UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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ROSLYN WILLIAMS, CHAIM LERMAN
CHRISTINA GONZALEZ, AND JAMES VORRASI,
Individually, and on behalf of others similarly situated,

Plaintiffs,

15 CV 07381 (SJ)

- against -

ORDER ON MOTION
TO DISMISS

APPLE INC.,

Defendant.

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JOHNSON, Senior District Judge:

Apple Inc. ("Apple") moves to dismiss the complaint of Roslyn Williams, Chaim Lerman, Christina Gonzalez, and James Vorrasi (collectively, "Plaintiffs"). Williams, Lerman, and Gonzalez (the "New York Plaintiffs") sued Apple under New York's Consumer Protection laws; Vorrasi sued Apple under New Jersey's Consumer Fraud Act. Based on the submissions of the parties and for the reasons stated below, the motion to dismiss is DENIED.

I. Background

Plaintiffs claim they were deceived into downloading iOS 9, an Apple operating system, which either completely crippled or greatly diminished the value of their iPhone 4s devices. Plaintiffs claim that they were made to believe that iOS

9 was either necessary to the continued security and operation of their devices or that it would improve their devices' operation. They claim Apple knew from its own internal testing that iOS 9 would destroy or greatly diminish the value of iPhone 4s devices. Yet, Apple not only failed to inform them of this eventuality, but also actively marketed iOS 9 to iPhone 4s owners, sending update alerts to their devices.

When Plaintiffs followed the alerts, they were led to a download screen that stated the following:

> With this update your iPhone, iPad and iPod Touch [will] become more intelligent and proactive with powerful search and improved Siri features … And, built in apps become more powerful with detailed transit information in Maps, a redesigned Notes app, and an all-new News app. And improvements at the foundation of the operating system enhance performance, improve security and give you up to an hour of extra battery life.

(Docket Number ("Dkt. No.") Dkt. No. 30-2, Ex. 5). Plaintiffs claim that no reasonable consumer would have thought that this message meant that iOS 9 would destroy their device.

Following the download screen, Plaintiffs encountered the iOS 9 User Agreement.[1] The agreement claims that iOS 9 is being offered on an "AS IS" and "AS AVAILABLE" basis with "ALL FAULTS AND WITHOUT WARRANTY OF ANY KIND." (Dkt. No. 30-1, at 7) (emphasis in original). "INSTALLATION OF THIS iOS SOFTWARE MAY AFFECT THE AVAILABILITY AND USABILITY

[1] It remains unclear how long this agreement would have been on the iPhone 4s's 3.5-inch screen; on a standard letter-size paper, the agreement is 11 pages long.

OF THIRD PARTY SOFTWARE, APPLICATIONS OR THIRD PARTY SERVICES, AS WELL AS APPLE PRODUCTS AND SERVICES." (Id.) The agreement further states that the user bears the "SOLE RISK" of the satisfactory quality, performance, accuracy and effort of iOS 9. (Id. at 6-7). Again, Plaintiffs claim that no reasonable consumer would have thought that this agreement meant that iOS 9 would destroy their device.

Gonzalez claims that after she downloaded iOS 9, her phone immediately "crashed and froze completely." (Dkt. No. 18, ¶ 11, 22). She could not access any functions whatsoever, not even the basic call and text features. (Id.) As a result, she had to purchase a new iPhone. Williams claims that although her device did not quite 'give up the ghost' like Gonzalez's, so many of the device's core functions, like phone, text, and email, failed so frequently that the device was de facto unusable. (Id. at ¶ 22). As a result, she also purchased a new iPhone. Lerman and Vorrasi claim to have experienced the same problems as Williams but simply refused to spend hundreds of dollars on a new device. (Id.)

