UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ORLANDO MEDEIROS, individually and on behalf of a class similarly situated,	)	
Plaintiff,	)	
v.	)	15-CV-10261-LTS
LENOVO (UNITED STATES), Inc.	)	
Defendant.	)	

ORDER AND MEMORADUM ON DEFENDANT'S MOTION TO DISMISS

January 27, 2016

SOROKIN, J.

In this consumer goods case, Plaintiff Orlando Medeiros ("Medeiros") brings suit on behalf of himself and a putative class against Lenovo (United States), Inc. ("Lenovo"), in connection with Lenovo's Yoga 2 Pro Laptop ("Yoga 2" or "laptop"). Medeiros asserts that Lenovo falsely represented that the battery would last "Up to 9 Hours" upon a full charge, but that he was only able to obtain four to five, or at most, six hours, of battery life on a full charge. He brings a two count Complaint asserting a claim for violation of the North Carolina Unfair and Deceptive Trade Practices Act, N.C. Gen. Stat. §§ 75-1-1, 75-16 (Count I), and a claim for Breach of Express Warranty (Count II). For the reasons set forth herein, Lenovo's Motion to Dismiss, Doc. 11, is ALLOWED.

I. FACTS ALLEGED

On or around October 16, 2013, Medeiros purchased a Yoga 2 through Lenovo's website. Doc. 1 ¶ 7. Lenovo advertised on its website that the battery life for the Yoga 2 was "Up to 9 Hours' Battery Life on a Single Charge." Id. ¶ 22.[1] Medeiros alleges, as to himself, that "almost immediately" after he purchased the Yoga 2, he noticed that the battery life "did not come close to the advertised nine hours." Id. ¶ 7. He alleges further that he placed the laptop in "Power Saving" battery mode, but the laptop "continued to fall significantly short of the battery life Lenovo represented, typically lasting only four or five, or at most, six hours." Id. The Complaint then goes on to allege, based upon on-line forums, that others have experienced battery life falling short of expectations. Id. ¶ 26-28. Specifically, Medeiros quotes three customers who claimed on an on-line forum that they each obtained only about four hours of battery life. Id.[2]

Medeiros alleges that "numerous variables" contribute to battery life. Id. ¶ 16, 17, 18. These variables include, among others things, the battery's energy storage capacity, the laptop's energy requirements, and the different configurations on a laptop, screen size, brightness settings, storage, and temperature. Id. According to Medeiros, given these variables and the importance of battery life, "consumers generally rely upon manufacturer's representations concerning battery life in making purchasing decisions." Id. ¶ 19. The Complaint's introductory paragraph alleges only that Medeiros "brings this action. . . on behalf of himself and all others

[1]The website states that the battery life is "Up to 9 hrs/ Windows 8 Idle @150 nits and Up to 6 hrs FHD playback @150 nits." Doc. 13-3. According to Lenovo, a "nit" is a measure of the brightness setting on the laptop screen, and "FHD" is full high-definition video. Doc. 13 at 11. The website states further that: "Battery life (and recharge times) will vary based on many factors, including system settings and usage. A description of the environment under which the test was performed is available upon request." Id.

[2] Looking to the same on-line forum, Lenovo points out that there are customers who did get nine or more hours of battery life. Doc. 13 at 12.

who were damaged when they purchased a Yoga Pro 2, *based on* Lenovo's false and misleading representations as to the battery life." Id. ¶ 1 (emphasis added). The Complaint alleges no other facts whatsoever demonstrating Medeiros' actual or reasonable reliance on Lenovo's representations as to battery life.

According to Medeiros, prior to October 2014, there were "'Terms and Conditions' to which purchasers were required to agree before purchasing a laptop through Lenovo's website." Id. ¶ 37; see also Doc. 20 ¶ 10 (Medeiros' counsel Declaration). Medeiros alleges, and Lenovo agrees, that the Terms and Conditions include a choice of law provision providing that North Carolina law applies to the contractual basis of the relationship. Doc 1 ¶ 37; Doc. 20-8.[3]

The Terms and Conditions also provide that "Lenovo hardware Products are warranted under the Lenovo Limited Warranty accompanying each Lenovo hardware Product." Doc. 20-8. That Limited Warranty, in relevant part, provides:

> **What this Warranty Covers**
>
> **Lenovo warrants that each Lenovo hardware product that you purchase is free from defects in materials and workmanship under normal use during the warranty period. The warranty period for the product starts on the original date of purchase as shown on your sales receipt or invoice or as may be otherwise specified by Lenovo. The warranty period and type of warranty service that apply to your product are as specified in "Part 3 - Warranty Service Information" below. This warranty only applies to products in the country or region of purchase.**

Id. (bold in original)**.**

There is no allegation in the Complaint specifying the defect in materials or workmanship. There is no allegation attributing the less than promised battery life to anything. Medeiros alleges only that he was unable to attain nine hours of battery life.

