factual basis to
19 sustain such a claim.”).

20 Under any test, Plaintiffs do not allege sufficient facts to establish that Huawei engages in
21 a “practice of selling defective phones without providing an adequate remedy to cure the Defects.”
22 CAC ¶ 302. Specifically, Plaintiffs point to five aspects of “Defendants” Huawei and Google’s
23 conduct: (1) knowingly sold defective phones, (2) refused to repair or replace phones when the
24 defects manifested outside the warranty period, (3) avoided providing warranty service by blaming
25 minor cosmetic issues, (4) had long wait periods on warranty claims, and (5) provided replacement
26 phones that were also defective. *Id.* ¶ 301. Although Plaintiffs endorse evaluating this conduct as
27 a whole without testing the sufficiency of each aspect, the problem is that Plaintiffs lump Huawei
28 and Google together under the heading of “Defendants” when each aspect does not apply

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

3 Ground (1) is easily discarded, as it merely parrots the already-rejected contention that
4 Huawei had knowledge of the defects at the time of sale. Ground (2) also falls away because the
5 California courts have held that there can be no “unfair” business practice, at least under the FTC
6 Act section 5 test, when the product functions as warranted throughout the term of an express
7 warranty. *Daugherty*, 51 Cal. Rptr. 3d at 130 (“[T]he failure to disclose a defect that might, or
8 might not, shorten the effective life span of an automobile part that functions precisely as
9 warranted throughout the term of its express warranty . . . does not constitute an unfair practice
10 under the UCL.”). Ground (3) appears more promising, but Plaintiffs do not provide sufficient
11 facts to support it. Only one California Plaintiff alleges that Huawei denied warranty coverage
12 based on a cosmetic flaw in his phone. *See* CAC ¶ 15 (“Huawei informed [Plaintiff]
13 Makcharoenwoodhi that his warranty was voided because his Phone had a small dent by the
14 volume button.”).⁷ One isolated instance where Huawei allegedly did not provide warranty
15 coverage based on a minor cosmetic issue does not rise to the level of an unfair practice of failing
16 to honor its warranties.

17 Ground (4) asserts that Huawei “[r]equir[ed] consumers to wait several weeks to several
18 months to receive accommodation for warranty claims.” CAC ¶ 301.d. However, Plaintiffs have
19 not identified any California Plaintiff who complains about wait times, *see id.* ¶¶ 65, 85, 122, 156,
20 and Plaintiffs do not argue, by reference to allegations in the CAC, that there is a basis to infer that
21 Huawei’s practice has affected any California resident. Moreover, the failure to provide timely
22 responses to warranty claims might amount to poor customer service but, standing alone, cannot
23 fairly be characterized as immoral, unethical, oppressive, or unscrupulous. Finally, based on the
24 present allegations, ground (5) does not apply to Huawei at all: Google is the only actor alleged to
25 have provided certain Plaintiffs with a defective replacement phone. *Id.* ¶¶ 49, 75, 113–14, 136.

26
27 ⁷ Plaintiffs separately point to the allegations by Ohio Plaintiff Servodio. Even if those allegations
28 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 Thus, none of Plaintiffs’ five asserted aspects of Huawei’s conduct withstands scrutiny at the
2 motion to dismiss stage.

3 More broadly, the CAC pleads that Huawei’s conduct is unfair because it “violated
4 California public policy, legislatively declared in the Song–Beverly Consumer Warranty Act,
5 requiring a manufacturer to ensure that goods it places on the market are fit for their ordinary and
6 intended purposes.” *Id.* ¶ 301. Even if that description of the Song–Beverly Act accurately
7 captures the general thrust of the statute, it fails to account for the Song–Beverly Act’s
8 circumscribed geographic reach to sales of consumer goods *in California*. *See* Cal. Civ. Code
9 § 1792. At a minimum, the Song–Beverly Act’s purpose is not offended by sales of
10 unmerchantable consumer goods outside the state of California. Thus, like with Plaintiffs’ claim
11 under the Song–Beverly Act, Plaintiffs’ claim under the UCL unfair prong fails because the CAC
12 does not allege that the California Plaintiffs purchased their phones in California.

13 Accordingly, the Court GRANTS Huawei’s Motion to Dismiss Plaintiffs’ UCL claim
14 under the unfair prong with leave to amend to allege relevant facts.

15 **(c) Fraudulent Business Act or Practice**

16 In the CAC, Plaintiffs identify three fraudulent acts on the part of Huawei and Google: (1)
17 “[k]nowingly and intentionally concealing from Plaintiffs and California Subclass members the
18 existence of the Defects in the Phones”; (2) “[f]alsely marketing the Phones as being functional
19 and not possessing defects that would render them useless”; and (3) “[p]romoting the battery
20 capabilities and lifespan despite knowing of the significant Defects in the Phones.” CAC ¶ 303.
21 Putting aside the fact that the allegations do not distinguish between Huawei and Google, all three
22 acts are premised on Huawei’s knowledge of the defects at the time of sale to the California
23 Plaintiffs. Plaintiffs’ opposition likewise characterizes the claim under the UCL fraud prong as
24 turning on the “allegations of Defendants’ knowledge of the Nexus 6Ps core defects, failure to
25 disclose them, and portrayal of these phones as well functioning.” Opp’n 40. As the Court has
26 repeatedly reiterated, Plaintiffs have not adequately alleged that Huawei had knowledge of the
27 defects when the California Plaintiffs purchased their phones. Accordingly, the Court GRANTS
28 Huawei’s Motion to Dismiss Plaintiffs’ UCL claim under the fraud prong with leave to amend to

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

3 (2) FAL

4 The Court next addresses the FAL claim. In relevant part, the statutory provision provides:

5 It is unlawful for any . . . corporation . . . with intent directly or indirectly to
6 dispose of real or personal property or to perform services, professional or
7 otherwise, or anything of any nature whatsoever or to induce the public to enter
8 into any obligation relating thereto, to make or disseminate or cause to be made or
9 disseminated . . . from this state before the public in any state, in any newspaper
10 or other publication, or any advertising device, . . . or in any other manner or
11 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.

12 Cal. Bus. & Prof. Code § 17500. Huawei contends that Plaintiffs' FAL claim is inadequately pled
13 because they fail to allege actual reliance on an advertisement by Huawei. Huawei Mot. 23.

14 Huawei is correct. As reflected in the statutory language quoted above, an FAL claim
15 requires an advertising statement. *See Norcia v. Samsung Telecommunications Am., LLC*, No. 14-
16 CV-00582-JD, 2015 WL 4967247, at *8 (N.D. Cal. Aug. 20, 2015) ("There can be no FAL claim
17 where there is no 'statement' at all."); *VP Racing Fuels, Inc. v. Gen. Petroleum Corp.*, 673 F.
18 Supp. 2d 1073, 1088 (E.D. Cal. 2009) ("The underlying element of a false advertising claim is
19 some type of advertising statement."). The CAC is devoid of any factual allegation that Huawei
20 made an advertising statement. The only allegation for the FAL claim regarding advertisements is
21 that "Defendants promoted false and misleading [statements] through advertising, marketing and
22 other publications," CAC ¶ 335, but that allegation fails to separate out Huawei's and Google's
23 conduct and the CAC otherwise refers only to advertising statements by Google. Therefore,
24 Plaintiffs cannot plead actual reliance on any advertising statement by Huawei because they have
25 not identified any statement by Huawei. Accordingly, the Court GRANTS Huawei's Motion to
26 Dismiss Plaintiffs' FAL claim with leave to amend to allege facts about Plaintiffs' actual reliance
27 on an advertising statement made by Huawei.
28

1 **vi. Ohio Trade Deceptive Practices Act**

2 Plaintiff Servodio asserts a claim under the Ohio Deceptive Trade Practices Act
3 (“ODTPA”) on behalf of the Ohio subclass. CAC ¶¶ 461–75. This claim must be dismissed
4 because Servodio, as a consumer, lacks standing to sue under the ODTPA.

5 Although the Ohio Supreme Court has not addressed this question, the Ohio Court of
6 Appeals has held that the ODTPA affords no relief to consumers because the statute is designed to
7 protect commercial actors against objectionable commercial conduct. *Dawson v. Blockbuster,*
8 *Inc.*, 2006-Ohio-1240, ¶ 24. It is well settled that Ohio courts look to the interpretation of the
9 analogous federal Lanham Act when interpreting the ODTPA, *Chandler & Assoc., Inc. v. Am.’s*
10 *Healthcare All., Inc.*, 709 N.E.2d 190, 195 (Ohio Ct. App. 1997), and all five circuits to address
11 the issue have held that consumers have no standing to sue under the Lanham Act, *see* 5 J.
12 Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 27:39 (5th ed. 2017)
13 (citing the holdings of the Second, Third, Fourth, Seventh, and Ninth Circuits). Although at least
14 one federal district court has reached a contrary conclusion, “[t]he vast majority of federal courts
15 and all lower state courts to address the issue have concluded that relief under the [ODTPA] is not
16 available to consumers.” *Phillips v. Philip Morris Cos.*, 290 F.R.D. 476, 482 (N.D. Ohio 2013).

17 Plaintiffs cite a case where the District Court of New Hampshire deferred deciding the
18 ODTPA standing issue at the motion for certification stage. *In re Dial Complete Mktg. & Sales*
19 *Practices Litig.*, 320 F.R.D. 326, 328 n.1 (D.N.H. 2017). Although the court stated that Ohio law
20 on the issue is “unsettled,” the court also noted that the parties had not “properly briefed the
21 issue.” *Id.* Here, in contrast, the parties have sufficiently briefed the issue, and Plaintiffs have not
22 provided authority outweighing the many cases that go against their position.

23 Accordingly, the Court GRANTS Huawei’s Motion to Dismiss the ODTPA claim.
24 Because consumers cannot bring the ODTPA claim as a matter of law, the Court dismisses this
25 claim without leave to amend.

26 **c. Unjust Enrichment Claim**

27 Plaintiffs’ final cause of action is for unjust enrichment. CAC ¶¶ 278–83. Relying on
28 *Astiana v. Hain Celestial Group, Inc.*, 783 F.3d 753, 762 (9th Cir. 2015), this Court has held that,

1 under California law, a claim alleging unjust enrichment states a claim for relief as a quasi-
2 contract claim for restitution. *Romero*, 2015 WL 2125004, at *9; *see also ESG Capital Partners,*
3 *LP v. Stratos*, 828 F.3d 1023, 1038 (9th Cir. 2016) (“While California case law appears unsettled
4 on the availability of such a cause of action, th[e Ninth] Circuit has construed the common law to
5 allow an unjust enrichment cause of action through quasi-contract.”). This Court has also rejected
6 the notion that unjust enrichment claims should be dismissed at the pleadings stage even if they
7 are duplicative of other claims. *See Romero*, 2015 WL 2125004, at *9 (citing Fed. R. Civ. P.
8 8(d)(2)).

9 However, Plaintiffs do not identify any particular law but instead assert their claim “on
10 behalf of the nationwide Class based upon universal principles in equity.” CAC ¶ 279. As this
11 Court and other courts in this district have recognized, “due to variances among state laws, failure
12 to allege which state law governs a common law claim is grounds for dismissal.” *Romero v.*
13 *Flowers Bakeries, LLC*, No. 14-CV-05189-BLF, 2016 WL 469370, at *12 (N.D. Cal. Feb. 8,
14 2016); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 781 F. Supp. 2d 955, 966 (N.D. Cal. 2011)
15 (“Several other courts in this district have similarly held that a plaintiff must specify the state
16 under which it brings an unjust enrichment claim.”). In order for the Court to determine whether
17 the unjust enrichment claim has been adequately pled, Plaintiff must allege the applicable law.

18 Accordingly, the Court GRANTS Huawei’s Motion to Dismiss the unjust enrichment
19 claim with leave to amend to assert which state law applies.

20 4. Claims Asserted Against Google

21 In broad strokes, the CAC asserts three categories of claims against Google—warranty
22 claims, fraud claims, and unjust enrichment claims. The Court first addresses an argument about
23 Google’s choice-of-law clause that cuts across these three categories for the non-California
24 Plaintiffs who purchased from Google, then addresses each category individually.

25 a. Google’s Choice-of-Law Clause

26 Google first seeks dismissal of claims under out-of-state laws for five non-California
27 Plaintiffs who purchased their Nexus 6Ps from Google. Google Mot. 3. Specifically, Plaintiffs
28 Tran, Berry, and Leone purchased their Nexus 6Ps through the Google Store, and Plaintiffs

1 Martorello and Jones purchased theirs directly from Google. CAC ¶¶ 38, 52, 70, 111, 130. Under
2 Google’s Terms of Sale, “[t]he laws of California, U.S.A. apply to these Terms, excluding
3 California’s choice of law rules, and will apply to any disputes arising out of or relating to these
4 Terms.” Google argues that this choice-of-law clause should be enforced against the out-of-state
5 Plaintiffs attempting to assert non-California based causes of action, Google Mot. 3–4, and
6 Plaintiffs offer no meaningful response. The Court briefly examines the issues related to Google’s
7 choice-of-law clause.

8 One issue is whether these out-of-state Plaintiffs mutually assented to Google’s Terms of
9 Sale, a question which implicates the law of Internet-based contract formation. As the Ninth
10 Circuit has recognized, “[c]ontracts formed on the Internet come primarily in two flavors:
11 ‘clickwrap’ (or ‘click-through’) agreements, in which website users are required to click on an ‘I
12 agree’ box after being presented with a list of terms and conditions of use; and ‘browsewrap’
13 agreements, where a website’s terms and conditions of use are generally posted on the website via
14 a hyperlink at the bottom of the screen.” *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1175–76
15 (9th Cir. 2014). Google submits evidence that its Terms of Sale fall in the former category
16 because, for online purchases, customers must click a button which indicates that the customer
17 agrees to the Terms of Sale. Gotuaco Decl. ¶ 3, ECF No. 57-2. Plaintiffs do not argue to the
18 contrary. In any event, regardless of whether Google’s Terms of Sale are more appropriately
19 characterized as a “clickwrap” or “browsewrap” agreement, courts have often enforced such
20 agreements when the user “had actual notice of the Terms of Use or was required to affirmatively
21 acknowledge the Terms of Use before completing his online purchase.” *Nguyen*, 763 F.3d at
22 1176; *see also, e.g., Nevarez v. Forty Niners Football Co., LLC*, No. 16-CV-07013-LHK, 2017
23 WL 3492110, at *8 (N.D. Cal. Aug. 15, 2017). The Court sees no reason to depart from those
24 cases here, and Plaintiffs provide none.

