SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 1, Honorable Sunil R. Kulkarni Presiding

Maggie Castellon, Courtroom Clerk
191 North First Street, San Jose, CA95113
Telephone: 408.882.2110

To contest the ruling, call (408) 808-6856 before 4:00 P.M. or email department1@scscourt.org. Please state your case name, case number, the name of the attorney and contact number. It would also be helpful if you could identify the specific portion or portions of the tentative ruling that will be contested. Please also make sure you have notified the other side in a timely fashion that you are contesting the tentative ruling. (See R. Ct. 3.1308(a)(1); Local Rule 8.E.)

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LAW AND MOTION TENTATIVE RULINGS
DATE: NOVEMBER 16, 2023 TIME: 1:30 P.M.
PREVAILING PARTY SHALL PREPARE THE ORDER
UNLESS OTHERWISE STATED (SEE RULE OF COURT 3.1312)

LINE #	CASE #	CASE TITLE	RULING
LINE 1	22CV408209	West v. Apple, Inc. (Class Action)	See tentative ruling. The Court will prepare the final order.
LINE 2	19CV349023	Jaramillo v. Marriott International, Inc., et al. (PAGA)	See tentative ruling. The Court will prepare the final order.
LINE 3	22CV403117	LVNV Funding LLC v. Deluna (Class Action)	OFF CALENDAR for now, as set forth in a separate order.
LINE 4	23CV413107	Realtek Semiconductor Corporation v. Advanced Micro Devices, Inc., et al.	See tentative ruling. The Court will prepare the final order.

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LAW AND MOTION TENTATIVE RULINGS

LINE 5	23CV417807	Cadence Design Systems, Inc. v. TCL Industrial Holdings, Co., Ltd., et al.	Good cause appearing, the Court GRANTS the pro hac vice application and will sign the proposed order.
LINE 6	22CV399353	Ocanas v. Catholic Charities of Santa Clara County (Class Action)	The Court's file does not reflect a motion for final approval. The parties should appear (remotely is fine) to explain the situation.
LINE 7			
LINE 8			
LINE 9			
LINE 10			
LINE 11			
LINE 12			
LINE 13			

Calendar Line 1

Case Name: *West v. Apple, Inc.*
Case No.: 22CV408209

This is a putative class action against Defendant Apple, Inc. ("Apple") based on its alleged concealment of a material defect in the cooling system (the "Defect") of 2020 MacBook Air laptops (the "Class Laptops"). Before the Court is Apple's demurrer to Plaintiff Alyssa West's operative First Amended Complaint ("FAC"), which is opposed by Plaintiff. As discussed below, the Court SUSTAINS the demurrer IN PART and OVERRULES it IN PART.

I. BACKGROUND

A. Factual

On June 30, 2020, Ms. West purchased a 13-inch 2020 1.2 Gigahertz ("GHz") Quad-Core Intel i7 MacBook Air and paid additional amounts to upgrade from the base model to a speedier configuration of 3.8 GHz with "Turbo Boost." (FAC, ¶ 22.) Prior to this purchase, Ms. West read and relied on representations made by Apple in its marketing and sales materials concerning the speed and functionality of the Class Laptops, particularly that her laptop would ordinarily operate at a 1.2 GHz baseline, with the ability to "Turbo Boost" CPU speed to 3.8 GHz. (*Id*., ¶ 24(i).) This statement, however, was false and misleading because Ms. West's laptop, due to the Defect, is unable to consistently perform at the represented speeds without overheating, slowing, freezing, and/or shutting down. (*Ibid*.)

The Defect causes processors in the Class Laptops to quickly reach internal temperatures of around 100 degrees Celsius and reduces their ability to dissipate heat. (FAC, ¶ 2.) When processor temperatures meet or exceed the foregoing measure, the Class Laptops are programmed to drastically reduce the speed of their processors- a process known as thermal throttling- to expedite cooling and avoid damage to internal components. (*Ibid*.) Due to the Defect, Class Laptops regularly resort to thermal throttling and remain in a throttled state for prolonged periods, causing applications to "freeze" in place or quit, resulting in the loss of unsaved data and at times the laptop automatically powering down. (*Ibid*.) Class Laptops began to throttle less than an hour after light use and can take between 30 minutes to one hour to cool down and return to normal operation. (*Id*., ¶ 3.)

Given the foregoing, the Class Laptops do not function as consumers expected and were promised. CPU throttling is intended to be a relatively rare "failsafe" mechanism to prevent hardware damage and potential electrical hazards that may arise when the laptops are being used in unusually hot climates or under extreme workloads. (FAC, ¶ 7.) But due to the Defect, Class Laptops throttle regularly under typical use in a normal home or office setting. (*Ibid*.)