[3] The Court applies the law of North Carolina to Medeiros' substantive claims.

The Limited Warranty then specifies how a consumer can obtain service under the warranty:

> How to Obtain Warranty Service
>
> If the product does not function as warranted during the warranty period, you may obtain warranty service by contacting Lenovo or a Lenovo approved Service Provider. A list of approved Service Providers and their telephone numbers is available at: www.lenovo.com/support/phone.
>
> Warranty service may not be available in all locations and may differ from location to location. Charges may apply outside a Service Provider's normal service area. Contact a local Service Provider for information specific to your location.
>
> Customer Responsibilities for Warranty Service
>
> Before warranty service is provided, you must take the following steps:
>
> • follow the service request procedures specified by the Service Provider
> • backup or secure all programs and data contained in the product
> • provide the Service Provider with all system keys or passwords
> • provide the Service Provider with sufficient, free, and safe access to your facilities to perform service
> • remove all data, including confidential information, proprietary information and personal information, from the product or, if you are unable to remove any such information, modify the information to prevent its access by another party or so that it is not personal data under applicable law. The Service Provider shall not be responsible for the loss or disclosure of any data, including confidential information, proprietary information, or personal information, on a product returned or accessed for warranty service
> • remove all features, parts, options, alterations, and attachments not covered by the warranty
> • ensure that the product or part is free of any legal restrictions that prevent its replacement
> • if you are not the owner of a product or part, obtain authorization from the owner for the Service Provider to provide warranty service

Id.

The warranty then explains what a consumer can expect from Lenovo if a warranty claim is made:

> What Your Service Provider Will Do to Correct Problems
>
> When you contact a Service Provider, you must follow the specified problem determination and resolution procedures. The Service Provider will attempt to diagnose and resolve your problem by telephone, e-mail or remote assistance. The Service Provider may direct you to download and install designated software updates. Some problems may be resolved with a replacement part that you install yourself called a "Customer Replaceable Unit" or "CRU." If so, the Service Provider will ship the CRU to you for you to install.
>
> If your problem cannot be resolved over the telephone; through the application of software updates or the installation of a CRU, the Service Provider will arrange for service under the type of warranty service designated for the product under "Part 3 - Warranty Service Information" below.
>
> If the Service Provider determines that it is unable to repair your product, the Service Provider will replace it with one that is at least functionally equivalent. If the Service Provider determines that it is unable to either repair or replace your product, your sole remedy under this Limited Warranty is to return the product to your place of purchase or to Lenovo for a refund of your purchase price.

Id.

There are no allegations in the Complaint alleging what efforts, if any, Medeiros undertook to obtain satisfaction under the warranty or that he sought to return his Yoga 2. Further, Medeiros does not allege that the remedies provided in Lenovo's written warranty fail of their essential purpose, or are otherwise unconscionable.

II. DISCUSSION

A. Standard of Review

To survive a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). The Court "must take the allegations in the complaint as true and must make all reasonable inferences in favor of the plaintiff." Watterson v.

Page, 987 F.2d 1, 3 (1st Cir. 1993). "[F]actual allegations" must be separated from "conclusory statements in order to analyze whether the former, if taken as true, set forth a plausible, not merely a conceivable, case for relief." Juarez v. Select Portfolio Servicing, Inc., 708 F.3d 269, 276 (1st Cir. 2013) (internal quotations omitted). This "highly deferential" standard of review "does not mean, however, that a court must (or should) accept every allegation made by the complainant, no matter how conclusory or generalized." United States v. AVX Corp., 962 F.2d 108, 115 (1st Cir. 1992). Dismissal for failure to state a claim is appropriate when the pleadings fail to set forth "factual allegations, either direct or inferential, respecting each material element necessary to sustain recovery under some actionable legal theory." Berner v. Delahanty, 129 F.3d 20, 25 (1st Cir. 1997) (quoting Gooley v. Mobil Oil Corp., 851 F.2d 513, 515 (1st Cir. 1988)) (internal quotation marks omitted). "A district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed." Assoc. Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 528 n.17 (1983). If a plaintiff has not sufficiently pled facts entitling him to relief, "this basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court." Twombly, 550 U.S. at 558.

B. The Terms of the Limited Warranty May Be Considered

Federal Rule of Procedure 12(b) addresses the materials a court may consider in resolving a motion under Rule 12(b)(6):

> If, on a motion asserting the . . . failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56.

Fed. R. Civ. P. 12(b).