25 Another issue is whether to enforce the contractual choice-of-law provision. California
26 law recognizes “strong policy considerations favoring the enforcement of freely negotiated choice-
27 of-law clauses” in contracts. *Nedlloyd Lines B.V. v. Superior Court*, 834 P.2d 1148, 1149 (Cal.
28 1992). Typically, choice-of-law provisions will be enforced in California unless (1) the chosen

1 state has no substantial relationship to the parties or the transaction or (2) application of the chosen
2 state’s law would be contrary to a fundamental policy of another interested state. *Id.* at 1151.

3 Neither of those exceptions is applicable in the instant case.

4 As to the first exception, California has a substantial relationship to defendant Google
5 because Google has its principal place of business in California and seeks to apply California law
6 to its sales transactions. *See* CAC ¶ 161. Courts have reached the same conclusion on nearly
7 identical choice-of-law provisions being applied in nearly the same manner. *See Rojas-Lozano v.*
8 *Google, Inc.*, 159 F. Supp. 3d 1101, 1110 (N.D. Cal. 2016) (enforcing Google’s choice-of-law
9 provision in part because “California has a substantial relationship to Google”). As for the second
10 exception, this Court has not located or been directed to any authority where a court in Florida,
11 Illinois, Michigan, North Dakota, or Pennsylvania has declined to apply California consumer law
12 for public policy reasons. In fact, a court in Pennsylvania has even agreed to apply California law
13 in an unfair business practices case, explaining that “Pennsylvania has no interests that would be
14 impaired by the application of California law.” *Nat’l Conference of Bar Examiners v. Multistate*
15 *Legal Studies, Inc.*, 413 F. Supp. 2d 485, 488 (E.D. Pa. 2005). Without any argument to the
16 contrary from Plaintiffs, the Court agrees with Google that its choice-of-law clause may properly
17 be enforced against the out-of-state Plaintiffs.

18 Accordingly, the Court GRANTS Google’s Motion to Dismiss the express warranty,
19 implied warranty, and fraud claims of Plaintiffs Martorello, Tran, Berry, Jones, and Leone to the
20 extent those claims are premised on Florida, Illinois, Michigan, North Dakota, and Pennsylvania
21 law, respectively. The Court also GRANTS Google’s Motion to Dismiss the related state-law
22 statutory claims—namely, Plaintiff Martorello’s claim under the Florida Deceptive and Unfair
23 Trade Practices Act (“FDUTPA”), Fla. Stat. § 501.204 *et seq.*, CAC ¶¶ 340–51; Plaintiff Tran’s
24 claims under the Illinois Consumer Fraud and Deceptive Business Practices Act (“ICFDBPA”),
25 815 Ill. Comp. Stat. § 505/1 *et seq.*, and the Illinois Uniform Deceptive Trade Practices Act
26 (“IUDTPA”), 815 Ill. Comp. Stat. § 510/1 *et seq.*, CAC ¶¶ 352–83; Plaintiff Berry’s claim under
27 the Michigan Consumer Protection Act (“MCPA”), Mich. Comp. Laws § 445.903 *et seq.*, CAC
28 ¶¶ 397–414; Plaintiff Jones’s claim under the North Dakota Consumer Fraud Act (“NDCFA”),

1 N.D. Cent. Code § 51-15-01 *et seq.*, CAC ¶¶ 444–60; and Plaintiff Leone’s claim under the
 2 Pennsylvania Unfair Trade Practices and Consumer Protection Law (“PUTPCPL”), Pa. Stat. Ann.
 3 § 201-1 *et seq.*, CAC ¶¶ 488–500. The Court GRANTS Google’s Motion to Dismiss these claims
 4 with leave to amend.

5 **b. Warranty Claims**

6 Plaintiffs assert four sets of warranty claims: (1) breach of express warranty, (2) breach of
 7 the implied warranty of merchantability, (3) violation of the California Song–Beverly Consumer
 8 Warranty Act, and (4) violation of the federal Magnuson–Moss Warranty Act. Google moves to
 9 dismiss all four causes of action. The Court addresses each in turn.

10 **i. Breach of Express Warranty**

11 Plaintiffs bring their first cause of action for breach of express warranty on behalf of a
 12 putative nationwide class but do not specify which law governs the claim. CAC ¶ 214.

13 Alternatively, they assert claims for breach of express warranty on behalf of the putative statewide
 14 subclasses under the laws of the respective states. *Id.* ¶ 215.

15 Unlike with Huawei, Plaintiffs do not plead that the Nexus 6P is accompanied by an
 16 express written warranty from Google. Rather, Plaintiffs turn to statements that Google made in
 17 advertising for the Nexus 6P. In particular, the Google webpage for the Nexus 6P states that
 18 charging is “fast—get up to seven hours of use after only ten minutes of charging.” CAC ¶ 227.a;
 19 RJN, Ex. 1. Plaintiffs also identify two other potentially relevant statements. First, the website
 20 also provides that the battery “keeps you talking, texting and apping into the night.” CAC ¶ 227.c;
 21 RJN, Ex. 1. Along the same lines, a Google presentation contained a statement that “[b]attery life
 22 keeps you going all day and into the night.” CAC ¶¶ 7, 227.b.⁸

23 According to Plaintiffs, those statements are concrete promises that give rise to Plaintiffs’
 24

25 ⁸ Plaintiffs also point to a representation at the 2015 launch event by Google’s Product
 26 Management Director Sabrina Ellis that, under the Nexus Protect insurance package, consumers
 27 with valid claims would “get a new device as early as the next business day.” CAC ¶¶ 170, 227.d.
 28 Google argues that that statement cannot form the basis for any of the California Plaintiffs’
 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 express warranty claims. Opp’n 21–24. Google responds that none of its statements are
 2 sufficiently specific to create an express warranty, and thus the express warranty claims of all
 3 Plaintiffs should be dismissed. Google Mot. 5–9. If the express warranty claims are not dismissed
 4 on this ground, Google provides various bases applicable to different classes of Plaintiffs. As to
 5 all Plaintiffs, Google contends that their allegations do not plausibly plead reliance on Google’s
 6 advertising statements. *Id.* at 6–9. As to Plaintiffs that bought from Google, Google contends that
 7 their express warranty claims are barred by Google’s disclaimer. *Id.* at 5. As to Plaintiffs that did
 8 not purchase from Google, Google contends that the lack of privity defeats their claims. *Id.* at 5,
 9 8–9. Finally, as to an undefined grouping of Plaintiffs, Google claims that they did not give
 10 Google notice and an opportunity to cure. *Id.* at 5; Google Reply 5. The Court sorts through this
 11 tangled series of arguments by taking them one at a time.

12 (1) Actionable Misrepresentations

13 Google does not dispute that an express warranty claim may be based on advertising
 14 statements. *See Rice v. Sunbeam Prods., Inc.*, No. 12-CV-07923-CAS, 2013 WL 146270, at *11
 15 (C.D. Cal. Jan. 7, 2013). Instead, Google contends that none of the identified statements amounts
 16 to a specific and unequivocal representation regarding the Nexus 6P. Google Mot. 5–6. Under
 17 California law, which Google asserts as representative of the other states and Plaintiffs rely on
 18 exclusively for this issue, no express warranty is created when the defendant makes
 19 “[g]eneralized, vague, and unspecified assertions.” *Azoulai v. BMW of N. Am. LLC*, No. 16-CV-
 20 00589-BLF, 2017 WL 1354781, at *8 (N.D. Cal. Apr. 13, 2017) (citation omitted); Cal. Com.
 21 Code § 2313(2) (“[A]n affirmation merely of the value of the goods or a statement purporting to
 22 be merely the seller’s opinion or commendation of the goods does not create a warranty.”). To
 23 constitute an actionable express warranty, the statement regarding the product must be “specific
 24 and measurable.” *Azoulai*, 2017 WL 1354781, at *8 (citing *Southland Sod Farms v. Stover Seed*
 25 *Co.*, 108 F.3d 1134, 1145 (9th Cir. 1997)).

26 Google’s statement about “get[ting] up to seven hours of use after only ten minutes of
 27 charging” is sufficiently specific and measurable. Most prominently, that statement relies on
 28 numerical figures with a set meaning and defines the relationship between them—specifically, if

1 the user charges for “ten minutes,” he will be able to use the phone for “up to seven hours.”
2 Google counters with a footnote hanging off its “get up to seven hours” statement, which says that
3 “[a]ll battery life claims are approximate and based on an average mixed use profile that includes
4 both usage and standby time.” RJN, Ex. 1; *see also id.* (“Actual battery performance will vary and
5 depends on many factors . . .”). That footnote does not undermine the specificity of the “get up
6 to seven hours” statement but merely clarifies that the “get up to seven hours” statement
7 contemplates normal use of the phone. In other words, a consumer who continuously streams
8 movies on his phone should not be upset if he is unable to watch for seven hours after charging for
9 ten minutes. But that does not preclude a consumer who engages in normal usage from reasonably
10 expecting to get up to seven hours of use after ten minutes of charging.

11 Measurability is not defeated by the fact that Google’s statement is phrased as assuring “up
12 to” seven hours, but not guaranteeing exactly seven hours. On this point, this case lies closer to
13 Plaintiffs’ cited authority than Google’s. In the case Google cites, the district court concluded that
14 a car manufacturer did not create an express warranty in advertising language, which stated that
15 the powertrain in its trucks “offers a maximum highway range of up to 680 miles on a single fill-
16 up.” *Acedo v. DMAX, Ltd.*, No. 15-CV-02443-MMM, 2015 WL 12696176, at *24 (C.D. Cal.
17 Nov. 13, 2015). Although the court noted the “qualifying language ‘up to,’” the court did not rest
18 its conclusion on that basis alone. *Id.* The defendant’s statement also specified that the 680-mile
19 range was a “maximum” and included a footnote expressly indicating that each individual driver’s
20 “range may be less.” *Id.* Google’s statement does not contain any comparable hedging language.
21 Moreover, in *Acedo*, the plaintiff’s theory was that, based on the car manufacturer’s statement, he
22 justifiably believed that “he would actually be able to drive 680 . . . miles on a single tank of gas.”
23 *Id.* Here, in contrast, Plaintiffs construe Google’s statement as a warranty that their phones would
24 not experience sudden shutdowns from battery failure, not that their phones would consistently get
25 exactly seven hours or almost seven hours of use.

26 In that last respect, this case is analogous to Plaintiffs’ cited authority. In *In re Toyota*
27 *Motor Corp.*, the warranty “statements convey[ed] that [the] [d]efendants’ use of advanced
28 technology in their vehicles . . . enhances safety.” 754 F. Supp. 2d at 1182. The plaintiffs’ theory

1 was that the use of the advanced technology was actually contributing to the danger of sudden
2 unintended acceleration in the defendants' vehicles. *Id.* In this way, the plaintiffs plausibly
3 alleged breach of express warranty because the pleaded facts represented the "antithesis" of the
4 defendants' statements. *Id.* The same is true in this case. Google's statement that a user can "get
5 up to seven hours of use after only ten minutes of charging" is directly contrary to Plaintiffs'
6 allegations about sudden shutdowns from battery failures. *See, e.g.,* CAC ¶¶ 13 (alleging that "[i]f
7 [Plaintiff Makcharoenwoodhi] connected the Phone to a charger and fully charged the Phone, it
8 would turn back on and the battery would operate for approximately 10 minutes before the battery
9 would run out and the Phone would turn off again"), 60 (alleging that "[i]n less than one hour
10 [Plaintiff Beheler's] Phone would go from a fully charged battery to shutting down, despite being
11 in safe mode with Google's Chrome browser the only open application"). Thus, Google's "get up
12 to seven hours" statement is sufficiently specific and measurable.

13 By contrast, the statements that the Nexus 6P's battery life "keeps you talking, texting and
14 apping into the night" and "keeps you going all day and into the night" are not adequate to create
15 express warranties. For one thing, neither statement discusses what length of time of charging or
16 what level of battery charge is envisioned. Equally important, the references to "into the night"
17 and "all day and into the night" are inexact and do not provide a baseline against which to measure
18 the rest of the statement. Such vague product superiority claims cannot reasonably be interpreted
19 by consumers as reliable factual claims about the battery life and performance of the Nexus 6P.
20 *See Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc.*, 911 F.2d 242, 246 (9th Cir. 1990)
21 ("[A]dvertising which merely states in general terms that one product is superior is not
22 actionable." (citation omitted)). Indeed, courts have found similar statements to be nonactionable
23 puffery, including that a consumer using the defendant's battery "will always have access to
24 power" when needed. *Punian v. Gillette Co.*, No. 14-CV-05028-LHK, 2016 WL 1029607, at *9
25 (N.D. Cal. Mar. 15, 2016).

26 The "keeps you talking, texting and apping" and "keeps you going" statements do not
27 constitute express warranties, whether taken individually or collectively. *See Elias v. Hewlett-*
28 *Packard Co.*, 950 F. Supp. 2d 1123, 1134 (N.D. Cal. 2013) ("[T]he combination of several 'puff

1 statements does not automatically create an actionable misrepresentation.”). Nevertheless, to the
 2 extent that Plaintiffs’ express warranty claims are premised on Google’s “get up to seven hours”
 3 statement, they are not properly dismissed as inactionable puffery.

