UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Bruce McMahon, et al.,

Plaintiff,

v.

Take-Two Interactive Software, Inc.,

Defendants.

CV 13-cv-02032-VAP-SP

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS (DOC. 48) WITH LEAVE TO AMEND

On October 24, 2016, Plaintiffs Bruce McMahon and Christopher Bengtson ("Plaintiffs") filed their First Amended Complaint ("FAC"). Doc. 44. On December 7, 2016, Defendant Take-Two Interactive Software, Inc., DBA Rockstar ("Rockstar") filed a Motion to Dismiss the FAC. Doc. 48. Plaintiffs filed their Opposition on February 13, 2017 (Doc. 61), and Rockstar filed its Reply on February 21, 2017 (Doc. 62). The Court has considered the papers filed in support of and in opposition to the motion.[1] The Court **GRANTS** the Motion, with leave to amend.

[1] Defendants' request for judicial notice (Doc. 49) is denied. Exhibits A and B are duplicative of Exhibits A and B of the FAC. The Court has no occasion to consider the remaining exhibits. *Accord McMahon v. Take-Two Interactive Software, Inc.*, 2014 WL 324008, at *3 (C.D. Cal. Jan. 29, 2014) (denying similar motion because "the Court finds resolution of the Motion does not turn on the existence or content of the documents included in Exhibits C through Q").

I. BACKGROUND

On September 17, 2013, Rockstar released Grand Theft Auto V ("GTA V"), the most recent installment in its popular crime-adventure video game series. FAC, ¶ 11. In addition to hundreds of hours of traditional, offline gameplay, GTA V supports online, multiplayer gameplay. The packaging for GTA V stated that the game "featur[ed] Grand Theft Auto Online" ("GTA Online"). Id., Exs. A, B. In smaller font beneath this statement, the packaging states that the online features "may not be available to all users, and may, upon 30 days' notice, be terminated, modified, or offered under different term." *Id.* Plaintiffs purchased GTA V on the day it was released for $59.99. Id., ¶ 12. They had no interest in the offline content, and believed that they would be able to access GTA Online immediately. Id., ¶¶ 14, 33. However, Rockstar did not launch GTA Online until October 1, 2013. Id., ¶ 15. Plaintiffs began playing GTA Online as soon as they were able to, around October 10, 2013. Id., ¶ 38.

On October 4, 2013—three days after the launch of GTA Online—Plaintiffs filed a class action complaint in Riverside County Superior Court, asserting claims for violations of California's Unfair Competition Law ("UCL") (Cal. Bus. & Prof. Code §§ 17200, *et seq.*) and California's False Advertising Laws (Cal. Bus. & Prof. Code §§ 17500, *et seq.*) ("FAL"). Doc. 1 at 7–19. On November 6, 2013, Rockstar removed the action pursuant to 28 U.S.C. § 1441, asserting federal jurisdiction under 28 U.S.C. § 1332(d)(2). Doc. 1.

On November 12, 2013, Rockstar moved to dismiss the original complaint, arguing that Plaintiffs (1) lacked standing to pursue their claims, (2) failed to identify a viable remedy, and (3) failed to state a claim under either the UCL or FAL. Doc. 8. The Court held that Plaintiffs had standing to pursue their claims and had set forth a theory of restitution, a cognizable remedy. McMahon v. Take-Two Interactive

Software, Inc., 2014 WL 324008, at *5 (C.D. Cal. Jan. 29, 2014). But the Court found that Plaintiffs had not stated a claim under the UCL or FAL because they "failed to identify a false and fraudulent statement on the packaging of GTAV." Id. at *8. The Court concluded that this defect could not be cured by amendment and therefore dismissed the complaint with prejudice. *Id.* at *12.