It is well settled that courts may consider documents outside the pleadings where, inter alia, the authenticity of the document is not disputed by the parties, or where the documents are integral or central to a plaintiff's claim. Watterson, 987 F.2d at 3; Solum v. CertainTeed Corp., No. 7:15-CV-114-D, 2015 U.S. Dist. LEXIS 145601 (E.D.N.C. Oct. 27, 2015) (cases cited). And, courts have held that the terms of a written warranty are generally considered central or integral to a breach of warranty claim. See Dixon v. Ford Motor Co., 14-CV-6135, 2015 U.S. Dist. LEXIS 146263, * 9 fn. 2 (E.D.N.Y. Sept. 30, 2015) (warranty guide attached to defendant's motion to dismiss considered because integral to plaintiff's breach of warranty claim); Sanchez-Knutson v. Ford Motor Co., 52 F. Supp.3d 1223, 1230 (S.D. Fla. 2014) (same); In re Porsche Cars N. Am., Inc. Plastic Coolant Tubes Prods. Liab. Litig., 880 F. Supp. 2d 801, 814 (S.D. Ohio. 2012) ("Because Plaintiffs refer to the Warranties and because the Warranties are undoubtedly central to this products liability action, the Court will consider the Warranties as part of the Complaint."); Kowalke v. Bernard Chevrolet, Inc., 99-c-7980, 2000 U.S. Dist. LEXIS 7154 (N.D. Ill. Mar. 23, 2000) (same); Jarrett v. Panasonic Court. Of N. Am., 8 F. Supp. 3d 1074, 1080 fn. 3 (E.D. Ark. 2013) (owner's manual considered because central to plaintiff's implied warranty claim).

Here, Medeiros specifically alleges that he agreed to Lenovo's "Terms and Conditions" when he purchased his laptop. Doc. 1 ¶ 37. [4] Those Terms and Conditions state that "Lenovo hardware Products are warranted under the Lenovo Limited Warranty accompanying each Lenovo hardware Product." Doc. 20-8. However, Medeiros did not attach Lenovo's Limited Warranty to his Complaint. Instead, the Limited Warranty is attached to Lenovo's counsel's

[4] Specifically, Medeiros alleges he agreed to "Lenovo's Terms and Conditions as of August 18, 2014," to which Medeiros further alleges, "Lenovo would require a website user [including Medeiros] to agree prior to making a purchase form [sic] Lenovo's website. Doc.1 ¶ 37.

Declaration attesting to its truth and accuracy. Doc. 13 ¶ 4. Medeiros does not challenge the authenticity of the attached Limited Warranty, or that it is *the* written warranty that Lenovo provided at the time Medeiros purchased his laptop. Medeiros argues only that Lenovo can point to no evidence demonstrating his assent to the terms of "any" warranty, and that this factual issue requires discovery. Doc. 42 at 5. The Court disagrees as a matter of law and pleading.

By the "click wrap" agreement, Medeiros assented to the Terms and Conditions, which incorporate Lenovo's Limited Warranty. Doc. 1 ¶ 37. [5] He "was immediately put on notice of the existence of a specific additional document that contained provisions that were also part of the" Terms and Conditions to which he expressly agreed. World Fuel Servs. Trading v. Hebei Prince Shipping Co., 783 F.3d 507, 518 (4th Cir. 2015). That he had to make additional "clicks," does not render a document otherwise incorporated to be excluded. Id. (general terms available two clicks into website deemed incorporated by reference into confirmation order) (citing One Beacon Ins. Co. v. Crowley Marine Servs., Inc., 648 F.3d 258, 266-70 (5th Cir. 2011) (terms and conditions available four clicks into the website contained in the contract were validly incorporated)). "[S]imply by reading the click wrap agreement before clicking 'I agree,'" Medeiros "would have known that his purchase was subject to" Lenovo's Limited Warranty. Solum, 2015 U.S. Dist. LEXIS 145601, at *15. "One who signs a written contract without reading it, when he can do so understandingly, is bound thereby unless the failure to read is justified by some special circumstance." Id. (internal citations and quotation marks omitted). Medeiros has not alleged any special circumstances as justification for not reading the Terms and Conditions, including the incorporated Limited Warranty, and he does not allege that he was

[5] A click wrap agreement is a "dialogue box that appears on a web page and requires the user to agree to certain terms before allowing the user to proceed." Solum, 2015 U.S. Dist. LEXIS 145601, at *2 (internal citation and quotation marks omitted).

"denied the opportunity to investigate or could not have learned the true facts by exercise of reasonable diligence." Id. Medeiros assented when he clicked "I agree," and there are no facts alleged that could plausibly lead to some other conclusion.