4 **(2) Basis of the Bargain and Reliance**

5 Google next contends that the Court should dismiss the express warranty claims of all
 6 Plaintiffs because they do not adequately plead reliance on Google’s advertising statements.
 7 Google Mot. 6–9. Like with Huawei, the relevant question is whether Plaintiffs must show
 8 reliance on the statement or representation for it to be considered part of the “basis of the bargain”
 9 under each state’s express warranty law. Cal. Com. Code § 2313(1)(a)–(b); Ind. Code Ann. § 26-
 10 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)–
 11 (b); Ohio Rev. Code Ann. § 1302.26(A)(1)–(2); Tex. Bus. & Com. Code Ann. § 2.313(a)(1)–(2);
 12 Wash. Rev. Code Ann. § 62A.2-313(1)(a)–(b). That analysis plays out somewhat differently in
 13 the context of Google’s advertising statements as compared with Huawei’s written warranty.

14 In particular, authority from each of the pertinent states supports the proposition that, at a
 15 minimum, the plaintiff must plead that he was aware of the advertising statements, though some
 16 cases state that principle more explicitly than others. *See Osborne v. Subaru of Am., Inc.*, 243 Cal.
 17 Rptr. 815, 824 (Ct. App. 1988) (California); *Royal Bus. Machs., Inc. v. Lorraine Corp.*, 633 F.2d
 18 34, 44 & n.7 (7th Cir. 1980) (Indiana); *CBS Inc.*, 553 N.E.2d at 1001 (New York); *Harbor Point*,
 19 697 S.E.2d at 447 (North Carolina); *Rogers v. Toni Home Permanent Co.*, 147 N.E.2d 612, 615–
 20 16 (Ohio 1958) (Ohio); *Lapray*, 135 S.W.3d at 676 (Texas); *Reece*, 953 P.2d at 123 (citing *Arrow*
 21 *Transp.*, 454 P.2d at 390) (Washington). There is a logical basis for states to have different
 22 standards for written warranties and advertising warranties: “‘awareness’ must be shown if the
 23 plaintiff intends to argue that other types of ‘representation[s]’ (e.g., advertising statements) form
 24 part of the express warranty; i.e., where the representations are used by the plaintiff to define the
 25 scope of the warranty.” *In re MyFord*, 2015 WL 5118308, at *6 (emphasis deleted) (interpreting
 26 Washington law).

27 Plaintiffs challenge this conclusion only with respect to California law, arguing that
 28

1 California does not require reliance. Opp’n 24.⁹ Although, as described above, the California
 2 Court of Appeal’s decision in *Weinstat* makes clear that a plaintiff need not plead reliance on
 3 individual representations, California law still requires the plaintiff to plead exposure to the
 4 advertising. *See Rosales v. FitFlop USA, LLC*, 882 F. Supp. 2d 1168, 1178 (S.D. Cal. 2012)
 5 (“While this does not require that plaintiff relied on the individual advertisements, it does require
 6 that plaintiff was actually exposed to the advertising.”). Indeed, one of Plaintiffs’ central
 7 authorities explains that, at the motion to dismiss stage, plaintiffs need not allege reliance but must
 8 provide “specific allegations that they were aware of the statements made in a national advertising
 9 campaign.” *In re Toyota Motor Corp.*, 754 F. Supp. 2d at 1182–83 & n.22.

10 Thus, the operative question is whether Plaintiffs have adequately alleged that they became
 11 aware of Google’s statements by exposure to its advertising. Plaintiffs do not clear that hurdle
 12 simply by alleging in a conclusory manner that “Plaintiffs and Class members were exposed to
 13 and relied on [Google’s above-identified] statements when they decided to buy Nexus 6P Phones”
 14 and that “Google’s express warranties formed part of the basis of the bargain that was reached
 15 when Plaintiffs and Class Members purchased their Phones.” CAC ¶ 228. The Court must
 16 scrutinize each individual Plaintiff’s allegations about exposure to Google’s actionable
 17 promotional promises. For convenience, the Court groups Plaintiffs by controlling state law.

18 (a) **California**

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

25 _____
 26 ⁹ Plaintiffs decline to respond to Google’s assertions with respect to the other states because, in
 27 Plaintiffs’ view, “Google’s legal challenges to the express warranty claims of non-California
 28 Plaintiffs contradict its position that California law controls.” Opp’n 24 (citations omitted). But
 Plaintiffs misread Google’s Motion to Dismiss, which advocates applying California law to those
 out-of-state Plaintiffs who purchased from Google and are subject to the choice-of-law provision
 in Google’s Terms of Sale. *See Google Mot.* 3–4, 6.

1 Plaintiff Tran “saw online advertisements representing that the Google Nexus 6P had a superior
2 battery life,” *id.* ¶ 52, it does not identify which advertisements he observed. That fact matters
3 because only one of Google’s statements—the “get up to seven hours” statement—is sufficiently
4 specific and measurable at this stage to create an express warranty. As to Plaintiff Leone, the
5 CAC alleges that he “watched the live stream of the Nexus 6P release event in San Francisco and
6 was exposed to Google’s representations regarding the Phone at that event,” and so he understood
7 that “superior battery life” was a major selling point for the Nexus 6P. *Id.* ¶ 129. But Plaintiffs do
8 not allege that the “get up to seven hours” statement was made at the launch event; that statement
9 appeared on Google’s website. Accordingly, the Court GRANTS Google’s Motion to Dismiss the
10 express warranty claims of Plaintiffs Makcharoenwoodhi, Gorbachev, Christensen, Martorello,
11 Tran, Berry, Jones, and Leone with leave to amend to allege which advertisements they saw.

12 **(b) Indiana**

13 Indiana Plaintiff Beheler’s express warranty claim must also be dismissed on this ground.
14 The CAC states that “[t]he Nexus 6P’s purportedly long battery life factored heavily into
15 [Plaintiff] Beheler’s decision to purchase this Phone.” CAC ¶ 59. But the CAC does not present
16 the source of Plaintiff Beheler’s view that the Nexus 6P had a long battery life. More precisely, it
17 is not alleged that Plaintiff Beheler received that information from advertising at all, let alone the
18 advertising containing Google’s “get up to seven hours” statement. Accordingly, the Court
19 GRANTS Google’s Motion to Dismiss the express warranty claim of Plaintiff Beheler with leave
20 to amend to allege which advertisements he saw.

21 **(c) New York**

22 The CAC does not allege that New York Plaintiff Davydov saw or relied on the advertising
23 statements identified as the basis for Plaintiffs’ express warranty claims. CAC ¶¶ 79–89.
24 Accordingly, the Court GRANTS Google’s Motion to Dismiss the express warranty claim of
25 Plaintiff Davydov with leave to amend to allege which advertisements he saw.

26 **(d) North Carolina**

27 Like with New York Plaintiff Davydov, the CAC does not allege that North Carolina
28 Plaintiff Himes saw or relied on the advertising statements identified as the basis for Plaintiffs’

1 express warranty claims. CAC ¶¶ 99–110. The allegations with respect to the other North
2 Carolina Plaintiff, Harrison, are more detailed but still unsatisfactory. Specifically, Plaintiff
3 Harrison’s decision to purchase a Nexus 6P was “materially influenced” by her viewing of
4 “advertisements representing that the Nexus 6P’s battery life was very good and touting the Nexus
5 6P as Google’s top-of-the-line phone.” *Id.* ¶ 91. Nonetheless, that language does not appear in the
6 advertising containing Google’s “get up to seven hours” statement. Nor does the CAC otherwise
7 nail down what particular advertising or statements Plaintiff Harrison encountered. Accordingly,
8 the Court GRANTS Google’s Motion to Dismiss the express warranty claims of Plaintiffs
9 Harrison and Himes with leave to amend to allege which advertisements they saw.

10 **(e) Ohio**

11 The CAC does not allege that Ohio Plaintiff Servodio saw or relied on the advertising
12 statements identified as the basis for Plaintiffs’ express warranty claims. CAC ¶¶ 119–27.
13 Accordingly, the Court GRANTS Google’s Motion to Dismiss the express warranty claim of
14 Plaintiff Servodio with leave to amend to allege which advertisements he saw.

15 **(f) Texas**

16 Like with Ohio Plaintiff Servodio, the CAC does not allege that Texas Plaintiff Poore saw
17 or relied on the advertising statements identified as the basis for Plaintiffs’ express warranty
18 claims. CAC ¶¶ 142–51. Accordingly, the Court GRANTS Google’s Motion to Dismiss the
19 express warranty claim of Plaintiff Poore with leave to amend to allege which advertisements he
20 saw.

21 **(g) Washington**

22 Finally, the CAC alleges that Washington Plaintiff Johnston’s decision to purchase a
23 Nexus 6P was “materially influenced” by his viewing of “television and online advertisements”
24 which “promoted the Phone in part on the basis of its superior battery life.” CAC ¶ 153. For
25 many of the same reasons noted above, that allegation is not enough. Because the CAC does not
26 pinpoint which advertisements Plaintiff Johnston has seen, there is no way to tell whether they
27 contained Google’s “get up to seven hours” statement, the actionable statement Plaintiffs have
28 identified as a basis for the express warranty claim. Accordingly, the Court GRANTS Google’s

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

3 In sum, the Court GRANTS Google’s Motion to Dismiss Plaintiffs’ express warranty
4 claims with leave to amend.

5 (3) Disclaimer

6 In its motion to dismiss, Google appears to separately contend that Plaintiffs who
7 purchased from Google—namely, Plaintiffs Gorbachev, Martorello, Tran, Berry, Jones, and
8 Leone, CAC ¶¶ 19, 38, 52, 70, 111, 130—are barred from pursuing an express warranty claim
9 based on Google’s disclaimer in its Terms of Sale. Google Mot. 5. Google’s terms include a
10 section titled “Defects; Warranties; Disclaimer of Warranties,” which states in relevant part:
11 “GOOGLE . . . EXPRESSLY DISCLAIM[S] ALL WARRANTIES AND CONDITIONS OF
12 ANY KIND, WHETHER EXPRESS OR IMPLIED, REGARDING ANY DEVICES.” To the
13 extent that Google contends that that language overrides Google’s advertising statements, Google
14 is incorrect.

15 California law on limiting warranties provides that “[w]ords or conduct relevant to the
16 creation of an express warranty and words or conduct tending to negate or limit warranty shall be
17 construed wherever reasonable as consistent with each other; but . . . negation or limitation is
18 inoperative to the extent that such construction is unreasonable.” Cal. Com. Code § 2316(1).
19 “Because a disclaimer . . . is inconsistent with an express warranty, words of disclaimer . . . give
20 way to words of warranty unless some clear agreement between the parties dictates the contrary
21 relationship.” *Hauter*, 534 P.2d at 386; see also *Arroyo v. TP-Link USA Corp.*, No. 14-CV-04999-
22 EJD, 2015 WL 5698752, at *10 (N.D. Cal. Sept. 29, 2015). In its reply, Google appears to
23 acknowledge this line of authority: Google’s sole rebuttal to Plaintiffs’ position is that it
24 “rehashes” the argument that “Google’s sales statements created a warranty.” Google Reply 3.
25 Because the Court has already determined that Google’s “get up to seven hours” statement is
26 sufficiently specific and measurable at this stage of the proceedings to create an express warranty,
27 these Plaintiffs may rely on that statement to support their express warranty claim.

(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 affirmation or promise “made by the seller to the buyer.” Cal. Com. 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 contract is the “general rule” (citation omitted)). And such privity is lacking “between the original seller and a subsequent purchaser who is in no way a party to the original sale.” *Burr*, 268 P.2d at 1048. Nevertheless, there are exceptions to the general rule, including “where representations are made by means of labels or advertisements.” *Id.* at 1049. The California courts appear to fit many cases within this exception, going so far as to say that “[p]rivacy is not required for an action based upon an express warranty.” *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 (Ct. App. 2008) (“Privity is generally not required for liability on an express warranty because it is deemed fair to impose responsibility on one who makes affirmative claims as to the merits of the product, upon which the remote consumer presumably relies.”).

In light of these strong statements in the case law, the Court concludes that Plaintiffs’ 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 the launch event, *id.* ¶ 169, and made specific statements about the phone in advertising on its
2 website, *id.* ¶ 227. It is of no moment that the examples cited in *Burr* all involved statements by a
3 manufacturer in labels or advertising material. 268 P.2d at 1049. The justification for the
4 exception does not appear to turn solely on the status of the warrantor. Instead, “it is deemed fair
5 to impose responsibility on one who makes affirmative claims as to the merits of the product, upon
6 which the remote consumer presumably relies.” *Cardinal Health 301*, 87 Cal. Rptr. 3d at 27.
7 Given Google’s significant role in the development of the Nexus 6P and its disseminated promises
8 about the phone, the Court sees no convincing reason to absolve Google of all liability for express
9 warranties to non-purchasers. Accordingly, this is not an appropriate basis on which to dismiss
10 Plaintiffs’ express warranty claims.

11 **(b) Indiana**

12 Although the default rule under Indiana law appears to be that “vertical privity is required
13 for claims of breach of express warranty,” *Atkinson v. P & G-Clairol, Inc.*, 813 F. Supp. 2d 1021,
14 1026 (N.D. Ind. 2011), that rule is not absolute. In *Prairie Production, Inc. v. Agchem Division-*
15 *Pennwalt Corp.*, 514 N.E.2d 1299, 1302 (Ind. Ct. App. 1987), the Indiana Court of Appeals held
16 that, on the facts of the case, the plaintiff was not precluded from suing the defendant for breach of
17 express warranty even though the parties were not in privity. In particular, the court permitted the
18 plaintiff to sue the remote manufacturer where the manufacturer had made affirmations about the
19 products in advertising. *Id.* at 1303. The court explained that discarding the privity requirement
20 was justified in these circumstances because “manufacturers commonly extoll the merits and
21 quality of their products in . . . media directed to each purchaser in the chain of distribution” and
22 their affirmations “may effectively induce the purchase, and are even intended to have that effect.”
23 *Id.* at 1302–03. More recently, the Indiana Supreme Court relatedly ruled that vertical privity is
24 not a necessary condition for a consumer to bring an implied warranty of merchantability claim
25 against a manufacturer. *See Hyundai Motor Am., Inc. v. Goodin*, 822 N.E.2d 947, 959 (Ind. 2005).

