UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Bruce McMahon et al.,

Plaintiffs,

v.

Take-Two Interactive Software, Inc.,

Defendant.

EDCV 13-02032-VAP (SPx)

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS (DOC. 70)

On May 8, 2017, Plaintiffs Bruce McMahon and Christopher Bengston ("Plaintiffs") filed their Second Amended Complaint ("SAC") alleging five claims for (1) violation of California's Unfair Competition Law ("UCL") (Cal. Bus. & Prof. Code §§ 17200, *et seq.*); (2) violation of California's False Advertising Laws ("FAL") (Cal. Bus. & Prof. Code §§ 17500, *et seq.*); (3) breach of express warranty; (4) breach of the warranty of merchantability; and (5) violation of the Song-Beverly Act. (Doc. 69.) On May 22, 2017, Defendant Take-Two Interactive Software, Inc., DBA Rockstar ("Rockstar") filed a Motion to Dismiss the SAC. (Doc. 70.) Plaintiffs filed their Opposition on June 5, 2017. (Doc. 75.) Rockstar filed its Reply on June 12, 2017. The Court has considered the papers filed in support of and in opposition to the motion, as well as the arguments advanced at the hearing on June 26, 2017.[1] The Court **GRANTS** Rockstar's motion and dismisses this action with prejudice.

[1] Defendant's request for judicial notice (Doc. 71) is denied. Exhibits A and B are duplicative of Exhibits A and B of the SAC. The Court has no occa-

I. BACKGROUND

A. Factual 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. (SAC ¶ 12.) In addition to 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 below this statement, the packaging stated that the online features "may not be available to all users, and may, upon 30 days' notice, be terminated, modified, or offered under different terms." (Id.) Plaintiffs purchased GTA V on the day it was released for $59.99. (Id. ¶ 13.) They had no interest in the offline content and believed that they would be able to access GTA Online immediately. (Id. ¶¶ 19, 40.) Plaintiffs began playing GTA Online as soon as they were able to, around October 10, 2013. (Id. ¶ 45.)

B. Procedural Background

On October 4, 2013—three days after the launch of GTA Online—Plaintiffs filed a class action complaint in the California Superior Court, County of Riverside, asserting claims for UCL and FAL violations. (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.)

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sion 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 request 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").

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 claim and had set forth a theory of restitution, a cognizable remedy. McMahon v. Take-Two Interactive Software, Inc., 2014 WL 324009, at *5 (C.D. Cal. Jan 29, 2014). The Court also found, however, that Plaintiffs had not stated a claim under the UCL or FAL because they "failed to identify a false or fraudulent statement on the packaging of GTA V." 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.

The 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 plaintiff's 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 First Amended Complaint ("FAC") on October 24, 2016, adding new factual allegations and asserting new claims in addition to their UCL and FAL claims for (1) breach of express warranty; (2) breach of warranty of merchantability; (3) breach of implied warranty in violation of the Song-Beverly Act; and (4) negligence. (Doc. 44.) On December 7, 2016, Rockstar moved to dismiss the FAC. (Doc. 48.) The Court held that Plaintiffs failed to state claims for all six of their causes of action because Plaintiffs failed to plausibly plead actual reliance on Defendant's allegedly deceptive or misleading packaging for GTA V. (Doc. 68 at 6–7.) Further, the Court found that, even if Plaintiffs were able to establish reliance, they could not establish that such reliance was reasonable. (Id. at 7–8.) At the hearing on Rockstar's motion, the parties agreed that Plaintiffs should be given another chance to amend their complaint, and thus the Court "grant[ed] Plaintiffs one final amendment." (Id. at 9.)

II. 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 upon which a pleading shows entitlement to relief. Fed. R. Civ. P. 8(a)(2); Conley v. Gibson, 355 U.S. 41, 47 (1957) (holding that the Federal Rules require a plaintiff to provide "'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests" (quoting Fed. R. Civ. P. 8(a)(2))); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). 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 non-moving party. 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). "The court need not accept as true, however, allegations that contradict facts that may be judicially noticed by the court." Schwarz v. United States, 234 F.3d 428, 435 (9th Cir. 2000).

"While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Twombly, 550 U.S. at 555 (citations omitted). Rather, the allegations in the complaint "must be enough to raise a right to relief above the speculative level." Id.

To survive a motion to dismiss, a plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." Twombly, 550 U.S. at 570; Ashcroft v. Iqbal, 556 U.S. 662, 697 (2009). "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 consistent with' a defendant's liability, it stops short of the line between possibility and plausibility of 'entitlement to relief.'" Iqbal, 556 U.S. at 678 (quoting Twombly, 550 U.S. at 556).