Essentially then, Medeiros seeks to have this Court consider the Terms and Conditions, but only that part which suit his purposes. That is, he seeks to have the Court consider the Terms and Conditions, while hoping to avoid the incorporated terms of the Limited Warranty. This Medeiros cannot do. The rule allowing courts to consider documents outside the pleadings "prevent[s] the situation where a plaintiff is able to maintain a claim of fraud by extracting an isolated statement from a document and placing it in the complaint, even though if the statement were examined in the full context of the document, it would be clear that the statement was not fraudulent." Solum, 2015 U.S. Dist. LEXIS 145601, at *7 (internal citation and quotation marks omitted). Given that Medeiros has: (1) not challenged the authenticity of the Limited Warranty; (2) that the Limited Warranty was incorporated by the Terms and Conditions upon which he seeks to rely in his Complaint; and (3) he assented to the Limited Warranty as a matter of law, I find that the Limited Warranty is integral to Medeiros' claims and may properly be considered by the Court without converting Lenovo's Motion to Dismiss to one for summary judgment.

C. The Complaint Fails to State a Claim Under the NC UDTPA (Count I)

To state a claim under the NC UDTPA, plaintiff must show: (1) an unfair or deceptive act or practice; (2) in or affecting commerce, and; (3) which proximately caused actual injury to the plaintiff or to his business. Dalton v. Camp, 548 S.E.2d 704, 711 (N.C. 2001); accord Walker v. Fleetwood Homes of N.C., Inc., 653 S.E.2d 393, 399 (N.C. 2007); RD&J Props. v. Lauralea-Dilton Enters. LLC, 600 S.E.2d 492, 500 (N.C. 2004).

In support of his UDTPA claim, Medeiros alleges that Lenovo advertised that the battery life for the Yoga 2 was "Up to 9 Hours' Battery Life on a Single Charge," but that these representations "were false and unsubstantiated when made." Doc. 1 ¶ ¶ 22, 24. Lenovo moves to dismiss Count I on three grounds: (1) the alleged injury did not occur in North Carolina; (2) the NC UDTPA does not apply because the crux of the dispute is contractual; and (3) the statement of "Up to 9 hours" is not actionable, as it would not deceive a reasonable consumer. Doc. 13 at 19-21.

i. Place of Injury

Lenovo argues that in order to state a claim under the NC UDTPA, a plaintiff must allege that the injury take place in North Carolina. The case of Hometown Publ'g v. Kidsville News!, Inc., No. 5:14-CV-76-FL, 2014 U.S. Dist. LEXIS 179106 (E.D.N.C. Oct. 3, 2014) (providing an extensive historical explanation of the relevant case law), is on point. Hometown held that where a "plaintiff alleges it was injured as a result of an in-state defendant's in-state conduct," a plaintiff can bring a NC UDTPA claim although the injury did not occur in North Carolina. Id. at *15. Lenovo is a North Carolina company and allegedly committed unfair and deceptive acts emanating from North Carolina. Under North Carolina law, the fact that the injury was allegedly sustained in Massachusetts does not prevent, in this case, the claim from proceeding against Lenovo in Massachusetts.

ii. Count I Does Not State a NC UDTPA Claim

In the circumstances of this case, the issue fairly raised is whether a NC UDTPA claim can withstand a motion to dismiss where: (1) the claim arises out of a breach of a consumer warranty based upon an alleged deceptive statement as to the product's performance; (2) the damage alleged is to the product itself; (3) the written warranty allocates the risk of loss, and; (4)

the written warranty is not alleged to be unconscionable or that it has failed of its essential purpose. Medeiros has not cited any factually analogous cases to support his claim that under these circumstances, a NC UDTPA claim can survive. Instead, he seeks to rely on general principles underlying his claim. Doc. 19 at 7-8. Looking, however, to factually analogous cases, it is clear that general principles will not suffice, and courts have readily dismissed similarly pled complaints for the following reasons.

First, it is well settled in North Carolina that a mere breach of contract or breach of warranty does not, standing alone, constitute an unfair or deceptive trade practice. Ellis v. Louisiana-Pacific Corp., 699 F.3d 778, 784 (4th Cir. 2012); Broussard v. Meineke Disc. Muffler Shops, Inc. 155 F.3d 331, 346 (4th Cir. 1998) (reversible error to allow a UDTPA claim to go forward where claim was essentially just a breach of contract claim); Kelly v. Georgia-Pacific, 671 F. Supp. 2d 785, 799 (E.D.N.C. 2009) (citing cases). As an earlier Fourth Circuit decision explained:

> It is clear that the statute encompasses such things as misrepresentation and a wide variety of shady practices sometimes associated with the marketing of consumer goods and services. Whatever the limit of their reach, however, the words must mean something more than an ordinary contract breach. In a sense, unfairness inheres in every breach of contract when one of the contracting parties is denied the advantage for which he contracted, but this is why remedial damages are awarded on contract claims**. If such an award is to be trebled, the North Carolina legislature must have intended that substantial aggravating circumstances be present.**

United Roasters, Inc. v. Colgate Palmolive Co., 649 F.2d 985, 992 (4th Cir. 1981) (emphasis added).