26 Under these precedents, the Court concludes that Indiana Plaintiff Beheler’s implied
27 warranty claim is not barred by failure to adequately plead privity. Like the manufacturer in
28 *Prairie Production*, Google here made affirmations about the Nexus 6P in advertising. The Court

1 has already determined that one of those statements was a specific and measurable promise. Even
 2 if the CAC does not sufficiently plead that Google is a manufacturer, the rationale of *Prairie*
 3 *Production* extends to this case. The CAC establishes that Google had significant involvement in
 4 the development of the Nexus 6P and advertised the virtues of the phone on its website in
 5 statements directed to consumers to induce them to buy the product. CAC ¶¶ 165–66, 169, 193,
 6 227. On these facts, it is proper to discard the privity requirement. Accordingly, this is not an
 7 appropriate basis on which to dismiss Plaintiff Beheler’s express warranty claim.

8 **(5) Notice and Opportunity to Cure**

9 Google’s offhand reference to notice in its motion to dismiss does not sufficiently raise the
 10 issue for resolution. The sole mention of “notice” is in a statement that “the [California] Plaintiffs
 11 do not allege reliance or pre-suit notice, as the law requires.” Google Mot. 5. Google’s reply is
 12 equally unilluminating, stating that the letters of certain Plaintiffs were insufficient to put Google
 13 on notice. Google Reply 5. In these filings, Google nowhere indicates what law should apply,
 14 provides the relevant contours of the legal landscape, or clearly states which Plaintiffs are affected.
 15 Given the potential variances among the states and Plaintiffs (as indicated by the analysis with
 16 respect to Huawei), the Court declines to consider Google’s bare assertion that notice provides
 17 another basis on which to dismiss Plaintiffs’ express warranty claims.

18 **ii. Breach of Implied Warranty of Merchantability**

19 Plaintiffs’ second cause of action is for breach of the implied warranty of merchantability
 20 on behalf of a putative nationwide class under an unspecified law or, alternatively, on behalf of the
 21 putative statewide subclasses under the laws of the respective states. CAC ¶¶ 235–36. Plaintiffs’
 22 cause of action alleges that Google “impliedly warranted that the Phones were of a merchantable
 23 quality” but failed to live up to that guarantee because the Nexus 6Ps “were not in merchantable
 24 condition and are not fit for the ordinary purpose for which phones are used.” *Id.* ¶ 239. Google’s
 25 arguments are split between Plaintiffs who purchased from Google and Plaintiffs who did not. For
 26 the former group, Google contends that these Plaintiffs are barred by the explicit disclaimer of the
 27 implied warranty of merchantability in its Terms of Sale. Google Mot. 5. For the latter, Google
 28 contends that these Plaintiffs have failed to adequately plead privity. *Id.* at 11–13.

1 (1) **Disclaimer and Unconscionability**

2 Google first contends that the implied warranty claims of Plaintiffs Gorbachev,
3 Martorello, Tran, Berry, Jones, and Leone—who purchased their Nexus 6Ps from Google, CAC
4 ¶¶ 19, 38, 52, 70, 111, 130—are barred by Google’s disclaimer in its Terms of Sale. Google Mot.
5 5. In relevant part, Google’s terms state: “GOOGLE . . . EXPRESSLY DISCLAIM[S] ALL
6 WARRANTIES AND CONDITIONS OF ANY KIND, WHETHER EXPRESS OR IMPLIED,
7 REGARDING ANY DEVICES, INCLUDING ANY IMPLIED WARRANTIES OF
8 MERCHANTABILITY.” Plaintiffs argue that there is no evidence about whether Plaintiffs had
9 actual or constructive notice of Google’s disclaimer and that, even if they did, the CAC adequately
10 pleads that Google’s disclaimer is unconscionable. Opp’n 27–29. Neither argument is persuasive.

11 First, Plaintiffs suggest that Google has not carried its burden of establishing that the
12 affirmative defense of disclaimer applies. *Id.* at 27–28. But Google’s submission of its Terms of
13 Sale demonstrates a valid disclaimer, and Plaintiffs have not identified any allegation in the CAC
14 that undercuts its application to this set of Plaintiffs. Under California law, a written disclaimer of
15 the implied warranty of merchantability must mention merchantability and be conspicuous. Cal.
16 Com. Code § 2316(2). Here, Google’s Terms of Sale disclaimed the implied warranty of
17 merchantability in accordance with California law because, under the bold heading “Defects;
18 Warranties; Disclaimer of Warranties,” the Terms provide in clear language and capitalized
19 formatting that Google “expressly disclaim[s] all warranties and conditions of any kind, whether
20 express or implied, regarding any devices, including any implied warranty of merchantability.”
21 The disclaimer is in all capital letters while the surrounding text is in lower case font of the same
22 size, and the disclaimer is one of only two places in the entirety of the Terms of Sale that uses
23 capitalized lettering. In these circumstances, the Court concludes that the disclaimer is
24 conspicuous. *See* Cal. Com. Code § 1201(10) (defining “conspicuous” as covering “[a] heading
25 . . . in contrasting type, font, or color to the surrounding text of the same or lesser size” and
26 “[l]anguage in the body of a record or display . . . in contrasting type, font, or color to the
27 surrounding text of the same size, or set off from surrounding text of the same size by symbols or
28 other marks that call attention to the language”). Courts in this district have found that very

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

9 Plaintiffs attempt to overcome this conclusion by challenging whether Plaintiffs had actual
10 or constructive knowledge of Google’s disclaimer. Opp’n 27. Plaintiffs point out that a
11 disclaimer is valid only if “the buyer has knowledge or is chargeable with notice of the disclaimer
12 before the bargain is complete.” *Burr*, 268 P.2d at 1047. The problem is that Plaintiffs’ position
13 conflicts with the CAC’s allegations and the law. The CAC acknowledges the existence of
14 Google’s disclaimer and the manner in which it is presented. CAC ¶¶ 245 (“Fairness therefore
15 requires invalidating the disclaimer of the implied warranty of merchantability in Google’s form
16 document.”), 261 (alleging that “[a]ny disclaimer of implied warranties by Google was
17 unconscionable”). In this way, Plaintiffs’ allegations are consistent with Google’s submitted
18 evidence, which provides that customers had to click a button to complete their online purchases
19 and that, next to the button, there was language advising that customer that clicking indicated
20 acceptance of Google’s Terms of Sale. Gotuaco Decl. ¶ 3. Plaintiffs do not otherwise allege that
21 they did not see or understand the disclaimer. Thus, this case is unlike the one cited by Plaintiffs
22 where the allegations established that the plaintiff did not have a reasonable opportunity to view
23 the disclaimer prior to purchase. *See Clark v. LG Elecs. U.S.A., Inc.*, No. 13-CV-00485-JM, 2013
24 WL 5816410, at *13 (S.D. Cal. Oct. 29, 2013) (“Based on Plaintiff’s allegations, there would have
25 been no way for Plaintiff to have noticed the disclaimer prior to receiving the product manual
26 when the refrigerator was delivered.”).

27 Second, Plaintiffs contend that, even if the disclaimer is binding, the CAC adequately
28 pleads that the disclaimer is unconscionable. As explained earlier, under California law, a contract

1 provision is “unconscionable, and therefore unenforceable, only if it is *both* procedurally and
2 substantively unconscionable.” *In re iPhone*, 2011 WL 4403963, at *7 (citing *Armendariz*, 6 P.3d
3 at 690). The procedural element focuses on oppression and surprise, while the substantive element
4 examines whether the terms of the agreement are so overly harsh or one-sided as to shock the
5 conscience. *Aron*, 49 Cal. Rptr. 3d at 564.

6 Plaintiffs’ procedural unconscionability argument is, at best, weak. They contend that the
7 disclaimer is unconscionable because Google and its customers are in an unequal bargaining
8 position and because Google had “exclusive knowledge of the Defects and true quality of the
9 Phones.” CAC ¶ 261. On the latter point, the Court has already concluded that Plaintiffs’
10 allegations are insufficient. That conclusion significantly weakens the former point that Google
11 had superior bargaining power. *See In re Sony Grand Wega*, 758 F. Supp. 2d at 1101 (rejecting
12 argument that defendant had superior bargaining power where plaintiffs had not sufficiently
13 alleged that the defendant knew of the defect before the point of sale). Even if the terms of the
14 disclaimer are non-negotiable, Plaintiffs do not plead that they had no meaningful alternatives;
15 they could have purchased other phones or obtained an additional warranty from Google.
16 *Davidson*, 2017 WL 976048, at *12. Moreover, the CAC does not allege that Plaintiffs were
17 “surprised” by the disclaimer’s terms or that they could not or did not access Google’s Terms of
18 Sale online at the time of purchase. *See id.*

19 Plaintiffs make no further allegations to support their claim of substantive
20 unconscionability. Plaintiffs repeat and reemphasize that Google knew of and concealed the
21 defects at the time that it sold the Nexus 6Ps. Opp’n 28–29; CAC ¶ 245 (“Google knowingly sold
22 a defective product without disclosing the Defects, while affirmatively misrepresenting purported
23 attributes of the product that were important to consumer purchasers.”). Again, Plaintiffs’
24 allegations are insufficient to establish that conclusion. In their opposition, Plaintiffs also slightly
25 change course from their complaint, asserting that a disclaimer may be substantively
26 unconscionable any time a product is unfit for its intended use. Opp’n 29 (citing the statement in
27 *Clark*, 2013 WL 5816410, at *13, that the “inability to use the LG refrigerator for its intended
28 purpose suggests that substantive unconscionability may exist”). That reading of the law seems

1 somewhat odd, as it works to invalidate a disclaimer of the implied warranty whenever the
 2 underlying implied warranty claim appears viable. In any event, Plaintiffs’ allegations are
 3 insufficient to show that Google’s disclaimer “create[s] overly harsh or one-sided results as to
 4 shock the conscience,” and thus Plaintiffs have not established substantive unconscionability.
 5 *Aron*, 49 Cal. Rptr. 3d at 564 (internal quotation marks and citation omitted).

6 Based on the allegations in the CAC, Google’s disclaimer is not unconscionable, and the
 7 disclaimer is enforceable. Accordingly, Plaintiffs have not stated a claim for breach of the implied
 8 warranty of merchantability for express warranty for Plaintiffs Gorbachev, Martorello, Tran,
 9 Berry, Jones, and Leone. The Court GRANTS Google’s Motion to Dismiss the implied warranty
 10 claim of Plaintiffs Gorbachev, Martorello, Tran, Berry, Jones, and Leone with leave to amend to
 11 allege further facts in support of Plaintiffs’ lack of notice and unconscionability arguments.

12 (2) Privity

13 For the remaining Plaintiffs who did not purchase from Google—namely, Plaintiffs
 14 Makcharoenwoodhi, Christensen, Beheler, Davydov, Harrison, Himes, Servodio, Poore, and
 15 Johnston, CAC ¶¶ 12, 28, 58, 79, 91, 99, 119, 142, 153—Google argues that their claims must be
 16 dismissed for failure to plead privity. Google Mot. 11–13. Even for the states that do not require
 17 a strict showing of privity, Google draws on the common-sense notion that, because an implied
 18 warranty of merchantability is “implied in a contract for the[] sale [of goods] if the seller is a
 19 merchant with respect to goods of that kind,” UCC § 2-314(1), a defendant cannot be liable unless
 20 it has sold the goods in question. Google Mot. 11. Plaintiffs’ central response is that Plaintiffs’
 21 claims may be sustained under the third-party beneficiary exception to the privity requirement.
 22 *Opp’n* 31–33.

23 Most of the relevant states require privity of contract to state a claim for breach of the
 24 implied warranty of merchantability. *See, e.g., Clemens*, 534 F.3d at 1024; *Curl v. Volkswagen of*
 25 *Am., Inc.*, 871 N.E.2d 1141, 1147 (Ohio 2007); *Tex Enters., Inc. v. Brockway Standard, Inc.*, 66
 26 P.3d 625, 630 (Wash. 2003). And Google is correct that Plaintiffs’ blanket assertion that
 27 “Plaintiffs and Class members were in privity of contract with . . . Google by virtue of their
 28 interactions with . . . Google,” CAC ¶ 242, is not plausible when some of the relevant Plaintiffs are

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

4 Even for the states that have abandoned the privity requirement for implied warranty
5 claims, *see, e.g., Pack*, 434 F.3d at 820 (Michigan); *Goodin*, 822 N.E.2d at 959 (Indiana), Google
6 notes that the defendants in those cases had sold the products at some point in the distribution
7 chain, *see, e.g., Gared Holdings, LLC v. Best Bolt Prod., Inc.*, 991 N.E.2d 1005, 1016 (Ind. Ct.
8 App. 2013) (emphasizing that the defendant had made multiple sales and was willing to sell to
9 prospective buyers). The requirement that the defendant has sold the product at issue flows
10 naturally from the statutory language, which provides that an implied warranty of merchantability
11 claim arises in a contract for the sale of goods by a merchant seller of those goods. *See* UCC § 2-
12 314(1); *see also* Ind. Code Ann. § 26-1-2-314(1) (same); Mich. Comp. Laws Ann. § 440.2314(1)
13 (same). The CAC does not satisfy this requirement because it nowhere provides that Google sold
14 the Nexus 6Ps to the retailers from whom Plaintiffs purchased. Although the CAC states that
15 “Defendants sell the Phones . . . through authorized retailers, including Newegg and Best Buy,”
16 CAC ¶ 168, it fails to distinguish between Google and Huawei. Indeed, without more factual
17 detail, it would be implausible to conclude that both Google and Huawei sold the same physical
18 phones through retailers. *See Garcia v. M-F Athletic Co.*, No. 11-CV-02430-WBS, 2012 WL
19 531008, at *2 (E.D. Cal. Feb. 17, 2012) (“It seems, however, implausible if not impossible that all
20 three defendants sold plaintiff the [product].”).

21 Plaintiffs attempt to steer around these roadblocks by resort to the third-party beneficiary
22 exception to the privity requirement. CAC ¶ 242; Opp’n 31–33. As noted above, the third-party
23 beneficiary exception allows a plaintiff to enforce a contract made expressly for his or her benefit.
24 *See* Cal. Civ. Code § 1559. Nevertheless, the plaintiff must identify and plead a contract between
25 the defendant and a third party which was expressly made for the benefit of the plaintiff. *See*
26 *Schauer*, 23 Cal. Rptr. 3d at 239; *Cartwright v. Viking Indus., Inc.*, 249 F.R.D. 351, 356 (E.D. Cal.
27 2008). Plaintiffs have failed to do so here.

