UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

IN RE APPLE PROCESSOR LITIGATION

Case No. 18-cv-00147-EJD

ORDER GRANTING MOTION TO DISMISS WITH LEAVE TO AMEND

Re: Dkt. No. 96

Putative class action Plaintiffs ("Plaintiffs") are purchasers or lessors of certain Apple products ("iDevices"), each containing a processor that Plaintiffs allege suffers from a design defect that allows unauthorized third parties to access sensitive user data. Plaintiffs bring this lawsuit against Defendant Apple Inc. ("Apple"), alleging that they paid more for their iDevices than they were worth because Apple knowingly omitted the defect; the value of Plaintiffs' products has diminished; and Apple's attempts to mitigate the defects with patches through software updates materially slowed down the performance of their iDevices.

Apple has filed a renewed motion to dismiss ("Mot.") Plaintiffs' second consolidated amended complaint ("SCAC") with prejudice under Federal Rule of Civil Procedure 12(b)(6) for inadequate pleading of their misrepresentation, omission, restitution, and injunctive relief claims.

I. BACKGROUND[1]

a. The Parties

Plaintiffs are Jennifer Abrams (CA), Anthony Bartling (NH), Robert Giraldi (NY), and

[1] The background is a summary of the allegations in the SCAC and does not rely on any exhibits that Apple has "referenced for background." Mot. 3 n.2.

Jacqueline Olson (NY) ("Plaintiffs") who, on behalf of themselves and all others similarly situated, allege that certain Apple products such as iPhones, iPads, and the Apple TV (collectively "iDevices") all contain a central processing unit that is defective. SCAC ¶ 1.

Plaintiffs bring their class action pursuant to Federal Rule of Civil Procedure 23 and seek to represent a class that consists of:

> All persons in the United States who purchased or leased from Apple and/or its authorized retailer sellers one or more iPhones, iPads, Apple TVs, or other products containing processors designed or modified by Apple, at any time since January 1, 2010.

Id. ¶ 115. Plaintiffs also seek to represent three subclasses: the "California Subclass," the "New Hampshire Subclass," and the "New York Subclass." *Id.* ¶ 117. These classes are comprised of members who purchased such iDevices within their respected states. *Id.*

Defendant Apple, Inc. is a business incorporated in Delaware with a principal place of business in Cupertino, California. Apple designs, manufactures, distributes, and sells products including the iDevices and other computing devices that contain processors. *Id.* ¶ 18.

b. The Alleged Defect

Each of Plaintiffs' iDevices contains a central processing unit, also referred to as a processor ("CPU" or "Processor") that carries out the instructions of programs running on the iDevices. SCAC ¶ 24. These Processors are based on architecture licensed from engineering firm ARM Holdings but are uniquely modified and designed by Apple. *Id.* ¶¶ 43-45. As relevant here, Apple customizes its Processors using two optimization techniques to improve performance: "speculative execution," which allows processors to anticipate and execute certain tasks preemptively; and "out-of-order execution," which allows a program's instructions to be executed in parallel or out of order, as opposed to strictly sequentially. *Id.* ¶ 30-31. These optimization techniques require specific modifications at the physical hardware level of each Processor. *Id.* ¶ 52. Apple's Processors are used exclusively in Apple products, and the Processor within each iDevice works with Apple's operating system ("iOS") to execute the device's programs and instructions. *Id.* ¶¶ 24-25, ¶ 48.

In 2017, independent security researchers discovered that certain processors contain two vulnerabilities—referred to by Plaintiffs as "Meltdown" and "Spectre," and collectively as the "Defects"—that allow unauthorized third parties to access sensitive user data. *Id.* ¶ 2. Specifically, Apple's implementation of speculative and out-of-order execution allegedly allows bad actors to access sensitive data that would normally need to process through security checks or require isolation within the OS. *Id.* ¶¶ 36-42, 49-51. The security issues raised by Meltdown and Spectre are not limited to only Apple Processors but may affect different manufacturers' processors differently, depending on how they had modified the original ARM processor architecture. *Id.* ¶¶ 49-51.