The requirement that substantial aggravating factors must be alleged is applicable to UDTPA claims arising out of a breach of warranty. In Ellis v. Louisiana-Pacific Corp., 699 F.3d 778 (4th Cir. 2012), homeowners brought a claim against the manufacturer of exterior siding

alleging, inter alia, that the manufacturer failed to inform consumers that the siding was defective despite the fact that the manufacturer knew or should have known of the defect. As to the claim of negligence, the Fourth Circuit applied the economic loss rule ("ELR") which provides that a breach of contract ordinarily "does not give rise to a tort action by the promise against the promisor." Id. at 783 (internal citation and quotations marks omitted). As set forth in Ellis:

> The rationale for the economic loss rule is that the sale of goods is accomplished by contract and the parties are free to include, or exclude, provisions as to the parties' respective rights and remedies, should the product prove to be defective. To give a party a remedy in tort, where the defect in the product damages the actual product, would permit the party to ignore and avoid the rights and remedies granted or imposed by the parties' contract.

Id. (citing Moore v. Coachmen Indus., Inc., 499 S.E.2d 772, 780 (N.C. Ct. App. 1998)).

Ellis also addressed the manufacturer's argument that the NC UDTPA claim was barred by the ELR, which the district court had applied in dismissing the claim. Because the highest court in North Carolina had not yet decided whether the ELR bars UDTPA claims,[6] the Fourth Circuit not wanting to extend North Carolina law, affirmed dismissal on the grounds that the plaintiff alleged only a mere breach of contract with no substantial aggravating circumstances. Id. at 786. The court reasoned that plaintiffs' allegation that the manufacturer knew that its product "would not live up to the terms of the warranty and should have disclosed this fact to consumers," was "simply another way of claiming that [the manufacturer] breached its express

[6] In Coker v. DaimlerChrysler Corp., 01-CVS-1264, 2004 NCBC LEXIS 2, at * 13 (N.C. Super. Ct. Jan. 5, 2004), the then Chief Business Court Judge applied the economic loss doctrine to bar claims for common law fraud and unfair trade practices arising from the sale of an allegedly defective automobile, stating that to do otherwise would "eviscerat[e] the contract/warranty system [of adjudicating liability] now in place." The North Carolina Court of Appeals affirmed on other grounds relating to standing, however, and the North Carolina Supreme Court's per curiam decision did not reach the issue. See Coker, 617 S.E. 2d 306 (N.C. Ct. App. 2005), rev. denied by, 623 S.E. 2d 581 (N.C. 2005). Following Coker, the economic loss rule was applied in Bussian v. DaimlerCrysler Corp., 411 F. Supp. 2d 614 (M.D.N.C. 2005) to a NC UDTPA claim arising out of a breach of warranty.

warranty to consumers." Id. As the Fourth Circuit recognized, "it is unlikely that an independent tort could arise in the course of contractual performance, since those sorts of claims are most appropriately addressed by asking simply whether a party adequately fulfilled its contractual obligations." Id. (citing Eastover Ridge L.L.C. v. Metric Constructors, Inc. 533 S.E.2d 827, 833 (N.C. Ct. App. 2000); see also Yancey v. Remington Arms Co., LLC, No. 1:12cv477, 2013 U.S. Dist. LEXIS 140397 (M.D.N.C. Sept. 30, 2013) (UDTPA claim dismissed where gun manufacturers allegedly warranted safety of gun); Kelly, 671 F. Supp. 2d at 799 (warranty claim based on manufacturer's alleged failure to address plaintiff's warranty claim to his satisfaction and defective design do not rise to substantial aggravating circumstances to support a UDTPA).

The requirement that a plaintiff allege substantial aggravating circumstances in a breach of warranty case is not easily overcome. For example, in Rohlik v. I-Flow, No. 7:10-CV-173-FL, 2011 U.S. Dist. LEXIS 73454 (E.D.N.C. Jul. 7, 2011), plaintiff underwent routine arthroscopic surgery. A pain pump manufactured by the defendant, which injected anesthetics on a continuous basis into plaintiff's shoulder joint through a catheter, was used to manage plaintiff's post-operative pain. The plaintiff suffered extensive injuries due to the pain pump and sued the manufacturer of the pump alleging that it knew about the danger of using pain pumps in such manner, and that the manufacturer purposely misled the medical community and the public by making false representations about the safety of its pumps. The court dismissed the UDTPA claim holding that:

> The complaint in this matter does not contain allegations of substantial aggravating circumstances unlocking the extraordinary treble damages provision of the UDTPA. Plaintiff's allegations that defendant represented that the pain pump used by plaintiff was free from defects and safe for use, **even if defendant knew the pain pump would not conform to these promises, is indistinguishable from a run-of-the-mill breach of warranty claim.**

Rohlik, 2011 U.S. Dist. LEXIS 73454, at *12-13 (emphasis added).