Then Ninth Circuit agreed with some aspects of the Court's reasoning but reversed its dismissal of the original complaint. McMahon v. Take-Two Interactive Software, Inc., 640 F. App'x 669 (9th Cir. 2016). First, the appellate court held that Plaintiffs allegations were sufficient to confer standing based on the allegation that Plaintiffs "would not have purchased GTA V at a 'premium price' if defendants had not misrepresented the availability of" GTA Online. Id. at 671, ¶ 1. Second, the appellate court held that Plaintiffs had a viable theory of restitution because they alleged that "they were induced to pay a premium price for a video game that did not perform as represented." Id., ¶ 2. Third, the appellate court held that "[t]he district court erred in concluding as a matter of law that the alleged misrepresentations on GTA V's packaging were not actionable under the UCL or the FAL." Id., ¶ 3. It explained:

> On a motion to dismiss for failure to state a claim, a court must construe a complaint's allegations in the light most favorable to plaintiffs. Here, plaintiffs alleged that they read all the disclosures and statements on GTA V's packaging, and that these representations lead them to believe that GTA Online would be available to play immediately upon purchase of GTA V. . . . The district court erred by failing to construe plaintiffs' allegations that these representations were misleading in the light most favorable to plaintiffs, and by making the finding that the representations were not misleading.

Id. (internal citations omitted). Finally, the appellate court explained that it would not reach the issue of reliance for the first time on appeal. *Id.* The appellate court remanded "with instructions that the district court grant leave to plaintiffs to file an

amended complaint." Id. at 672. The Court granted Plaintiffs leave to amend and they filed their FAC, adding new factual allegations and asserting new claims for (1) breach of express warrant; (2) breach of warranty of merchantability and fitness; (3) breach of implied warranty in violation of the Song-Beverly Act; and (4) negligence. Doc. 44.

I. LEGAL STANDARD

Federal Rule of Civil Procedure 12(b)(6) allows a party to bring a motion to dismiss for failure to state a claim upon which relief can be granted. Rule 12(b)(6) is read along with Rule 8(a), which requires a short, plain statement showing that the plaintiff is entitled to relief. Fed. R. Civ. P. 8(a)(2).[2] A claim satisfies this standard when it sets forth a cognizable legal theory and factual allegations sufficient to render this theory plausible. See Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1988); Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007). A complaint that sets forth a cognizable legal theory will survive a 12(b)(6) motion as long as it contains "enough facts to state a claim to relief that is plausible on its face." Twombly, 550 U.S. at 570. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are 'merely

[2] "Claims for fraud and negligent misrepresentation must meet the heightened pleading requirements of Rule 9(b)." Glen Holly Entm't, Inc. v. Tektronix, Inc., 100 F. Supp. 2d 1086, 1093 (C.D. Cal. 1999). Under Rule 9(b), "a party must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. Proc. 9(b). "Rule 9(b) demands that, when averments of fraud are made, the circumstances constituting the alleged fraud be specific enough to give Defendants notice of the particular misconduct so that they can defend against the charge[.]" Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir. 2003) (internal citations omitted). Under Rule 9(b), fraud allegations must include the "time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentations." Swartz v. KPMG LLP, 476 F.3d 756, 764 (9th Cir. 2007) (citing Edwards v. Marin Park, Inc., 356 F.3d 1058, 1066 (9th Cir. 2004)).

consistent with' a defendant's liability, it stops short of the line between possibility and plausibility of 'entitlement to relief.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S. at 556).

When evaluating a Rule 12(b)(6) motion, a court must accept all material allegations in the complaint—as well as any reasonable inferences to be drawn from them—as true and construe them in the light most favorable to the plaintiff. See Doe v. United States, 419 F.3d 1058, 1062 (9th Cir. 2005); ARC Ecology v. U.S. Dep't of Air Force, 411 F.3d 1092, 1096 (9th Cir. 2005); Moyo v. Gomez, 32 F.3d 1382, 1384 (9th Cir. 1994). Legal conclusions couched as factual allegations are not entitled to a presumption of truth and are not sufficient to defeat a 12(b)(6) motion. Iqbal, 556 U.S. at 678.