28 Plaintiffs identify no agreement that Google has entered into for Plaintiffs’ benefit.

1 Specifically, Plaintiffs plead that they “are the intended third-party beneficiaries of the implied
2 warranties and other contracts between Defendants and the retailers who sell the Phones.” CAC
3 ¶ 242. Even shelving the ever-persisting issue of lumping Google with Huawei, Plaintiffs do not
4 plead that Google had contracts to sell the Nexus 6P to retailers, such as Best Buy, Newegg, and
5 Amazon. The sole agreement that Plaintiffs identify is Huawei’s Limited Warranty. Opp’n 33.
6 But Plaintiffs cannot use that warranty to bootstrap Google’s liability without an accompanying
7 allegation that Huawei’s Limited Warranty was an agreement with Google to benefit customers.
8 Because Plaintiffs have not done so, they have not pleaded sufficient facts to make use of the
9 third-party beneficiary exception.

10 Accordingly, the Court GRANTS Google’s Motion to dismiss the implied warranty of
11 merchantability claims of Plaintiffs Makcharoenwoodhi, Christensen, Beheler, Davydov,
12 Harrison, Himes, Servodio, Poore, and Johnston with leave to amend to allege further facts about a
13 privity relationship or an agreement between Google and a third-party that is intended for the
14 benefit of these Plaintiffs.

15 **iii. Song–Beverly Consumer Warranty Act**

16 The California Plaintiffs assert a cause of action under the Song–Beverly Act, Cal. Civ.
17 Code §§ 1791.1, 1792, on behalf of the California subclass. CAC ¶¶ 284–96. As to individual
18 Plaintiffs, Google asserts that Plaintiffs Makcharoenwoodhi and Christensen’s claims should be
19 dismissed because they did not purchase their phones from Google and that Plaintiff Gorbachev’s
20 claim should be dismissed because he has not plausibly alleged unmerchantability. Google Mot.
21 13. Google also puts forward a basis on which the claim should be dismissed that applies to all
22 three California Plaintiffs—namely, that Plaintiffs do not allege that they purchased their phones
23 in California. *Id.* The Court marches through each of these three arguments.

24 **(1) Manufacturer or Retail Seller**

25 Google first contends that Plaintiffs Makcharoenwoodhi and Christensen’s claims fail
26 because they did not purchase from Google. The Song–Beverly Act generates an implied
27 warranty of merchantability by manufacturers and retail sellers. Cal. Civ. Code § 1792. Google
28 argues that the CAC does not establish that Google counts as either a manufacturer or retail seller

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

2 Based on the CAC’s present allegations, Google is neither a “manufacturer” nor a “retail
3 seller” with respect to Plaintiffs Makcharoenwoodhi and Christensen. A “manufacturer” is “any
4 individual, partnership, corporation, association, or other legal relationship that manufactures,
5 assembles, or produces consumer goods.” Cal. Civ. Code § 1791(j). At multiple places in the
6 CAC (including the section asserting the Song–Beverly Act claim), the CAC labels Huawei as the
7 “manufacturer” of the Nexus 6P. *See* CAC ¶¶ 165 (stating that “Huawei manufactured the
8 device”), 288 (“Huawei is a ‘manufacturer’ of the Nexus 6P smartphones within the meaning of
9 Cal. Civ. Code § 1791(j).”). The CAC does not make any such allegations as to Google and does
10 not otherwise state that Google “manufactures, assembles, or produces” the Nexus 6P. Plaintiffs
11 cannot shoehorn Google into the “manufacturer” definition merely by pointing out that Google
12 and Huawei “collaborat[ed]” to create the Nexus 6P, especially when the allegation explicitly
13 singles out Huawei as the entity that “manufactured” the phone. *Id.* ¶ 165.

14 Nor does the CAC provide that Google is a “retail seller” as to Plaintiffs
15 Makcharoenwoodhi and Christensen. A “retail seller” is “any individual, partnership, corporation,
16 association, or other legal relationship that engages in the business of selling or leasing consumer
17 goods to retail buyers.” Cal. Civ. Code § 1791(l). The California courts have interpreted “retail”
18 as “to sell in small quantities directly to the ultimate consumer.” *Dagher v. Ford Motor Co.*, 190
19 Cal. Rptr. 3d 261, 269 (Ct. App. 2015) (citation omitted). Although Google and Huawei both
20 generally “market and distribute the Phones” and specifically “sell the Phones to consumers
21 directly as well as through authorized retailers,” CAC ¶¶ 165, 168, Google did not sell the Nexus
22 6P to the end consumers at issue here. Rather, Plaintiff Makcharoenwoodhi bought from Best
23 Buy, and Plaintiff Christensen bought from Huawei. *Id.* ¶¶ 12, 28. Plaintiffs make no other
24 arguments for why Google falls under the definition of “retail seller.”

25 Accordingly, the Court GRANTS Google’s Motion to Dismiss the Song–Beverly Act
26 claims of Plaintiffs Makcharoenwoodhi and Christensen with leave to amend to allege further
27 facts about whether Google qualifies as a “manufacturer” or “retail seller.”

28

(2) Merchantability

Google next challenges the sufficiency of the allegations as to the unmerchantability of Plaintiff Gorbachev's Nexus 6P. Google Mot. 14. The implied warranty of merchantability guarantees that the goods meet "a minimum level of quality." *Am. Suzuki*, 44 Cal. Rptr. 2d at 529 (citation omitted). The key inquiry is whether the goods are "fit[] for the ordinary purpose for which such goods are used." *Mexia*, 95 Cal. Rptr. 3d at 289 (citation omitted). Under that test, an alleged defect must constitute more than an inconvenience; the defect must be "so fundamental as to render the product unfit for its ordinary purpose." *In re Carrier IQ*, 78 F. Supp. 3d at 1108; *see also Mocek v. Alfa Leisure, Inc.*, 7 Cal. Rptr. 3d 546, 549 (Ct. App. 2003) ("[A] breach of the implied warranty of merchantability means the product did not possess even the most basic degree of fitness for ordinary use.").

The allegations with respect to Plaintiff Gorbachev's Nexus 6P meet these requirements. The CAC first alleges that "[d]uring his first few months of owning the Phone, [Plaintiff] Gorbachev regularly experienced incidents in which it would suddenly shut down and restart without warning, sometimes on a daily basis." CAC ¶ 20. The CAC then goes on to say that, on March 17, 2017, Plaintiff Gorbachev's phone exhibited the Bootloop Defect. While Plaintiff Gorbachev 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. As the CAC explains, Plaintiff "Gorbachev's Phone never proceeded past the Google logo screen again." *Id.* ¶ 24. These circumstances clearly demonstrate that Plaintiff Gorbachev's Nexus 6P was unfit for ordinary use. After the Bootloop Defect manifested, Plaintiff Gorbachev 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 Gorbachev.

(3) Location of Purchases

As discussed above with respect to Huawei, the California Plaintiffs' Song-Beverly Act claim must be dismissed because Plaintiffs have failed to allege the necessary element of whether the phone purchases took place in California. Accordingly, the Court GRANTS Google's Motion

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

3 **iv. Magnuson–Moss Warranty Act**

4 Plaintiffs’ third cause of action alleges violations of the Magnuson–Moss Warranty Act, 15
5 U.S.C. § 2301 *et seq.*, presumably on behalf of the nationwide class. CAC ¶¶ 249–67. With one
6 caveat, the parties agree that, in this case, “the claims under the Magnuson–Moss Act stand or fall
7 with [the] express and implied warranty claims under state law.” *Clemens*, 534 F.3d at 1022. As
8 for the caveat, Plaintiffs contend that where a state-law breach of implied warranty claim
9 insufficiently alleges privity, an implied warranty claim under the Magnuson–Moss Warranty Act
10 may proceed if there is an express warranty. Opp’n 35. However, Plaintiffs’ cited authority is
11 inapplicable because Plaintiffs have not alleged that Google issued a written warranty that
12 complies with the requirements of the Magnuson–Moss Warranty Act. *See Szajna v. Gen. Motors*
13 *Corp.*, 503 N.E.2d 760, 769 (Ill. 1986) (“In cases where no Magnuson–Moss written warranty has
14 been given, Magnuson–Moss has no effect upon State-law privity requirements . . .”). Therefore,
15 in this case, Plaintiffs’ claims under the Magnuson–Moss Warranty Act survive only if the
16 underlying state-law express or implied warranty claims do.

17 The Court has dismissed all of the express and implied warranty claims against Google.
18 Accordingly, the Court GRANTS Google’s Motion to Dismiss the Magnuson–Moss Warranty Act
19 claims of all Plaintiffs with leave to amend.

20 **c. Fraud and Deceptive Practices Claims**

21 Plaintiffs assert a common-law claim for deceit and fraudulent concealment and fraud
22 claims under various state statutes. The Court first addresses the common-law claim, then
23 analyzes each of the remaining state statutory claims.

24 **i. Deceit and Fraudulent Concealment**

25 Plaintiffs assert a cause of action for deceit and fraudulent concealment on behalf of each
26 of the twelve statewide subclasses. CAC ¶ 269. As reflected both in the CAC and Plaintiffs’
27 opposition, every state-law claim is premised on the allegation that Google “concealed and
28 suppressed material facts” regarding the Nexus 6P because Google “knew (or in the exercise of

1 reasonable diligence should have known) of the Defects, but failed to disclose them prior to or at
 2 the time [it] marketed Phones and sold them to consumers.” *Id.* ¶ 270; Opp’n 50. For the reasons
 3 already stated, the CAC does not sufficiently plead that Google had knowledge of the Bootloop or
 4 Battery Drain Defect at the time that Plaintiffs acquired their Nexus 6Ps. Accordingly, the Court
 5 GRANTS Google’s Motion to Dismiss the deceit and fraudulent concealment claims with leave to
 6 amend to allege further facts in support of Google’s knowledge.

7 **ii. California Consumers Legal Remedies Act**

8 The California Plaintiffs bring a claim under the CLRA, Cal. Civ. Code § 1780, on behalf
 9 of the California subclass. CAC ¶ 310. Google seeks dismissal on a procedural ground—namely,
 10 the failure to submit the affidavit under § 1780(d)—and on substantive grounds—namely, failure
 11 to state a claim. Google Mot. 15–18. The Court addresses these grounds in turn.

12 **(1) Procedural Ground**

13 Courts must dismiss without prejudice CLRA claims that are unaccompanied by “an
 14 affidavit stating facts showing that the action has been commenced in a county described in this
 15 section as a proper place for the trial of the action.” Cal. Civ. Code § 1780(d). As noted above,
 16 this Court requires the submission of such an affidavit. *See Romero*, 2015 WL 2125004, at *8.
 17 Because Plaintiffs concede that no CLRA affidavit has been filed, Opp’n 50, the Court GRANTS
 18 Google’s Motion to Dismiss Plaintiffs’ CLRA claim with leave to file the necessary CLRA
 19 affidavit.

20 **(2) Substantive Grounds**

21 The CLRA proscribes “unfair methods of competition and unfair or deceptive acts or
 22 practices undertaken by any person in a transaction intended to result or that results in the sale . . .
 23 of goods or services to any consumer.” Cal. Civ. Code § 1770(a). The CAC advances two
 24 distinct theories for Google’s liability under that section. First, the CAC charges that Google
 25 committed fraud by omission because it had a duty to disclose its knowledge of the defects. CAC
 26 ¶¶ 318–19. Second, the CAC avows that Google affirmatively misrepresented the qualities of the
 27 Nexus 6P despite knowing of the defects. *Id.* ¶¶ 321–22. Both theories depend on Google’s
 28 awareness of the defects at the time of sale, which Plaintiffs have not adequately pled.

1 Accordingly, the Court GRANTS Google’s Motion to Dismiss Plaintiffs’ CLRA with leave to
2 amend to allege further facts about Google’s knowledge of the defects.

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

5 **(a) Fraudulent Omissions**

6 Plaintiffs’ fraudulent omissions theory avers that “Defendants had a duty to disclose the
7 Defects because Huawei and Google had exclusive knowledge of the Defects prior to making sales
8 of Phones and because Defendants made partial representations about the quality of the Phones,
9 but failed to fully disclose the Defects.” CAC ¶ 319. As the Court noted earlier, “[t]o state a
10 claim for failing to disclose a defect, a party must allege . . . the existence of an unreasonable
11 safety hazard.” *Williams*, 851 F.3d at 1025. Plaintiffs do not offer unreasonable-safety-hazard
12 allegations specific to Google that go beyond those alleged as to Huawei. For the same reasons
13 stated with respect to Huawei, Plaintiffs’ allegations are insufficient as to Google. Accordingly,
14 the Court GRANTS Google’s Motion to Dismiss Plaintiffs’ CLRA claim to the extent it is
15 predicated on a fraudulent omissions theory with leave to amend to allege whether the defects
16 pose an unreasonable safety hazard.

17 **(b) Affirmative Misrepresentation**

18 Plaintiffs’ affirmative misrepresentation theory avers that Google made false statements
19 about the Nexus 6P even though Google was aware that the phones were suffering from the
20 Bootloop and Battery Drain Defects. CAC ¶ 322. Plaintiffs point to the same three statements
21 that the Court analyzed above for Plaintiffs’ express warranty claims—namely, the “get up to
22 seven hours” statement, the “keeps you talking, texting and apping” statement, and the “keeps you
23 going” statement. *Id.* ¶ 321. Although Google asserts that these three statements are not
24 actionable, Google Mot. 16, the standard under the CLRA is identical to the standard for an
25 express warranty. *See Azoulai*, 2017 WL 1354781, at *8 (analyzing CLRA and express warranty
26 claims together). Thus, the Court’s determination that the “get up to seven hours” statement is
27 adequately specific and measurable holds here.