Here, Medeiros alleges only that Lenovo warranted the battery life up to nine hours, but that it knew the battery life was substantially less than nine hours. Even assuming that Lenovo knew there was no chance that a consumer could attain nine hours of battery life; that is, it "would not conform to" this promise, the claim is nonetheless "indistinguishable from a run-of-the-mill breach of warranty claim." Id. This is merely another way of alleging that Lenovo did not fulfill its promise to provide a laptop with a battery that would last up to nine hours. His allegations, as such, do not state a plausible claim under the NC UDTPA.

To avoid this conclusion, Medeiros argues that his UDTPA claim should survive because Lenovo's misrepresentation induced consumers to purchase the Yoga 2. Doc. 19 at 14. However, the cases cited for this proposition are not factually analogous.[7] The Court, instead, looks to Terry's Floor Fashions, Inc. v. Georgia-Pacific Corp., No. 5:97-CV-683-BR(2), 1998 U.S. Dist. LEXIS 15392 (E.D.N.C. Jul. 23, 1998), an analogous case, for guidance. There, plaintiff a seller of vinyl flooring purchased certain plywood underlayment from the defendant manufacturer in reliance on defendant's warranty that the plywood would not discolor the vinyl flooring. After the plywood was installed and the vinyl was installed on top of the plywood, the vinyl became discolored. Id. at *3. The plaintiff alleged that the defendant "deliberately misrepresented" the traits and qualities of the plywood underlayment in order to induce plaintiff

[7] See Doc 19 at 14-15, and cases cited in the following order: Mapp v. Toyota World, Inc., 344 S.E.2d 297 (N.C. Ct. App.1986) (used car dealer misrepresentation); Torrance v. AS & L Motors, 459 S.E.2d 67 (N.C. Ct. App. 1995) (same); Huff v. Autos Unlimited, 477 S.E.2d 86 (N.C. Ct. App. 1996) (same); Bhatti v. Buckland, 400 S.E.2d at 440 (N.C. 1991) (misrepresentation as to real property boundaries); Winston Realty Co. v. G.H.G., Inc., 331 S.E. 2d 677 (N.C. 1985) (employment agency failure to check references); Oxley v. Asplundh Tree Expert Co., 1:06-CV-60, 2006 U.S Dist. LEXIS 42092 (W.D. N.C. May 16, 2006) (aggravating factors found where defendant entered into contract agreeing to cease contaminating environment, but continued to contaminate); Griffith v. Glen Wood Co., 646 S.E. 2d 550 (N.C. Ct. App. 2007) (trade secret).

to enter into the contract. Id. at *4. The court held that even were this true, "the fact remains that this dispute, at bottom, is one over whether the product that was delivered by defendant was in accordance" with the contract and "Plaintiff cannot convert its breach of warranty claim into an unfair trade practices claim simply by 'artfully pleading' the appropriate legal language for such a claim." Id. at *30. Accordingly, Medeiros' argument that Lenovo's misrepresentation induced the contract will not save his UDTPA claim given the circumstances of the instant case.

Second, post the Fourth Circuit's decision in Ellis, other courts have continued to apply the ELR to UDTPA claims based on a breach of warranty. In Erickson v. Bldg. Materials Corp. of Am. (In re Bldg. Materials Corp. of Am. Asphalt Roofing Shingle Prod. Liab. Litig. No. 8:11-mn-02000-JMC, 2013 U.S. Dist. LEXIS 7009, *2 (D. S.C. Jan. 16, 2013), the plaintiff brought a claim against a shingle manufacturer alleging, inter alia, that she relied on representations in advertisements that promised the shingles were industry compliant and had "superior durability." The manufacturer allegedly was aware of a defect, which resulted in the shingles prematurely cracking, but intentionally failed to disclose this defect to her and other consumers. The court dismissed both the fraud and the NC UDTPA claims, holding that these claims were "intertwined with the breach of contract or warranty claims," and thus barred by the ELR. Id. at *23. The plaintiff argued that the economic loss rule did not bar her claims for fraud and NC UDTPA because they were based on the defendant having engaged in fraudulent, misleading, and deceptive statements, and she could have brought either claim without the other. Id. The court rejected the argument because the plaintiff relied on the defendant's representations for both claims in such a way that the claims were intertwined. Id.

