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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
--X
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.
--X

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

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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.

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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."

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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

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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.

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