28 Google’s meatier—and ultimately meritorious—challenge is that Plaintiffs fail to

1 sufficiently allege that they relied on Google’s misrepresentation. Under the CLRA, a plaintiff
 2 must allege that he relied on the defendant’s alleged misrepresentations and that he suffered injury
 3 as a result. *See Sateriale v. R.J. Reynolds Tobacco Co.*, 697 F.3d 777, 794 (9th Cir. 2012)
 4 (“[C]onsumers seeking to recover damages under the CLRA based on a fraud theory must prove
 5 ‘actual reliance on the misrepresentation and harm.’” (citation omitted)); *Durell v. Sharp*
 6 *Healthcare*, 108 Cal. Rptr. 3d 682, 697 (Ct. App. 2010) (concluding that complaint was properly
 7 dismissed where plaintiff did not allege that he “relied on any representation by” the defendant).
 8 Furthermore, when CLRA claims are premised on misleading advertising statements, the pleading
 9 standard in Federal Rule of Civil Procedure 9(b) governs and requires the plaintiff to allege “the
 10 particular circumstances surrounding [the] representations.” *Kearns v. Ford Motor Co.*, 567 F.3d
 11 1120, 1126 (9th Cir. 2009). In other words, the plaintiff must “specify which statements the
 12 plaintiff actually saw and relied upon.” *In re Arris Cable Modem Consumer Litig.*, No. 17-CV-
 13 01834-LHK, 2018 WL 288085, at *8 (N.D. Cal. Jan. 4, 2018).

14 Plaintiffs do not come close to fulfilling that high burden here. The CAC does not allege
 15 that any of the California Plaintiffs saw any advertising about the Nexus 6P at all, let alone that
 16 they saw and relied upon Google’s “get up to seven hours” statement. CAC ¶¶ 12–37. Generally,
 17 Rule 9(b) requires that a plaintiff plead “an account of the time, place, and specific content of the
 18 false representations as well as the identities of the parties to the misrepresentations.” *Swartz v.*
 19 *KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007) (internal quotation marks and citation omitted);
 20 *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) (“Averments of fraud must
 21 be accompanied by ‘the who, what, when, where, and how’ of the misconduct charged.” (citation
 22 omitted)). Plaintiffs must provide that level of detail. Accordingly, the Court GRANTS Google’s
 23 Motion to Dismiss Plaintiffs’ CLRA claim to the extent it is predicated on an affirmative
 24 misrepresentation theory with leave to amend to allege which of Google’s statements Plaintiffs
 25 actually saw and relied upon.

26 iii. California Unfair Competition & False Advertising Laws

27 The California Plaintiffs assert claims under the UCL, Cal. Bus. & Prof. Code § 17200 *et*
 28 *seq.*, and under the FAL, Cal. Bus. & Prof. Code § 17500 *et seq.*, on behalf of the California

1 subclass. CAC ¶¶ 298, 333. Google first contends that Plaintiffs cannot sustain either the UCL or
2 FAL claim because they have not shown entitlement to equitable relief. Google Mot. 20–21.
3 Google then makes arguments specific to the UCL and FAL claims. *Id.* at 21–24. The Court first
4 examines Google’s contention that applies to both the UCL and FAL claims, then considers the
5 arguments about each individual claim.

6 **(1) Entitlement to Equitable Relief**

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

16 **(a) Standing to Seek Injunctive Relief**

17 Google challenges the California Plaintiffs’ Article III standing to seek injunctive relief.
18 Google Mot. 21. After briefing on Google’s Motion to Dismiss was complete, the Ninth Circuit
19 issued a decision bearing on the question. In *Davidson v. Kimberly-Clark Corp.*, 873 F.3d 1103,
20 1107 (9th Cir. 2017), the defendants marketed and sold pre-moistened wipes as suitable for
21 flushing down a toilet, but the plaintiff discovered that the products were not truly “flushable.”
22 The plaintiff brought UCL and FAL claims, which sought both restitution and an injunction. *Id.* at
23 1108. The district court dismissed the claims for injunctive relief, finding that the plaintiff lacked
24 standing because she was unlikely to purchase the wipes in the future. *Id.* at 1109.

25 The Ninth Circuit reversed. The court resolved the open question whether a “previously
26 deceived consumer who brings a false advertising claim can allege that her inability to rely on the
27 advertising in the future is an injury sufficient to grant her Article III standing to seek injunctive
28 relief.” *Id.* at 1113. Specifically, the court held that consumers can have standing to pursue

1 injunctive relief in at least two circumstances:

2 In some cases, the threat of future harm may be the consumer’s plausible
3 allegations that she will be unable to rely on the product’s advertising or labeling
4 in the future, and so will not purchase the product although she would like to. In
5 other cases, the threat of future harm may be the consumer’s plausible allegations
6 that she might purchase the product in the future, despite the fact it was once
7 marred by false advertising or labeling, as she may reasonably, but incorrectly,
8 assume the product was improved.

9 *Id.* at 1115. Under those standards, the court deemed sufficient the plaintiff’s allegations that she
10 wanted to purchase the defendants’ flushable wipes in the future but that she could not rely on the
11 defendants’ representation with any confidence. *Id.* at 1116.

12 Without the benefit of the Ninth Circuit’s guidance in *Davidson*, it will come as no
13 surprise that Plaintiffs’ allegations are deficient. The CAC does not fit either of the two scenarios
14 countenanced by the Ninth Circuit because there is no pleading that the California Plaintiffs would
15 like to purchase in the future but cannot trust Google’s advertising or that the California Plaintiffs
16 might purchase in the future on the belief that the product has been improved. *See* CAC ¶¶ 12–37,
17 297–308, 332–39. Plaintiffs’ opposition even concedes that their allegations are lacking on the
18 latter point. Opp’n 49. Because *Davidson* was unavailable at the time that Plaintiffs were drafting
19 their CAC and writing their opposition, they also have not presented any other theory about how
20 they “suffer[ed] an ‘actual and imminent, not conjectural or hypothetical’ threat of future harm.”
21 873 F.3d at 1115 (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009)). In their
22 amended allegations, Plaintiffs will have the opportunity to make that showing.

23 Accordingly, the Court GRANTS Google’s Motion to Dismiss the California Plaintiffs’
24 claims for injunctive relief with leave to amend to allege further facts about Plaintiffs’ non-
25 speculative threat of future harm.

26 (b) Entitlement to Restitution

27 Google contends that Plaintiffs Makcharoenwoodhi and Christensen, who did not purchase
28 from Google, have not adequately pled entitlement to restitution because the CAC does not allege
that money or property in which they have a vested interest is in Google’s possession. Google
Mot. 21. “[I]n appropriate circumstances, the plaintiff in a UCL action may obtain restitution

1 from a defendant with whom the plaintiff did not deal directly.” *Shersher v. Superior Court*, 65
 2 Cal. Rptr. 3d 634, 640 (Ct. App. 2007); *see also Cty. of Solano v. Vallejo Redevelopment Agency*,
 3 90 Cal. Rptr. 2d 41, 52 (Ct. App. 1999) (“For a benefit to be conferred, it is not essential that
 4 money be paid directly to the recipient by the party seeking restitution.”). Nevertheless, in order
 5 to recover from a defendant from whom the plaintiff did not purchase, the plaintiff must trace his
 6 money or property to money or property within the defendant’s possession. *See Shersher*, 65 Cal.
 7 Rptr. 3d at 641 (concluding that plaintiff who purchased product from defendant’s retailer
 8 adequately alleged entitlement to restitution because defendant indirectly acquired plaintiff’s
 9 money); *Cheverez v. Plains All Am. Pipeline, LP*, No. 15-CV-04113-PSG, 2016 WL 4771883, at
 10 *3 (C.D. Cal. Mar. 4, 2016).

11 These standards compel dismissal of Plaintiffs Makcharoenwoodhi and Christensen’s
 12 claims for restitution. The allegations as to Plaintiff Christensen clearly fall flat. The CAC
 13 alleges that Plaintiff Christensen purchased his Nexus 6P directly from Huawei. CAC ¶ 28. The
 14 CAC makes no further effort to identify how that money came into Google’s possession as a result
 15 of Plaintiff Christensen’s purchase. The allegations as to Plaintiff Makcharoenwoodhi come
 16 closer but do not warrant a different conclusion. According to the CAC, Plaintiff
 17 Makcharoenwoodhi purchased his Nexus 6P from Best Buy. *Id.* ¶ 12. Google is alleged to have a
 18 connection with Best Buy, as the CAC states that “Defendants sell the Phones to consumers . . .
 19 through authorized retailers, including . . . Best Buy.” *Id.* ¶ 168. While it may be plausible to
 20 infer that a plaintiff’s money ends up in the defendant’s possession when the plaintiff buys the
 21 defendant’s product from the defendant’s retailer, *see Shersher*, 65 Cal. Rptr. 3d at 641, the waters
 22 are more muddled here. In particular, by treating Google and Huawei as a single unit without
 23 otherwise identifying Google’s relationship with Best Buy, the CAC obscures the relevant actor.
 24 In these circumstances, it is equally plausible that Plaintiff Makcharoenwoodhi’s money is in
 25 Huawei’s possession, not Google’s. Thus, neither Plaintiff Makcharoenwoodhi nor Plaintiff
 26 Christensen has adequately pled entitlement to restitution.

27 Accordingly, the Court GRANTS Google’s Motion to Dismiss Plaintiffs
 28 Makcharoenwoodhi and Christensen’s claims for restitution with leave to amend to allege further

1 facts about how their money came into Google’s possession.

2 (c) Adequate Remedy at Law

3 Google’s final, and broadest, contention is that Plaintiffs cannot seek equitable remedies
4 because they have available an adequate remedy at law—namely, compensatory damages for the
5 same alleged conduct. Google Mot. 20. Of course, it is axiomatic that a plaintiff seeking
6 equitable relief must establish that he has no adequate legal remedy. *Philpott v. Superior Court*,
7 36 P.2d 635, 638 (Cal. 1934); *Prudential Home Mortg. Co. v. Superior Court*, 78 Cal. Rptr. 2d
8 566, 573 (Ct. App. 1998) (applying these fundamental equitable principles in the context of a UCL
9 claim). Although the California Plaintiffs’ claims for equitable relief are not necessarily doomed
10 to fail, the Court concludes that dismissal is proper at this juncture.

11 In addition to retrospective relief for injuries already suffered, Plaintiffs seek to “enjoin
12 [Google] from continuing [its] unfair, unlawful, and fraudulent practices.” CAC ¶ 308. That
13 injunctive relief is asserted on behalf of the class and, if granted, would accrue to the benefit of the
14 public at large. *See id.* ¶¶ 208(h) (requesting injunctive relief for Plaintiffs and class members),
15 212 (“Defendants have acted or refused to act on grounds generally applicable to Plaintiffs and
16 Class members, making final injunctive relief . . . appropriate with respect to the Class as a
17 whole.”). In this way, the injunctive relief could provide a remedy above and beyond a legal
18 award of damages. *See Cal. Bus. & Prof. Code* §§ 17203 (allowing plaintiff to pursue
19 representative claims for injunctive relief on behalf of similarly situated individuals), 17205
20 (noting that UCL remedies “are cumulative . . . to the remedies or penalties available under all
21 other laws of this state”). However, a plaintiff cannot seek injunctive relief on behalf of the public
22 unless he is individually entitled to such relief. *See Hodgers-Durgin v. de la Vina*, 199 F.3d 1037,
23 1045 (9th Cir. 1999) (en banc) (“Unless the named plaintiffs are themselves entitled to seek
24 injunctive relief, they may not represent a class seeking that relief.”); *Rhynes v. Stryker Corp.*, No.
25 10-CV-05619-SC, 2011 WL 2149095, at *4 (N.D. Cal. May 31, 2011). Because the Court has
26 presently determined that the California Plaintiffs have not adequately pled standing to seek
27 injunctive relief, their prayer for injunctive relief on behalf of the entire class must also fail.

28 Accordingly, the Court the Court GRANTS Google’s Motion to Dismiss the California

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

3 **(2) UCL**

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

10 **(a) Unlawful Business Act or Practice**

11 Plaintiffs predicate their claim under the “unlawful” prong on Google’s alleged violations
12 of the Magnuson–Moss Warranty Act, the Song–Beverly Act, the CLRA, and the FAL and on
13 Google’s breach of express and implied warranty, fraudulent concealment, and unjust enrichment.
14 CAC ¶ 300. The UCL “borrows violations of other laws and treats them as unlawful practices that
15 the unfair competition law makes independently actionable.” *Wilson*, 668 F.3d at 1140 (quoting
16 *Cel-Tech Commc’ns*, 973 P.2d at 539–40). Because the Court concludes that the California
17 Plaintiffs have not stated a claim against Google under any of these statutes or causes of action,
18 they have not stated a claim against Google for violation of the UCL “unlawful” prong.
19 Accordingly, the Court GRANTS Google’s Motion to Dismiss Plaintiffs’ UCL claim under the
20 unlawful prong with leave to amend.

21 **(b) Unfair Business Act or Practice**

22 The “unfair” prong of the UCL creates a cause of action that is not limited to business
23 practices that are proscribed by some other law. *Korea Supply Co.*, 63 P.3d at 943. As noted
24 above, courts have not coalesced around one test for measuring what is “unfair” under the UCL.
25 *Lozano*, 504 F.3d at 735–36. Plaintiffs advocate for the *South Bay* balancing test or the FTC Act
26 section 5 test. Opp’n 39. Google contends that Plaintiffs’ claim fails under either test. Google
27 Mot. 22; *see also* Google Reply 14 (“[N]one of the five acts [California] Plaintiffs identify as the
28 basis for the ‘unfair’ claim in the CAC are ‘unfair’ under either the FTC Act Section 5 test or the

1 balancing test”).