Similarly, another post-Ellis decision, Malone v. Tamko Roofing Prods., 3:13-cv-00089-MOC-DCK, 2013 U.S. Dist. LEXIS 145530 (W.D.N.C. Oct. 8, 2013), applied the ELR to

plaintiff's UDTPA claim where the plaintiff-homeowner sued the manufacturer of a roofing system after the shingles curled and slid off the roof, and after the manufacturer denied the home owner relief under the written warranty. The defendant moved to dismiss because the homeowner had an adequate remedy under the warranty, the tort claims—including the UDTPA claim must be dismissed. The court applied the ELR and dismissed the tort and UDTPA claims relying, in part on, River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 872-73 (1986), wherein the Supreme Court stated that "[d]amage to a product itself is most naturally understood as a warranty claim," and a manufacturer may "restrict its liability, within limits, by disclaiming warranties or limiting remedies." Malone, 2013 U.S. Dist. Lexis 145530, at *7.

Contrary to Medeiros' assertions, application of the ELR would not ban all UDTPA claims alleging only benefit-of-the bargain or other economic damage. Doc. 42 at 2-5. In Bussian v. DaimlerChrysler Corp., 411 F. Supp. 2d 614 (M.D.N.C. 2005), the court explained the limits of its holding:

> [T]his Court is careful to note that it is not finding, nor could it find, that the economic loss rule bars all claims of unfair trade practices that allege only economic losses. See [Coker v. DaimlerChrysler Corp.. 172 N.C. App. 386, 617 S.E.2d 306, 318 (N.C. Ct. App. 2005)] (noting numerous North Carolina cases allowing purely economic recovery in unfair trade practices claims). The Court limits its decision to cases such as the instant case involving allegations of a defective product where the only damage alleged is damage to the product itself and the allegations of unfair trade practices are intertwined with the breach of contract or warranty claims.

Id. at 627.

Accordingly, for the foregoing reasons, Count I fails to state a claim upon which relief can be based.

iii. The Complaint Fails to Allege Actual or Reasonable Reliance

"When the alleged UDTPA violation is a misrepresentation, a plaintiff must prove detrimental reliance on the alleged misrepresentation to satisfy the proximate cause requirement." Solum, 2015 U.S. Dist. Lexis 145601, at *11. In order to withstand Lenovo's Motion to Dismiss, Medeiros must allege both actual and reasonable reliance. Id. at *12 (and cases cited). Here, nowhere does Medeiros allege any facts that he relied on any promise or warranty when he purchased the Yoga 2. The absence of specific allegations that Medeiros actually relied is fatal to his claim. Even assuming, however, that Medeiros can allege actual reliance, he still has to allege facts giving rise to a plausible claim that his reliance was reasonable.

As to reasonable reliance, Lenovo asserts that the statement, "Up to 9 hours" is not actionable, as it would not deceive a reasonable consumer. The North Carolina courts have not addressed the issue of so-called "up to" claims specifically. [8] However, the Fourth Circuit in Brown v. GNC Corp. (In re GNC Corp., Triflex Prods. Mktg. & Sales Practices Litig. (No. 11), 789 F.3d 505 (2015), recently addressed the issue of whether plaintiff stated a plausible claim for unfair and deceptive practices where it was alleged that certain supplements promoted joint health, but where many scientific studies showed the promised benefits to be false. The court in

[8]Some courts have held that the issue of whether "up to" claims are misleading raises issues of fact. See e.g., Herron v. Best Buy Co. Inc., 924 F. Supp. 2d 1161, 1172 (E.D.Cal. 2013) (reasonable interpretation of "up to" raised fact question); Walter v. Hughes Communs. Inc., 682 F Supp. 2d 1031, 1044 (N.D.Cal. 2010) ("A reasonable jury could find that representations about its internet services are deceptive even in light of [defendant's] disclosures that it could not guarantee any particular or average speed."). Still other courts have held that "up to" claims may be misleading but that a plaintiff must allege, pursuant to Federal Rule of Civil Procedure 9(b), the manner in which the representation was false or misleading. See Frenzel v. Aliphcom, 76 F. Supp. 3d 999, 1012-13 (N.D.Cal. 2014) (alleging battery that promised "up to 10 hours," but failed to live up to its promise was not enough). Because Lenovo has not made a Rule 9(b) argument, the Court does not address the issue.

Brown looked to false advertising claims under the Lanham Act for guidance in construing the state unfair and deceptive trade practice statutes at issue. Id. at 513. In so doing, the court recognized that "[c]ourts uniformly interpret 'false or misleading' as creating two different theories of recovery in a false advertising claim: A plaintiff must allege either (i) that the challenged representation is literally false or (ii) that is it literally true but nevertheless misleading." Id. Because the plaintiff in Brown alleged only that the challenged representation was literally false, the plaintiffs' failure to also allege that "all reasonable experts in the field agree that the representations are false" required dismissal of the complaint. Id. That is, because some, albeit a minority, of experts did not agree that the representation was false, the motion to dismiss was allowed because plaintiffs could not demonstrate the claim was literally false. Id. Similarly, Medeiros has not alleged that consumers could never obtain nine hours of battery life on a single charge and, thus, he has not alleged that the representation was literally false.[9] The issue fairly raised is whether Medeiros has alleged sufficient facts to state a plausible claim that the representation is literally true, but nevertheless misleading to him, as a reasonable consumer.