II. DISCUSSION

A. Reliance

To state a claim under the UCL or FAL, a plaintiff "must demonstrate actual reliance on the allegedly deceptive or misleading statements." In re Tobacco II Cases, 46 Cal. 4th 298, 306 (2009). That requires the plaintiff to show that "but for defendant's material misrepresentation or omission plaintiffs would have proceeded differently." In re Sony Gaming Networks & Customer Data Sec. Breach Litig., 903 F. Supp. 2d 942, 969 (S.D. Cal. 2012). The reliance must have been both detrimental and reasonable. See Rosado v. eBay Inc., 53 F. Supp. 3d 1256, 1264–65 (N.D. Cal. 2014) ("Plaintiff must show that he personally lost money or property because of his own actual and reasonable reliance on the allegedly untrue or misleading statements.") (citing In re Tobacco II Cases, 46 Cal. 4th at 326–28).

Plaintiffs allege that they "would not have purchased the GTA V videogame on September 17, 2013 at a premium price had they been informed that the online features of the game were not available." FAC, ¶ 65. Rockstar argues that this

allegation is insufficient to establish detrimental and reasonable reliance. The Court agrees.

First, Plaintiffs have failed to identify any detriment they suffered as a result of the alleged misrepresentation about the launch date of GTA Online. Plaintiffs' theory rests on the premise that they would have waited to purchase GTA V, and avoided paying a premium price for the game, if they had known that GTA Online would not launch until October 1, 2013. That premise is contradicted by other allegations in the FAC, however. The FAC acknowledges that the price for GTA V did not change between September 17, 2013, when Plaintiffs purchased the game, and October 1, 2013, when GTA Online was launched. Doc. 44, ¶ 57 ("Defendants charged[] a $59.99 premium price to purchase the GTA V game when it was released on September 17, 2013, *up until November of 2013*, when it was offered at a reduced price") (emphasis added). If Rockstar had included GTA Online's launch date on the packaging of GTA V, Plaintiffs might have waited until October 1, 2013 to buy the game, but they would not have saved any money as a result. As Plaintiffs did not actually pay a premium price to purchase the game early, they cannot establish that their reliance on the alleged misrepresentation was detrimental.[3]

Plaintiffs have not offered any other theory of detrimental reliance. Plaintiffs do not allege that they would have refrained entirely from purchasing GTA V if not

[3] The new allegation in the FAC—which makes clear that Plaintiffs did not pay a premium price for GTA V based on the alleged misrepresentation—undermines the basis for the Ninth Circuit's holding that Plaintiffs' original complaint plausibly alleged standing and a theory of restitution. See McMahon, Inc., 640 F. App'x at 671, ¶¶ 1, 2 (Plaintiffs had standing based on the allegation that they "would not have purchased GTA V at a 'premium price' if defendants had not misrepresented the availability of" GTA Online, and a viable theory of restitution based on the allegation that "they were induced to pay a premium price for a video game that did not perform as represented.").

for the alleged misrepresentation. Nor would such an allegation be plausible, given Plaintiffs' allegations that they purchased GTA V on the day it was released and began playing GTA Online as soon as it became available. FAC, ¶¶ 12, 37; cf. Noll v. eBay Inc., 2013 WL 2384250, at *4 (N.D. Cal. May 30, 2013) (dismissing UCL and FAL claims because plaintiffs did not allege that they ceased using the defendant's products upon discovering the alleged misrepresentation).[4]