2 Like with Huawei, Plaintiffs’ allegation that Google has engaged in a “practice of selling
3 defective phones without providing an adequate remedy to cure the Defects,” CAC ¶ 302, fails
4 under any test. Plaintiffs point to five aspects of “Defendants” Google and Huawei’s conduct: (1)
5 knowingly sold defective phones, (2) refused to repair or replace phones when the defects
6 manifested outside the warranty period, (3) avoided providing warranty service by blaming minor
7 cosmetic issues, (4) had long wait periods on warranty claims, and (5) provided replacement
8 phones that were also defective. *Id.* ¶ 301. Again, due to the melding of Google and Huawei
9 under the heading of “Defendants,” the Court must strive to unravel which actions the CAC
10 attributes solely to Google.¹⁰

11 For the same reasons discussed with respect to Huawei, grounds (1) and (2)—alleging
12 knowledge of the defects and unwillingness to fix out-of-warranty phones—are unsustainable.
13 Ground (3) is even weaker with respect to Google. No California Plaintiff alleges that Google
14 denied warranty coverage by pointing to cosmetic damage. CAC ¶¶ 12–37. Although
15 Pennsylvania Plaintiff Leone pleads that Google rejected warranty coverage based on “screen
16 scratches, dents in the metal frame, [and] cracked rear glass,” *id.* ¶¶ 133–34, that allegation—even
17 if relevant for a California claim under California law—does not show that Google’s practice was
18 to turn down warranty coverage on these grounds. Ground (4) is inapplicable to Google because
19 the allegations about long wait times for warranty claims all relate to Huawei. *See id.* ¶¶ 65, 85,
20 122, 156. Finally, the CAC accuses Google of providing some non-California Plaintiffs with
21 defective replacement phones. *Id.* ¶¶ 49, 75, 113–14, 136. No California Plaintiff was allegedly
22 affected by this conduct, and Plaintiffs provide no argument that such an inference is reasonable
23 based on the allegations. Moreover, Plaintiffs do not identify any authority holding that a
24 defendant who provides a defective product on more than one occasion has committed an unfair
25 business practice. Hence, none of Plaintiffs’ five asserted aspects of Google’s conduct withstands
26 scrutiny at the motion to dismiss stage.

27 _____
28 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 Plaintiffs' argument that Google's conduct violates the Song-Beverly Act's policy of
 2 preventing unmerchantable products from reaching consumers, *id.* ¶ 301, fares no better. As noted
 3 with respect to Huawei, Plaintiffs' conception of the Song-Beverly Act's purpose improperly
 4 extends beyond California state lines. *See* Cal. Civ. Code § 1792. Plaintiffs therefore cannot rely
 5 on the Song-Beverly Act's purpose without accompanying allegations about where the California
 6 Plaintiffs purchased their phones.

7 Accordingly, the Court GRANTS Google's Motion to Dismiss Plaintiffs' UCL claim
 8 under the unfair prong with leave to amend to allege relevant facts.

9 **(c) Fraudulent Business Act or Practice**

10 The analysis with respect to Google and Huawei under the UCL fraud prong is identical
 11 because the CAC depends on the same three fraudulent acts for both companies. *See* CAC ¶ 303.
 12 As Plaintiffs' opposition admits, Opp'n 40, all three acts take as a given Google's knowledge of
 13 the defects at the time of sale to the California Plaintiffs. The Court has previously explained at
 14 length that Plaintiffs have not adequately alleged that Google had knowledge of the defects when
 15 the California Plaintiffs purchased their phones. Accordingly, the Court GRANTS Google's
 16 Motion to Dismiss Plaintiffs' UCL claim under the fraud prong with leave to amend to allege that
 17 Google had knowledge of the defects at the time that the California Plaintiffs purchased their
 18 phones.

19 **(2) False Advertising Law**

20 The disposition on Plaintiffs' FAL claim requires little explanation because the analysis is
 21 substantively identical to that under the UCL fraud prong. Indeed, this Court and other courts in
 22 this district have treated FAL claims together with the UCL fraud prong, *Singh v. Google Inc.*, No.
 23 16-CV-03734-BLF, 2017 WL 2404986, at *4–5 (N.D. Cal. June 2, 2017); *Chacanaca v. Quaker*
 24 *Oats Co.*, 752 F. Supp. 2d 1111, 1124–26 (N.D. Cal. 2010), and both Google and Plaintiffs
 25 recommend following that approach here, Google Mot. 23; Opp'n 41. Because the allegations
 26 underlying the FAL claim are also contingent on Google's knowledge of the Nexus 6P's defects,
 27 *see* CAC ¶ 335, Plaintiffs have failed to state a claim upon which relief can be granted.

28 Accordingly, the Court GRANTS Google's Motion to Dismiss Plaintiffs' FAL claim with leave to

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

3 **iv. Indiana Deceptive Consumer Sales Act**

4 Indiana Plaintiff Beheler asserts a claim under the Indiana Deceptive Consumer Sales Act
5 (“IDCSA”), Ind. Code § 24-5-0.5-1 *et seq.*, on behalf of the Indiana subclass. CAC ¶¶ 384–96.
6 Under the IDCSA, “[a] person relying upon an . . . incurable deceptive act may bring an action for
7 the damages actually suffered as a consumer as a result of the deceptive act.” Ind. Code Ann.
8 § 24-5-0.5-4(a). The IDCSA in turn defines “incurable deceptive act” as “a deceptive act done by
9 a supplier as part of a scheme, artifice, or device with intent to defraud or mislead.” *Id.* § 24-5-
10 0.5-2(a)(8). The CAC bases the IDCSA claim on Google’s alleged misrepresentation that the
11 Nexus 6P has a “high-performing batter[y]” that will keep consumers “talking, texting, and apping
12 into the night.” CAC ¶¶ 390, 395.

13 Plaintiffs do not challenge that Rule 9(b)’s heightened pleading standard applies, but
14 instead argue that their allegations satisfy that standard. Opp’n 54–55. Plaintiffs are incorrect.
15 The CAC states that “[t]he Nexus 6P’s purportedly long battery life factored heavily into
16 [Plaintiff] Beheler’s decision to purchase this Phone,” CAC ¶ 59, but does not indicate whether
17 Plaintiff Beheler received this information from Google’s advertising or came upon it by some
18 other means, such as word of mouth from a friend or a technical review written by another
19 company. This is insufficient to support Plaintiffs’ contention that Plaintiff Beheler “saw and
20 relied upon Google’s advertising of long battery life.” Opp’n 55. Accordingly, the Court
21 GRANTS Google’s Motion to Dismiss Plaintiff Beheler’s IDCSA claim with leave to amend to
22 specify the advertisements and the content of the advertisements that Plaintiff Beheler relied upon
23 in purchasing his Nexus 6P.¹¹

24
25
26 ¹¹ The Court need not address Google’s separate argument about Plaintiff Beheler’s failure to give
27 Google written notice. Google Mot. 25. As Google indicated in its Motion to Dismiss, that
28 argument applies only to the extent that Plaintiff Beheler alleges an “uncured” deceptive act, as
opposed to an “incurable” deceptive act. *Id.* In their opposition, Plaintiffs make clear that
Plaintiff Beheler pleads an “incurable” deceptive act, as reflected in paragraph 395 of the CAC.
Opp’n 55.

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

6 **vi. North Carolina Unfair and Deceptive Trade Practices Act**

7 North Carolina Plaintiffs Harrison and Himes assert a claim under the North Carolina
 8 Unfair and Deceptive Trade Practices Act (“NCUDTPA”), N.C. Gen. Stat. § 75-1.1 *et seq.*, on
 9 behalf of the North Carolina subclass. CAC ¶¶ 433–43. To state a claim under the NCUDTPA, a
 10 plaintiff must plead that “(1) defendant committed an unfair or deceptive act or practice, (2) the
 11 action in question was in or affecting commerce, and (3) the act proximately caused injury to the
 12 plaintiff.” *Dalton v. Camp*, 548 S.E.2d 704, 711 (N.C. 2001); *see also* N.C. Gen. Stat. Ann.
 13 §§ 75-1.1(a) (declaring unlawful “unfair or deceptive acts or practices in or affecting commerce”),
 14 75-16 (creating private right of action for persons “injured by reason of any [unfair or deceptive]
 15 act”). The CAC alleges that Google engaged in “unfair” and “deceptive” acts. First, it states that
 16 Google’s acts were “unfair” because “Defendants knowingly sold [Plaintiff] Harrison, [Plaintiff]
 17 Himes, and North Carolina Subclass members Phones with the Defects, refused to honor
 18 warranties, required consumers to wait several weeks to several months on warranty claims, and
 19 replaced Phones under warranty with other defective Phones.” CAC ¶ 437. Second, the CAC also
 20 goes on to say that Google’s acts are “deceptive” because Google made misrepresentations about
 21 the Nexus 6P in advertising. *Id.* ¶ 439. Neither is well-pled.

22 As to “unfair” acts, the alleged actions pertain to Huawei and appear to include Google
 23 only by the misleading use of the cover term “Defendants.” Not only do the CAC’s allegations
 24 fail to plausibly plead that Google had knowledge at the time of sale, but the CAC admits that
 25 Google did not sell to Plaintiffs Harrison and Himes at all—they purchased their phones from
 26 Amazon and Best Buy, respectively. *Id.* ¶¶ 91, 99. The rest of the allegations relate to warranty
 27 problems, but neither Plaintiff Harrison nor Plaintiff Himes submitted a warranty claim to Google.
 28 Rather, Plaintiff Harrison “called Huawei to make a warranty claim,” *id.* ¶ 94, and Plaintiff Himes

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

2 As to “deceptive” acts, the CAC looks to Google’s advertising statements. The North
 3 Carolina Supreme Court has instructed that “a claim under section 75-1.1 stemming from an
 4 alleged misrepresentation does indeed require a plaintiff to demonstrate reliance on the
 5 misrepresentation in order to show the necessary proximate cause.” *Bumpers v. Cmty. Bank of N.*
 6 *Va.*, 747 S.E.2d 220, 226 (N.C. 2013). For essentially the same reasons discussed with respect to
 7 their breach of express warranty claims, Plaintiffs Harrison and Himes have both failed to
 8 adequately plead reliance on Google’s advertising statements.

9 Accordingly, the Court GRANTS Google’s Motion to Dismiss the NCUDTPA claim of
 10 Plaintiffs Harrison and Himes with leave to amend to allege further facts.

11 **vii. Ohio Deceptive Trade Practices Act**

12 Ohio Plaintiff Servodio asserts a claim under the ODTPA on behalf of the Ohio subclass.
 13 CAC ¶¶ 461–75. As discussed above with respect to Huawei, this claim must be dismissed
 14 without leave to amend because, as a legal matter, consumers lack standing to sue under the
 15 ODTPA. Accordingly, the Court GRANTS WITHOUT LEAVE TO AMEND Google’s Motion
 16 to Dismiss the ODTPA claim.

17 **viii. Ohio Consumer Sales Practices Act**

18 Ohio Plaintiff Servodio asserts a claim under the Ohio Consumer Sales Practices Act
 19 (“OCSPA”), Ohio Rev. Code § 1345.01 *et seq.*, on behalf of the Ohio subclass. CAC ¶¶ 476–87.
 20 The OCSPA provides a private right of action to consumers for “unfair or deceptive act[s] or
 21 practice[s] in connection with a consumer transaction.” Ohio Rev. Code Ann. §§ 1345.02(A),
 22 1345.09(A). Nevertheless, “a consumer may qualify for class-action certification under [the
 23 OCSPA] only if the defendant’s alleged violation of the Act is substantially similar to an act or
 24 practice previously declared to be deceptive by” a rule adopted by the Attorney General or an
 25 Ohio court decision holding such deceptive conduct unlawful. *Marrone v. Philip Morris USA,*
 26 *Inc.*, 850 N.E.2d 31, 33 (Ohio 2006). “Cases that involve industries and conduct very different
 27 from the defendant’s do not provide meaningful notice of specific acts or practices that violate the
 28 [OCSPA].” *Id.* at 36.

1 Plaintiffs do not adequately allege that Google was put on notice by an Ohio court
2 decision. The bare allegation that “Defendants acted in the face of prior notice that their conduct
3 was deceptive, unfair, or unconscionable” does not satisfy Plaintiffs’ burden. CAC ¶ 482. More
4 importantly, Plaintiffs do not identify any cases where, for example, a court has held that selling a
5 defective product constitutes a deceptive act under the OCSPA. Rather, as the CAC admits, the
6 cases cited therein stand for the proposition that “failing to honor express and implied warranties
7 violates the OCSPA.” *Id.* ¶ 483 (citing *Nee v. State Indus., Inc.*, 3 N.E.3d 1290, 1306 (Ohio Ct.
8 App. 2013); *Brown v. Decorator Carpets of Canton, Inc.*, 1979 WL 185083, at *2 (Ohio Ct. Com.
9 Pl. Nov. 5, 1979); and *Mason v. Mercedes-Benz USA, LLC*, 2005 WL 1995087 at *5 (Ohio Ct.
10 App. Aug. 18, 2005)). Given that Plaintiffs have not pled that Google failed to honor Plaintiff
11 Servodio’s warranty, CAC ¶¶ 119–27, or that Google breached any express or implied warranty at
12 all, these cases do not provide meaningful notice that Google’s alleged acts and practices violate
13 the OCSPA.

14 Although the Court agrees with Google on the substance of its argument, the Court parts
15 ways with Google as to the remedy. Google suggests that dismissal of Plaintiff Servodio’s
16 OCSPA claim is appropriate. Google Mot. 27. But the cases do not support that view. The
17 principal authority on which Google relies, the Ohio Supreme Court decision in *Marrone*,
18 concerns the prerequisites for “a consumer [to] qualify for class-action certification under [the
19 OCSPA].” 850 N.E.2d at 33. Similarly, Google’s district court case states that class action claims
20 under the OCSPA may be dismissed at the pleadings stage. *See Gascho v. Glob. Fitness*
21 *Holdings, LLC*, 863 F. Supp. 2d 677, 693 (S.D. Ohio 2012). Because Google has identified no
22 other ground on which to dismiss Plaintiff Servodio’s individual OCSPA claim, that claim will not
23 be dismissed.

24 Accordingly, the Court GRANTS Google’s Motion to Dismiss Plaintiff Servodio’s
25 OCSPA class claims with leave to amend to allege further facts about whether Google was on
26 notice that its conduct violated the OCSPA, but DENIES Google’s Motion to Dismiss Plaintiff
27 Servodio’s individual OCSPA claim.