Defendants move to dismiss Plaintiffs' claims arguing, among other things, that the iOS 9 User Agreement bars any suit regarding the satisfactory operation of iOS 9 or its compatibility with any device. Plaintiffs assert that nothing in the agreement disclaims or makes a user aware of the potential that iOS 9 will destroy their device, nor should a mere disclaimer entitle Apple to intentionally damage their devices under the guise of an update that will "enhance performance."

II. Discussion

A. Standards of review

To survive a motion to dismiss, a complaint must contain sufficient facts that, if accepted as true, would "state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). A claim is facially plausible where "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at 678. The complaint must contain "more than labels" and conclusory assertions. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007).

B. N.Y. G.B.L. §§ 349 & 350

New York prohibits "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state." N.Y. G.B.L. § 349. New York also prohibits "[f]alse advertising in the conduct of any business, trade, or commerce or in the furnishing of any service in this state." N.Y. G.B.L. § 350. To prove a violation of Section 349 or 350, a plaintiff must show that the defendant engaged in consumer-oriented conduct that was materially misleading and that the plaintiff suffered an injury as a result of that deceptive act or practice. See Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, 85 N.Y.2d

20, 25 (1995); Koch v. Aker, Merrall & Condit Co., 18 N.Y.3d 940, 941 (2012); see also Orlander v. Staples, Inc., 802 F.3d 289, 300 (2d Cir. 2015).[2]

A practice is materially misleading where it is "likely to mislead a reasonable consumer acting reasonably under the circumstances." Stutman v. Chem. Bank, 95 N.Y.2d 24, 29 (2000). A plaintiff need not prove that the "defendant acted intentionally or with scienter." Watts v. Jackson Hewitt Tax Service Inc., 579 F. Supp. 2d 334, 347 (E.D.N.Y. 2008). But there can be no claim of deceptive practices "when the alleged practice was fully disclosed." Id.

In assessing the adequacy of pleadings under Sections 349 and 350, courts may take into account the parties' relative bargaining positions and access to information. See Gaidon v. Guardian Life Ins. Co. of Am., 94 N.Y.2d 330, 343-44 (1999); Sims v. First Consumers Nat'l Bank, 303 A.D.2d 288, 290 (N.Y. App. Div. 2003). For example, when a defendant exclusively possesses information that a reasonable consumer would want to know and could not discover without difficulty, failure to disclose can constitute a deceptive or misleading practice. See Oswego, 85 N.Y.2d at 27; Watts, 579 F. Supp. 2d at 347.

An injury under Sections 349 and 350 must be "actual, although not necessarily pecuniary, harm." Oswego, 85 N.Y.2d at 26; see also Small v. Lorillard Tobacco Co., 94 N.Y.2d 43, 56 (1999); Orlander, 802 F.3d at 302. And although

[2] Apple does not dispute that the practices at issue were consumer oriented. As such, this Court assumes Plaintiffs have properly pleaded that element.

"reliance is not an element of a § 349 claim," Stutman, 95 N.Y.2d at 29, a plaintiff must prove that the material misrepresentation or omission caused the injury. See Oswego, 85 N.Y.2d at 26; Stutman, 95 N.Y.2d at 30.

1. Material misrepresentation

The New York Plaintiffs alleged that the download screen makes material misrepresentations by stating that iOS 9 will "enhance performance" and make their devices "more intelligent" when iOS 9 actually destroys (or at least greatly diminishes the value of) iPhone 4s devices. This allegation is sufficient to satisfy the material misrepresentation element.

Alternatively, the New York Plaintiffs also satisfied this element by alleging that iOS 9 was harmful due to factors within Apple's control and that Apple knew about its harmfulness from pre-release testing yet failed to disclose that harm. See Goshen v. Mutual Life Ins. Co. of N.Y., 98 N.Y.2d 314, 326-27 (2002).