The problem for Medeiros is that he has failed to allege any facts whatsoever to support a claim that his reliance on the "Up to 9 hours," statement was reasonable under the circumstances of this case, which, under North Carolina law, he must do. Solum, 2015 U.S. Dist. LEXIS 145601, at *13. Because Medeiros has not alleged any facts supporting that he actually relied on any representation by Lenovo, or that any such reliance was reasonable, Count I is DISMISSED.

[9]Federal Rule of Civil Procedure 11 may preclude Medeiros from making such allegation as Lenovo points out that Medeiros posted under the username, "Medeiom," that he made adjustments to the power settings, was then able to get more than nine hours of battery life thereafter, and said, "I love my Y2P!" Doc. 12 at 8. At the hearing on the instant motion, counsel for Medeiros made no effort to dispute these assertions. Doc. 40 at 6. These assertions, however, have no bearing on the resolution of the pending motion as they are outside the scope of the pleadings.

D. The Complaint Fails to State a Claim for Breach of Express Warranty (Count II)

Medeiros asserts that an express warranty may not be waived and that the Limited Warranty "purports to effect a waiver of all express warranties Lenovo made and, at least as Lenovo now construes it, to prevent a purchaser from seeking remedies for breach of express warranty in court." Doc. 19 at 19. This is not correct. Medeiros confuses a "waiver of warranty" and a "limitation of remedy" provision. Pursuant to the North Carolina version of the Uniform Commercial Code, "the agreement . . . may limit or alter the measure of damages recoverable under this article, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of nonconforming goods or parts." N.C. Gen. Stat. § 25-2-719(1)(a). A contractual limitation of remedy is permitted so long as "circumstances [do not] cause an exclusive or limited remedy to fail of its essential purpose." Id. at §25-2-719(2). Here, the Limited Warranty provides for repair, replace or refund if there is a defect in materials or workmanship, and there is no allegation that the Limited Warranty was unconscionable or failed of its essential purpose. Cf., Kelly, 671 F. Supp. 2d at 798. Medeiros does not allege the specific defect in materials or workmanship beyond the allegation that the battery did not last up to nine hours. The absence of any allegations whatsoever as to a defect in materials or workmanship is fatal to Medeiros' warranty claim.

In addition, under North Carolina law, "a buyer must have relied upon a warrantor's statement in order to establish a breach of an express warranty." Id. (citing Garner v. Kearns, 125 S.E.2d 390, 392 (N.C. 1962)). "In other words, under North Carolina law, reliance is an essential element of an express warranty claim." Id. (internal citations omitted). As noted above, Medeiros has failed to allege facts supporting reliance. And, "merely alleging that a representation became

part of the bargain does not satisfy pleading standards under Iqbal and Twombly." Yancey, 2013 U.S. Dist. LEXIS 140397, at *25.

Finally, under North Carolina law, "a consumer must provide the seller with notice of any alleged breach of warranty and allow reasonable time for the seller to cure the alleged defect before he is entitled to file suit." Butcher v. DaimlerChrysler Co., 1:08CV207, 2008 U.S. Dist. LEXIS 57679, *10. (M.D.N.C. 2008); accord Halprin v. Ford Motor Co., 420 S.E.2d 686, 688-89 (N.C.1992) (once a buyer accepts a seller' tender, he must notify seller of alleged breach of warranty within reasonable time of discovery of any defect and allow the seller opportunity to remedy said defect); Maybank v. S.S. Kresge Co., 273 S.E.2d 681, 684 (N.C. 1981) (notice requirement includes providing the seller with reasonable opportunity to cure the defect or otherwise minimize its damages, and to allow the seller to prepare for litigation). Medeiros has failed to allege any facts whatsoever that took any affirmative steps to put the seller on notice, or that he gave Lenovo any time at all to cure the alleged breach. This too requires that Count II be DISMISSED.

Order

For the reasons stated, Lenovo's Motion to Dismiss, Doc.11, is ALLOWED. Plaintiff's Motion for Leave to Amend the Complaint previously filed, Doc. 17, is DENIED as MOOT, as the proffer by counsel does not cure the defects in the Complaint as stated herein. Counsel is reminded that a motion to amend must be filed along with a proposed amended complaint.[10]

SO ORDERED.

/s/ Leo T. Sorokin
Leo T. Sorokin
United States District Judge

[10] Any motion to amend by Medeiros should be considered carefully in light of Medeiros' asserted admission that he was able to attain nine hours of battery life with some adjustments. Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 40 n.20 (1976) ("[N]amed plaintiffs who represent a class must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.").