Second, even if Plaintiffs were able to establish detrimental reliance on the alleged misrepresentation, they could not establish that such reliance was reasonable, *i.e.*, that a reasonable member of the consuming public would have relied upon the alleged misrepresentation in a similar manner. Ebner v. Fresh, Inc., 838 F.3d 958, 965 (9th Cir. 2016). The packaging for GTA V stated that the game "featur[ed]" GTA Online, but that GTA Online "may not be available to all users, and may, upon 30 days' notice, be terminated, modified, or offered under different term." FAC, Exs. A, B. A reasonable member of the consuming public who was only interested in playing GTA Online would not have purchased GTA V in reliance on this language. At minimum, such a consumer would have inquired to Rockstar to determine *why* the product might not be available to a particular user. Because it is not plausible that a reasonable consumer would have relied upon the alleged misrepresentation in the way Plaintiffs allegedly did, dismissal is appropriate. Cf. Ebner, 838 F.3d at 966 (upholding dismissal based on conclusion that a reasonable

[4] One paragraph of the FAC states that Plaintiffs would "perhaps" not have purchased GTA V if they had known the launch date of GTA Online. FAC, ¶ 28. Plaintiffs do not cite this paragraph in their Opposition. In any case, this speculative, half-hearted allegation is not plausible in light of Plaintiffs' conduct after discovering the alleged misrepresentation.

consumer would not adopt the plaintiff's understanding of alleged misrepresentation).

B. Warranty Claims

Rockstar moves to dismiss Counts 3, 4, and 5 of the FAC, which assert claims for breach of express warranty, breach of warranty of merchantability and fitness, and breach of the Song-Beverley Consumer Warranty Act. The Court agrees that these claims must be dismissed. A warranty claim must establish reasonable reliance resulting in injury. Minkler v. Apple, Inc., 65 F. Supp. 3d 810, 817 (N.D. Cal. 2014) ("To state a claim for breach of express warranty under California law, a plaintiff must allege (1) the exact terms of the warranty; (2) reasonable reliance thereon; and (3) a breach of warranty which proximately caused plaintiff's injury.") (citing Williams v. Beechnut Nutrition Corp., 185 Cal.App.3d 135, 142 (1986)). As explained, Plaintiffs cannot establish reasonable reliance on Rockstar' alleged misrepresentation.

A claim for breach of implied warranty must also show that "the product lacks even the most basic degree of fitness for ordinary use." Birdsong v. Apple, Inc., 590 F.3d 955, 958 (9th Cir. 2009) (citation and quotation marks omitted). Plaintiffs cannot plausibly allege that the short-term unavailability of GTA Online rendered GTA V fundamentally defective.

C. Negligence

Rockstar moves to dismiss Count 6 of the FAC, arguing that Plaintiffs cannot state a claim for negligence because they fail to allege any non-economic injury. Doc. 48 at 26 (citing Swearingen v. Santa Cruz Nat., Inc., 2016 WL 4382544, at *10 (N.D. Cal. Aug. 17, 2016) (the economic loss doctrine "requires a purchaser to recover in contract for purely economic loss due to disappointed expectations, unless he can demonstrate harm above and beyond a broken contractual promise.")).

Plaintiffs do not respond to this argument. Accordingly, the Court will dismiss Plaintiffs' negligence claim. Alaei v. Holder, 2016 WL 3024103, at *4 (C.D. Cal. May 26, 2016) ("Where plaintiffs fail to provide a defense for a claim in opposition to a motion to dismiss, the claim is deemed waived.") (citations omitted; alterations incorporated).

D. Leave to Amend

"Leave to amend at least once is freely granted unless amendment would be futile." McMahon, 640 F. App'x at 671. Plaintiffs have already had one opportunity to amend their complaint. At the hearing held on this motion, the parties agreed that Plaintiffs should be given another chance to amend their complaint. Accordingly, the Court will grant Plaintiffs one final amendment.

III. CONCLUSION

For the reasons stated above, the Court **GRANTS** Defendants' Motion, with leave to amend. Plaintiffs may file a Third Amendment Complaint no later than May 8, 2017.

IT IS SO ORDERED.

Dated: 4/19/17

Virginia A. Phillips
Chief United States District Judge