Apple argues that neither of these constitutes a material misrepresentation. First, Apple claims, despite its download screen representations, its disclaimers bar the instant claims. But Apple knows well that disclaimers cannot, at the motion to dismiss stage, bar a Section 349 suit because disclaimers do not establish a defense as a matter of law. See Koch, 802 F.3d at 941; Goshen, 98 N.Y.2d at 326; Gaidon, 94 N.Y.2d at 345; Koch v. Greenberg, 626 Fed. App'x 335, 340 (2d Cir. 2015) (summary order).

Second, Apple claims the iOS 9 User Agreement fully discloses the allegedly deceptive conduct, foreclosing any claim of misrepresentation. This argument is a variant of the first. Apple is arguing that no reasonable consumer would have been misled by its conduct in light of the disclosures made in the agreement. But by this Court's reading, a reasonable consumer could find that the agreement does not disclose that the iOS 9 software would (or could) render their iPhone 4s inoperable.

Furthermore, the agreement appears directly after the download screen. A reasonable consumer under these circumstances would read the agreement in light of the download screen's representations, concluding that iOS 9 was safe – after all, Apple told consumers to download it for the express purpose of improving their devices.

Finally, Apple argues that the representations in the download screen were not misleading. The download screen says "improvements at the foundation of the operating system *enhance performance, improve security and give you up to an hour of extra battery life*." (Dkt. No. 30-2, at Ex. 5) (emphasis added). Plaintiffs allege that the phrase "enhance performance" is misleading since the update actually destroyed their devices. Apple claims that Plaintiffs' isolation of "enhance performance" inappropriately takes that phrase out of context. But the Court is hard-pressed to find any context which makes "enhance performance" compatible with "destroys iPhone 4s devices."

Conveniently then, Apple alternatively claims iOS 9 *did* enhance performance: by improving security and extending battery life. In essence, Apple claims that "enhance performance" has no meaning by itself. This is a shocking argument to make on the heels of a claim that "enhance performance" was taken out of context – and therefore had at least some meaning, even if different than the meaning ascribed to it by Plaintiffs. But the contradiction is of no moment. The plain language of the download screen precludes such an interpretation. The download screen uses the conjunction *and* with a comma. It is reasonable to think that "enhances performance, improves security and [extends battery life]," means that the download will do all three.

Even if "enhance performance" only meant improving security and extending battery life, that argument still does not defeat the New York Plaintiffs' claims since inducing a consumer to download iOS 9 while knowing that it will destroy their device implicates Sections 349 and 350.

2. Injury

The New York Plaintiffs have sufficiently pleaded injury in that they claim iOS 9 irreversibly[3] destroyed, or greatly diminished the value of, their device. Apple's opposition to this prong is without merit.

[3] It is important to note that the iOS 9 download was irreversible. Once applied to a device, Plaintiffs could not revert to their prior operating system.

3. Causation

Finally, the New York Plaintiffs have sufficiently pleaded causation. Apple misled them into believing iOS 9 would enhance the performance of their devices through representations it made in its download screen. As a result, they downloaded the software, which destroyed, or greatly diminished the value of, their devices. Apple concedes Plaintiffs encountered the download screen prior to downloading iOS 9 and that it makes the above representations. As such, Apple's causation arguments are without merit. Therefore, the New York Plaintiffs' Sections 349 and 350 claims are plausible.

C. New Jersey Consumer Fraud Act ("CFA") claims

To establish a Consumer Fraud Act claim in New Jersey, a plaintiff must plead: (1) unlawful conduct; (2) ascertainable loss; and (3) a causal relationship between the unlawful conduct and the ascertainable loss. See Bosland v. Warnock Dodge, Inc., 197 N.J. 543, 557 (2009). Unlawful conduct is any "unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or knowing concealment, suppression, or omission of any material fact with intent that others rely… whether or not any person has in fact been misled, deceived or damaged thereby." N.J.S.A. 56:8-2. The prime ingredient is the capacity to mislead. See Fenwick v. KayAm. Jeep, Inc., 72 N.J. 372, 378 (1977).