The Ninth Circuit has clarified that (1) a complaint must "contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively" and (2) "the factual allegations that are taken as true must plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation." Starr v. Baca, 652 F. 3d 1202, 1216 (9th Cir. 2011).

Although the scope of review is limited to the contents of the complaint, a court may also consider exhibits submitted with the complaint, Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1555 n.19 (9th Cir. 1990), and "take judicial notice of matters of public record outside the pleadings," Mir v. Little Co. of Mary Hosp., 844 F.2d 646, 649 (9th Cir. 1988).

III. DISCUSSION

Defendant moves to dismiss Plaintiffs' claims for (1) violation of the UCL; (2) violation of the FAL; (3) breach of express warranty; (4) breach of warranty of

merchantability; and (5) violation of the Song-Beverly Act without leave to amend. (Mot. at 1–2.) The Court addresses Plaintiffs' five claims below.

A. Reliance

As the Court stated in its April 19, 2017 Order Granting Defendant's Motion to Dismiss with Leave to Amend (Doc. 68), in order 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). This 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.").

1. Plaintiffs Did Not Plausibly Plead Reliance

Plaintiffs have amended their complaint to allege that they were planning to purchase either the Sony PlayStation 4 or Microsoft XBOX One consoles, which were scheduled to be released on November 15, 2013 and November 22, 2013 respectively. (SAC ¶¶ 14–16.) Plaintiffs also allege they had limited financial means and could not purchase both a new console and GTA V.[2] (Id. ¶ 17.)

[2] Plaintiffs have abandoned the theory that they previously offered to this Court and the Ninth Circuit that Plaintiffs paid a "premium price" for GTA V because they purchased it on September 17, 2013 instead of October 1, 2013, when GTA Online was available. Plaintiff's FAC made it clear that there were no price reductions for the game until at least November 2013. (FAC ¶ 57.)

Plaintiffs now allege that, had they known that GTA Online would not be available on September 17, 2013, they would not have purchased GTA V at any point, including after the October 1, 2013 launch date of GTA Online. Plaintiffs allege that they would have instead foregone the purchase of GTA V in order to purchase either a PlayStation 4 or XBOX One on their respective release dates. The Court struggles to reconcile these allegations with Plaintiffs' other allegations in the SAC. Specifically, Plaintiffs state that they were planning to buy either a PlayStation 4 or XBOX One on the video game console's release date. (SAC ¶16.) In addition, Plaintiffs admit that they did purchase GTA V on September 17, 2013, the day of its release. (Id. ¶ 13.)

To satisfy the reliance element of their claims for violations of the UCL and FAL, Plaintiffs seem to rest on their allegation that if they had a theoretical decision to make on October 1, 2013, they would have chosen to forego purchasing GTA V, even after the launch of GTA Online, in order to be able to purchase a new console on the console's release date in November 2013. Plaintiffs actually made the decision to purchase GTA V on September 17, 2013, which they allege was at the expense of their ability to purchase a new console. In other words, Plaintiff's actual conduct on September 17, 2013 suggests that when faced with a decision between saving money to purchase a PlayStation 4 or XBOX One or instead purchasing GTA V—which Plaintiffs allege that they believed contained GTA Online—Plaintiffs actually chose GTA V. Thus, Plaintiff's admissions regarding their actions directly contradict their allegations that they would have chosen to forego purchasing GTA V after the launch of GTA Online in order to save money for a new video game console.

Further, the Court cannot logically reconcile Plaintiffs' three allegations that (1) Plaintiffs were planning on buying a new video game console on the console's November 2013 release date, (2) Plaintiffs only had enough funds to purchase GTA V in September 2013 or a new video game console in November 2013, and (3) Plaintiffs did in fact purchase GTA V on September 17, 2013.

If all three allegations are true, it is not possible that Plaintiffs were still planning to buy a new video game console after they purchased GTA V on September 17, 2013 because they allege that their purchase of GTA V precluded the purchase of a new console. The only logical interpretation that reconciles all of these allegations is that Plaintiffs were planning on buying either a PlayStation 4 or XBOX One console, but then abandoned this plan on September 17, 2013 in order to buy GTA V with the knowledge that their limited incomes would no longer allow them to purchase a new video game console on its release date. As explained above, the hypothetical choice on October 1, 2013 that Plaintiffs present is functionally identical to the choice that they actually made on September 17, 2013: Whether to buy GTA V after the launch of GTA Online[3] or to forego that purchase in order to be able to purchase either a PlayStation 4 or XBOX One in November 2013. Plaintiffs chose to purchase GTA V on September 17, 2013 and have failed to allege any reason why their theoretical decision on October 1, 2013 would be any different than their actual decision on September 17, 2013.