28

1 **ix. Texas Deceptive Trade Practices Act**

2 Texas Plaintiff Poore asserts a claim under the Texas Deceptive Trade Practices Act
 3 (“TDTPA”), Tex. Bus. & Com. Code § 17.41 *et seq.*, on behalf of the Texas subclass. CAC
 4 ¶¶ 501–17. A consumer may bring an action under the TDTPA when the defendant employs a
 5 deceptive act or practice enumerated in Tex. Bus. & Com. Code § 17.46(b) that is a “producing
 6 cause” of the consumer’s economic damages. Tex. Bus. & Com. Code § 17.50(a)(1). Although
 7 the CAC lists violations of multiple subsections of § 17.46(b), CAC ¶ 509, Plaintiffs’ opposition
 8 confirms that its claim is that Google ran afoul of § 17.46(b)(24), Opp’n 53. That subsection
 9 proscribes “failing to disclose information concerning goods or services which was known at the
 10 time of the transaction if such failure to disclose such information was intended to induce the
 11 consumer into a transaction into which the consumer would not have entered had the information
 12 been disclosed.” Tex. Bus. & Com. Code § 17.46(b)(24).

13 With the Plaintiffs’ claim limited to this subsection, the TDTPA claim fails for familiar
 14 reasons. Google cannot violate § 17.46(b)(24) unless Google “fail[ed] to disclose information . . .
 15 which was known at the time of the transaction.” As even the most cursory reader will have
 16 gleaned by this point, Plaintiffs have not adequately pled that Google had knowledge of the
 17 defects at the time that Plaintiff Poore purchased his Nexus 6P. Therefore, Plaintiffs’ allegations
 18 do not establish that Plaintiff Poore is entitled to relief on the TDTPA claim.

19 Google’s fallback argument that Plaintiff Poore did not provide the required pre-suit
 20 notice, Google Mot. 28, is unavailing. Google appears to have overlooked Plaintiffs’ allegation
 21 that “[o]n or about April 19, 2017, [Plaintiff] Poore notified Defendants of the damage and Defect
 22 in his Phone in satisfaction of Tex. Bus. & Com. Code § 17.505.” CAC ¶ 517. Google concedes
 23 this point in its reply. Google Reply 18.

24 Accordingly, the Court GRANTS Google’s Motion to Dismiss Plaintiff Poore’s TDTPA
 25 claim with leave to amend to allege that Google had knowledge of the defects at the time that he
 26 purchased his phone.

27 **x. Washington Consumer Protection Act**

28 Washington Plaintiff Johnston asserts a claim under the Washington Consumer Protection

1 Act (“WCPA”), Wash. Rev. Code § 19.86 *et. seq.*, on behalf of the Washington subclass. CAC
2 ¶¶ 518–35. The WCPA authorizes “[a]ny person who is injured in his or her business or property
3 by a violation of [the WCPA] . . . [to] bring a civil action . . . to enjoin further violations [or] to
4 recover the actual damages sustained by him or her.” Wash. Rev. Code Ann. § 19.86.090. One
5 such violation occurs when a defendant commits “unfair or deceptive acts or practices in the
6 conduct of any trade or commerce.” *Id.* § 19.86.020.

7 The CAC alleges that Google engaged in “unfair” and “deceptive” acts in nearly the same
8 fashion as the now-dismissed NCUOTPA claim. Plaintiff Johnston’s WCPA claim falters on the
9 same grounds. First, the CAC states that Google’s acts were “unfair” because “Defendants
10 knowingly sold [Plaintiff] Johnston and Washington Subclass members Phones with the Defects,
11 refused to honor warranties, required consumers to wait several weeks to several months on
12 warranty claims, and replaced Phones under warranty with other defective Phones.” CAC ¶ 522.
13 Google did not do any of those things with respect to Plaintiff Johnston, who bought his Nexus 6P
14 from Best Buy and did not submit a warranty claim to Google. *Id.* ¶¶ 152–59. Second, the CAC
15 states that Google’s acts are “deceptive” because Google made misrepresentations about the
16 Nexus 6P in advertising. *Id.* ¶ 524. Like with his breach of express warranty claim, Plaintiff
17 Johnston has failed to adequately identify which Google advertisements he saw.

18 Accordingly, the Court GRANTS Google’s Motion to Dismiss Plaintiff Johnston’s WCPA
19 claim with leave to amend to allege further facts.

20 **d. Unjust Enrichment Claim**

21 Plaintiffs assert a cause of action for unjust enrichment. CAC ¶¶ 278–83. As discussed
22 above with respect to Huawei, although a claim alleging unjust enrichment may state a claim for
23 relief as a quasi-contract claim for restitution, *Romero*, 2015 WL 2125004, at *9, Plaintiffs’ claim
24 must be dismissed for “failure to allege which state law governs,” *Romero*, 2016 WL 469370, at
25 *12. Accordingly, the Court GRANTS Google’s Motion to Dismiss the unjust enrichment claim
26 with leave to amend to assert which state law applies.

27 **C. Motions to Strike**

28 Huawei and Google both move to strike Plaintiffs’ class allegations under Federal Rule of

1 Civil Procedure 12(f). Huawei Mot. 26–28; Google Mot. 29. “There is a split in this District as to
2 whether a motion to strike class action allegations may be entertained at the motion to dismiss
3 stage.” *Ogola v. Chevron Corp.*, No. 14-CV-00173-SC, 2014 WL 4145408, at *2 (N.D. Cal. Aug.
4 21, 2014). Even courts that have been willing to entertain such a motion early in the proceedings
5 “have applied a very strict standard to motions to strike class allegations on the pleadings.” *Id.*
6 “Only if the court is convinced that any questions of law are clear and not in dispute, and that
7 under no set of circumstances could the claim or defense succeed may the allegations be stricken.”
8 *Id.* (internal quotation marks and citation omitted).

9 Huawei and Google contend that the putative nationwide class and the statewide
10 subclasses are facially overbroad because they include individuals who never experienced
11 problems with their Nexus 6Ps. Huawei Mot. 26–27; Google Mot. 29. Moreover, Huawei and
12 Google assert that a class action will be unmanageable because the suit requires adjudicating
13 various claims under differing state laws and resolving individualized inquiries. Huawei Mot. 27–
14 28; Google Mot. 29.

15 Although these concerns are not without merit, Huawei’s and Google’s arguments are
16 more appropriately addressed at a later stage of the proceedings when the issues have been more
17 fully developed and sharpened. At the hearing, the Court indicated its inclination to defer these
18 issues to the class certification stage. The Court remains convinced that it would be premature to
19 resolve the issues at the pleading stage. *See Los Gatos Mercantile, Inc v. E.I. DuPont De*
20 *Nemours & Co.*, No. 13-CV-01180-BLF, 2015 WL 4755335, at *33 (N.D. Cal. Aug. 11, 2015).

21 Accordingly, the Court DENIES Huawei’s and Google’s motions to strike class allegations
22 without prejudice to raising the arguments presented in those motions at a later stage of the
23 proceedings.

24 **IV. ORDER**

25 For the foregoing reasons, IT IS HEREBY ORDERED that Huawei’s and Google’s
26 Motions to Dismiss are GRANTED WITH LEAVE TO AMEND IN PART, GRANTED
27 WITHOUT LEAVE TO AMEND IN PART, AND DENIED IN PART. Specifically, with respect
28 to Huawei, the Court rules as follows:

- 1 • The Court GRANTS WITH LEAVE TO AMEND Huawei’s Motion to Dismiss the
2 express warranty claims of Plaintiffs Gorbachev, Christensen, Martorello, Tran, Berry,
3 Davydov, Harrison, Himes, Jones, Leone, and Poore and DENIES Huawei’s Motion to
4 Dismiss the express warranty claims of all remaining Plaintiffs.
- 5 • The Court GRANTS WITH LEAVE TO AMEND Huawei’s Motion to Dismiss the
6 implied warranty claims of Plaintiffs Berry and Poore and DENIES Huawei’s Motion to
7 Dismiss the implied warranty claims of all remaining Plaintiffs.
- 8 • The Court GRANTS WITH LEAVE TO AMEND Huawei’s Motion to Dismiss the
9 California Plaintiffs’ Song–Beverly Act claim.
- 10 • The Court GRANTS WITH LEAVE TO AMEND Huawei’s Motion to Dismiss the
11 Magnuson–Moss Warranty Act claims of Plaintiffs Berry and Poore and DENIES
12 Huawei’s Motion to Dismiss the Magnuson–Moss Warranty Act claims of all remaining
13 Plaintiffs.
- 14 • The Court GRANTS WITH LEAVE TO AMEND Huawei’s Motion to Dismiss Plaintiffs’
15 fraud claims to the extent they are based on a fraudulent omissions theory.
- 16 • The Court GRANTS WITH LEAVE TO AMEND Huawei’s Motion to Dismiss the
17 California Plaintiffs’ CLRA claim.
- 18 • The Court GRANTS WITH LEAVE TO AMEND Huawei’s Motion to Dismiss the
19 California Plaintiffs’ UCL claim under the unfair and fraudulent prongs and DENIES
20 Huawei’s Motion to Dismiss the California Plaintiffs’ UCL claim under the unlawful
21 prong.
- 22 • The Court GRANTS WITH LEAVE TO AMEND Huawei’s Motion to Dismiss the
23 California Plaintiffs’ FAL claim.
- 24 • The Court GRANTS WITHOUT LEAVE TO AMEND Huawei’s Motion to Dismiss Ohio
25 Plaintiff Servodio’s ODTPA claim.
- 26 • The Court GRANTS WITH LEAVE TO AMEND Huawei’s Motion to Dismiss the unjust
27 enrichment claims of all Plaintiffs.

28 Specifically, with respect to Google, the Court rules as follows:

- 1 • The Court GRANTS WITH LEAVE TO AMEND Google’s Motion to Dismiss the express
2 warranty claims of all Plaintiffs.
- 3 • The Court GRANTS WITH LEAVE TO AMEND Google’s Motion to Dismiss the
4 implied warranty claims of all Plaintiffs.
- 5 • The Court GRANTS WITH LEAVE TO AMEND Google’s Motion to Dismiss the
6 California Plaintiffs’ Song–Beverly Act claim.
- 7 • The Court GRANTS WITH LEAVE TO AMEND Google’s Motion to Dismiss the
8 Magnuson–Moss Warranty Act claims of all Plaintiffs.
- 9 • The Court GRANTS WITH LEAVE TO AMEND Google’s Motion to Dismiss the deceit
10 and fraudulent concealment claims of all Plaintiffs.
- 11 • The Court GRANTS WITH LEAVE TO AMEND Google’s Motion to Dismiss the
12 California Plaintiffs’ CLRA claim.
- 13 • The Court GRANTS WITH LEAVE TO AMEND Google’s Motion to Dismiss the
14 California Plaintiffs’ UCL claim.
- 15 • The Court GRANTS WITH LEAVE TO AMEND Google’s Motion to Dismiss the
16 California Plaintiffs’ FAL claim.
- 17 • The Court GRANTS WITH LEAVE TO AMEND Google’s Motion to Dismiss Florida
18 Plaintiff Martorello’s FDUTPA claim.
- 19 • The Court GRANTS WITH LEAVE TO AMEND Google’s Motion to Dismiss Illinois
20 Plaintiff Tran’s ICFDBPA and IUDTPA claims.
- 21 • The Court GRANTS WITH LEAVE TO AMEND Google’s Motion to Dismiss Indiana
22 Plaintiff Beheler’s IDCSEA claim.
- 23 • The Court GRANTS WITH LEAVE TO AMEND Google’s Motion to Dismiss Michigan
24 Plaintiff Berry’s MCPA claim.
- 25 • The Court GRANTS WITH LEAVE TO AMEND Google’s Motion to Dismiss New York
26 Plaintiff Davydov’s claims under N.Y. Gen. Bus. Law §§ 349–350.
- 27 • The Court GRANTS WITH LEAVE TO AMEND Google’s Motion to Dismiss North
28 Carolina Plaintiffs Harrison and Himes’s NCUDTPA claims.

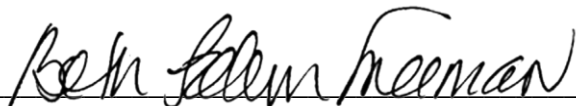
United States District Court
Northern District of California

- 1 • The Court GRANTS WITH LEAVE TO AMEND Google’s Motion to Dismiss North
- 2 Dakota Plaintiff Jones’s NDCFA claim.
- 3 • The Court GRANTS WITHOUT LEAVE TO AMEND Google’s Motion to Dismiss Ohio
- 4 Plaintiff Servodio’s ODTPA claim.
- 5 • The Court GRANTS WITH LEAVE TO AMEND Google’s Motion to Dismiss Ohio
- 6 Plaintiff Servodio’s OCSPA class claims and DENIES Google’s Motion to Dismiss Ohio
- 7 Plaintiff Servodio’s individual OCSPA claim.
- 8 • The Court GRANTS WITH LEAVE TO AMEND Google’s Motion to Dismiss
- 9 Pennsylvania Plaintiff Leone’s PUTPCPL claim.
- 10 • The Court GRANTS WITH LEAVE TO AMEND Google’s Motion to Dismiss Texas
- 11 Plaintiff Poore’s TDTPA claim.
- 12 • The Court GRANTS WITH LEAVE TO AMEND Google’s Motion to Dismiss
- 13 Washington Plaintiff Johnston’s WCPA claim.
- 14 • The Court GRANTS WITH LEAVE TO AMEND Google’s Motion to Dismiss the unjust
- 15 enrichment claims of all Plaintiffs.

16 Finally, with respect to Huawei and Google, the Court DENIES their motions to strike Plaintiffs’
17 class allegations.

18 An amended complaint shall be filed on or before June 8, 2018. Plaintiffs may request
19 additional time, if needed, to accommodate the jurisdictional discovery schedule set forth in a
20 separate order.

21
22 Dated: March 5, 2018

23 
24 BETH LABSON FREEMAN
25 United States District Judge
26
27
28