For affirmative acts of unlawful conduct, intent is not an element. See Cox v. Sears Roebuck & Co., 138 N.J. 2, 17-18 (1994). But for omissions, plaintiffs must allege that the defendant acted with knowledge; and intent is an element. Id.

Ascertainable loss is defined as a definite, certain and measurable loss, rather than one that is merely theoretical. See Thiedemann v. Mercedes-Benz USA, LLC., 183 N.J. 234, 248 (2004). However, the loss need not yet have been experienced as an out-of-pocket loss to the plaintiff. Id. at 248-49; see also, Cox, 138 N.J. at 22–23 (noting that to demonstrate "loss" a victim need not have actually spent money to perform repairs to correct defendant's errors).

CFA claims must be pleaded with sufficient particularity and according to Rule 9. See Maniscalco v. Brother Intern. Corp., 627 F.Supp.2d 494, 500 (D.N.J. 2009); see also FED. R. CIV. P. 9(b). at 500, 503. Therefore, Plaintiffs must "(1) detail the statements (or omissions) that the plaintiff contends are fraudulent, (2) identify the speaker, (3) state where and when the statements (or omissions) were made, and (4) explain why the statements (or omissions) are fraudulent." L.S. v. Webloyalty.com, Inc., 673 F. App'x 100, 104 (2d Cir. 2016) (quoting Fin. Guar. Ins. Co. v. Putnam Advisory Co., LLC, 783 F.3d 395, 403 (2d Cir. 2015). However, no special specificity is necessary for pleading ascertainable loss, knowledge or intent; each may be pleaded generally. See Maniscalco, 627 F.Supp.2d at 500.

Vorrasi's CFA claim is virtually a mirror image of the New York Plaintiffs' claims. He details the download screen misrepresentations and even provides a

picture of the image he encountered. He identifies Apple as the entity that made the misrepresentations. He alleges that he received the misrepresentations just before he downloaded iOS 9, within the first or second week after its release on September 16, 2015. He alleges the reason the statements were fraudulent – the update does not enhance performance; it greatly diminished the value of iPhone 4s devices. He alleges that his iPhone 4s device was damaged and its value diminished. He also alleges that Apple conducted pre-release testing and therefore knew that iOS 9 would diminish the value of iPhone 4s devices. As such, according to Vorrasi, Apple knowingly omitted material information in violation of CFA. Without remarking on the substantive sufficiency of his arguments, his pleading certainly satisfies the Rule 9(b) particularity-pleading standard. See L.S. v. Webloyalty.com, Inc., 673 F. App'x at 104.

In terms of substance, Vorrasi's claims are sufficient for the same reasons as the New York Plaintiffs' claims. Vorrasi has pleaded an affirmative misrepresentation (false download screen statements); a knowing omission (Apple tested the product, knew it would harm iPhone 4s devices and released it anyway); intent (Apple purposely induced him to download iOS 9 using update alerts); ascertainable loss (the value of his phone is diminished and he lost the benefit of his bargain); and causation (he downloaded iOS 9 after being misled by the download screen and the damaged device was a direct result of the deception). Having satisfied

Rule 9(b) and having sufficiently pleaded a prima facie case for a violation of CFA, there seems to be no reason why Vorrasi should not reach discovery.

Naturally, Apple disagrees. But Apple's retorts are more smoke than fire. Apple simply regurgitates the same arguments that failed against the New York Plaintiffs: the iOS 9 User Agreement bars the claim and the download screen makes no misrepresentations. But now, Apple adds two new arguments: Vorrasi's omission claim does not properly plead knowledge, and does not plead quantifiable loss. As explained above, each of these arguments are without merit.

Conclusion

For the foregoing reasons, this Court DENIES Apple's motion to dismiss, as Plaintiffs' claims are properly pleaded.

SO ORDERED.

/s/ USDJ STERLING JOHNSON, JR.

Dated: October 26, 2017
Brooklyn, NY

Sterling Johnson, Jr., U.S.D.J.