[3] Plaintiffs allege that they believed that the GTA Online feature would be functional as of the September 17, 2013 release date. (SAC ¶ 19.) In fact, Plaintiffs allege that they had no interest in any feature of GTA V other than GTA Online. (Id. ¶ 40.)

Plaintiffs' desire to play GTA Online allegedly motivated them to purchase GTA V on its release date. (SAC ¶ 13.) To the extent that Plaintiffs believed GTA V was worthless without GTA Online, it is plausible that they would have waited until October 1, 2013 to purchase the game.[4] It is not plausible that Plaintiffs would have declined to purchase GTA V in order to purchase a new video game console in light of the fact that they chose to purchase GTA V under the exact same conditions two weeks earlier. Thus, Plaintiffs have failed to plead a plausible theory of reliance.

2. Even if Plaintiffs Relied on GTA V's Allegedly Misleading Packaging, Their Reliance Was Not Reasonable

As the Court explained in its April 19, 2017 Order Granting Defendant's Motion to Dismiss (Doc. 48 at 7–8), 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).

Plaintiffs contend that that it is "highly unreasonable" for the Court to make this finding in light of the "clear law highlighted by the Court of Appeal in their [sic] opinion." (Opp. at 5.) The Ninth Circuits order, however, made no finding that Plaintiffs plausibly plead reliance or that this reliance was reasonable. See McMahon, 640 F. App'x 669 at 671 ("The district court did not address whether the complaint adequately alleged reliance on the alleged misrepresentations. We decline to reach this issue for the first time on appeal."). The Ninth Circuit's order

[4] This is further evidenced by the fact that Plaintiffs did in fact begin to play GTA Online as soon as it was available. (SAC ¶ 37.)

merely held that Plaintiffs plausibly plead that the packaging was misleading because "GTA Online was not available immediately to any purchasers." Id. 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." (SAC, Exs. A, B.) The implication in the Ninth Circuit's order is that the packaging is misleading because it cautioned that certain features "may not be available to all users," but in fact "GTA Online was not available immediately to any purchasers." (SAC, Exs. A, B), McMahon, 640 F. App'x 669 at 671.

Plaintiffs have alleged that GTA V had absolutely no value to them outside of the GTA Online feature. (Compl. ¶ 40.) In light of the warning on GTA V's packaging that GTA Online "may not be available to all users, and may, upon 30 days' notice, be terminated, modified, or offered under different term," Plaintiffs have failed to allege any facts as to why they relied on GTA Online being available specifically to them as of September 17, 2013. 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 a minimum, such a consumer would have inquired of Rockstar to determine *why* the product might not be available to a particular user. As 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 consumer would not adopt the plaintiff's understanding of the alleged misrepresentation).

B. Warranty Claims

Rockstar moves to dismiss Counts 3, 4, and 5 of the SAC, which assert claims for breach of express warranty, breach of warranty of merchantability and fitness, and breach of the Song-Beverly Consumer Warranty Act. (Mot. at 13–15.) Plaintiffs' express warranty claim relies on their allegation that GTA V's packaging promised and affirmed that GTA Online would be immediately available upon purchase, but was not. (SAC ¶¶ 94–95.) Plaintiffs' warranty of merchantability claim is premised on their allegation that GTA V did not conform to its promises concerning its abilities and performance because GTA Online was not immediately available. (Id. ¶¶ 99–102.) Plaintiffs' claim for violation of the Song-Beverly Act is premised on their allegations that Defendants violated the warranty of merchantability. (Id. ¶ 110.)

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 the warranty which proximately caused plaintiff's injury.") (citing Williams v. Beechnut Nutrition Corp., 185 Cal.App.3d 135, 142(1986)). As explained above, Plaintiffs cannot establish reasonable reliance on Rockstar's alleged misrepresentation.

Plaintiffs' claim for the breach of the warranty of merchantability and their claim for violation of the Song Beverly Act—which Plaintiffs allege is premised on Defendant's violation of the warranty of merchantability— are both claims for the breach of an implied warranty. 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.

IV. CONCLUSION

For the reasons stated above, the Court GRANTS Defendants' Motion and DISMISSES this action with prejudice.

IT IS SO ORDERED.

Dated: 7/6/17

Virginia A. Phillips
Chief United States District Judge