Plaintiffs allege that Apple was notified of the Defects in June 2017 but did not publicly disclose them until January 4, 2018, after a New York Times article leaked the vulnerabilities. *Id.* ¶¶ 83-84. In that public announcement—which was made ahead of a coordinated disclosure date previously agreed upon by Apple, Intel, Google, Microsoft, Amazon, AMD, and ARM—Apple addressed speculative execution and Meltdown, disclosing that its December 2, 2017 iOS 11.2 update included a software update to address the vulnerability. *Id.* ¶ 54. On January 8, 2018, Apple separately released iOS 11.2.2, a software update to address Spectre. *Id.* Plaintiffs assert that these vulnerabilities are material because, "had they known data stored on their systems would be compromised and made available to unauthorized third parties," they would not have purchased their iDevices or paid the price they did. *Id.* ¶ 68. After Apple made the announcements, the iDevices allegedly declined in value. *Id.* ¶¶ 71–79.

c. Apple's Representations of Its Processors

Plaintiffs allege that Apple made various representations to the public through "extensive and long-term advertising and promotion efforts" regarding the benefits, capabilities, and quality of Apple Processors and iDevices. SCAC ¶ 86. The SCAC identified various statements from Apple advertising iPhones 4, 5, 5s, 6, 6 Plus, 6s, 6s Plus, 7, 7 Plus, 8, 8 Plus, X, as well as various generations of iPads. *Id.* ¶¶ 87-112. These statements included the following assertions regarding the performance of Apple Processors:

- A4 Processor: "provides exceptional processor and graphic performance along with long battery life" (*Id.* ¶ 87);
- A6 Processor: "maximize performance and power efficiency . . . up to twice the CPU and graphics performance" (*Id.* ¶ 89);
- A6X Processor: "delivers up to twice the CPU performance and up to twice the graphics performance of the A5X chip" (*Id.* ¶ 102);
- A7 Processor: "brings 64-bit desktop-class architecture to a smartphone . . . up to twice the CPU and graphics performance" (*Id.* ¶ 90);
- A8 Processor: "faster performance and is more energy efficient, delivering higher sustained performance with great battery life" (*Id.* ¶ 91);
- A8X Processor: "delivers a 40 percent improvement in CPU performance and 2.5 times the graphics performance of iPad Air" (*Id.* ¶ 104);
- A9 Processor: "70 percent faster CPU and 90 percent faster GPU performance than the A8, all with gains in energy efficiency for great battery life" (*Id.* ¶ 92);
- A10 Fusion Processor: "run[s] up to two times faster than iPhone 6. . . [and is] capable of running at just one-fifth the power of the high-performance cores. Graphics performance is also more powerful, running up to three times faster than iPhone 6 at as little as half the power" (*Id.* ¶ 93);
- A10X Fusion Processor: "up to 30 percent faster CPU performance and 40 percent graphics performance than the industry-leading A9X chip" (*Id.* ¶¶ 108-09); and
- A11 Bionic Processor: "features a six-core CPU design with two performance cores that are 25 percent faster and four efficiency cores that are 70 percent faster than the A10 Fusion . . . delivering up to 70 percent greater performance for multi-threaded workloads . . . up to 30 percent faster graphics performance than the previous generation" (*Id.* ¶ 95).

Additionally, Plaintiffs identified two video commercials on YouTube that depict the iPhone as being more secure and private than other phones, which included the following

statements in the videos' YouTube descriptions:

- "Access to the latest updates keeps your iPhone secure. Life's easier when you switch to iPhone." (*Id.* ¶ 111); and
- "We build iPhone with your privacy in mind. Life's easier when you switch to iPhone." (*Id.* ¶ 112).

d. Procedural History

On June 8, 2018, Plaintiffs filed a consolidated amended complaint against Apple alleging sixteen causes of action. ECF No. 46. On August 7, 2018, Apple filed a motion to dismiss, which the Court granted on standing grounds with leave to amend. ECF Nos. 49, 66. On February 21, 2019, Plaintiffs filed the Second Consolidated Amended Complaint, asserting seven causes of action. ECF No. 72. Apple again moved to dismiss Plaintiffs' SCAC for lack of standing or any cause of action, which the Court granted again on standing grounds without leave to amend and entered judgment in favor of Apple. ECF Nos. 75, 88-89.

On appeal, a Ninth Circuit panel held that Plaintiffs had sufficiently pled standing but expressly declined to address Apple's Rule 12(b)(6) arguments, leaving that task to this Court in the first instance. ECF No. 93. On remand, the parties stipulated to renewed and updated briefing on Apple's 12(b)(6) defenses, ECF No. 95, which is presently before the Court.

II. LEGAL STANDARDS

Federal Rule of Civil Procedure 8(a) requires a plaintiff to plead each claim with sufficient specificity to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal quotations omitted). Although particular detail is not generally necessary, the factual allegations "must be enough to raise a right to relief above the speculative level" such that the claim "is plausible on its face." *Id.* at 555, 570. A complaint which falls short of the Rule 8(a) standard may be dismissed if it fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). Dismissal of a claim under Rule 12(b)(6) may be based on a "lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901

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