Plaintiff alleges that Apple has long been aware of the Defect but has refused to remedy it or repair the Class Laptops without charge, including under its standard one-year written express warranty (the "Limited Warranty") and under its extended warranty program ("AppleCare+"). (FAC, ¶¶ 8-9.) She further alleges that had she and Class members known about the Defect at the time of purchase, they would not have bought the Class Laptops, or

would have paid substantially less for them. (*Id*., ¶ 11.) By engaging in the foregoing conduct, Ms. West pleads, Apple has violated the Consumer Legal Remedies Act (the "CLRA"), the Song-Beverly Consumer Warranty Act (the "Song-Beverly Act"), California Unfair Competition Law (the "UCL"), and other statutes and common law obligations.

B. Procedural

Based on the foregoing, Plaintiff initiated this action with the filing of the original complaint on December 12, 2022. Plaintiff filed the operative FAC on July 24, 2023, asserting the following causes of action: (1) violation of the CLRA (Civ. Code § 1750, et seq.); (2) violation of UCL (Bus. & Prof. Code § 17200, et seq.); (3) violations of False Advertising Law ("FAL") (Bus. & Prof. Code § 17500, et seq.); (4) breach of express warranty under the Song-Beverly Act; (5) breach of express warranty; (6) breach of implied warranty under the Song-Beverly Act; (7) breach of implied warranty; (8) fraud by concealment; and (9) unjust enrichment.

II. DEMURRER

Apple demurs to the FAC and each of the nine causes of action asserted therein on the ground of failure to state facts sufficient to constitute a cause of action. (Code Civ. Proc., § 430.10, subd. (e).)

A. Legal Standard

The function of a demurrer is to test the legal sufficiency of a pleading. (*Trs. Of Capital Wholesale Elec. Etc. Fund v. Shearson Lehman Bros.* (1990) 221 Cal.App.3d 617, 621.) Consequently, "[a] demurrer reaches only to the contents of the pleading and such matters as may be considered under the doctrine of judicial notice." (*South Shore Land Co. v. Petersen* (1964) 226 Cal.App.2d 725, 732, internal citations and quotations omitted; see also Code Civ. Proc., § 430.30, subd. (a).) "It is not the ordinary function of a demurrer to test the truth of the plaintiff's allegations or the accuracy with which he describes the defendant's conduct. … Thus, … the facts alleged in the pleading are deemed to be true, however improbable they may be." (*Align Technology, Inc. v. Tran* (2009) 179 Cal.App.4th 949, 958, internal citations and quotations omitted.)

In ruling on a demurrer, the allegations of the complaint must be liberally construed, with a view to substantial justice between the parties. (*Glennen v. Allergan, Inc.* (2016) 247 Cal.App.4th 1, 6.) Nevertheless, while "[a] demurrer admits all facts properly pleaded, [it does] not [admit] contentions, deductions or conclusions of law or fact." (*George v. Automobile Club of Southern California* (2011) 201 Cal.App.4th 1112, 1120.)

B. Discussion

1. *First Cause of Action: Violation of the CLRA*

In the first cause of action, Ms. West alleges that Apple violated various provisions of the CLRA, specifically Civil Code sections 1770, subdivision (a)(4), (5), (7) and (9), by representing that the Class Laptops were capable of operating at particular processor speeds (as

shown on its website and the laptop packaging) and were usable to perform basic computing functions when the Defect prevents them from actually doing so. (FAC, ¶¶ 140-141.)

The CLRA targets a class of "unfair methods of competition and unfair or deceptive acts or practices" enumerated in Civil Code section 1770. (Civ. Code, § 1770, subd. (a).) "Any consumer who suffers any damage as a result of the use or employment by any person of" this unlawful conduct may bring an action for damages, restitution of property, and injunctive relief. (Civ. Code, § 1780, subd. (a).) The consumer may also bring a class action on behalf of "other consumers similarly situated." (Civ. Code, § 1781, subd. (a).) The CLRA is interpreted liberally "to promote its underlying purposes, which are to protect consumers against unfair and deceptive business practices and to provide efficient and economical procedures to secure such protection." (Civ. Code, § 1760.) The provisions of the CLRA alleged to have been violated by Apple (see FAC, ¶ 140-141) proscribe both fraudulent omissions and fraudulent affirmative misrepresentations.

Apple maintains that Plaintiff has failed to state a claim under the CLRA because she has not pleaded an actionable misrepresentation, she fails to sufficiently plead that the statements it purportedly made are false and misleading, and she fails to meet the heightened pleading standard for causes of action sounding in fraud. With respect to the alleged misrepresentations at issue, Apple argues that they are merely generalized statements that are legally considered non-actionable "puffery" and statements that the laptops were capable of delivering "up to" a specified speed performance are not actionable misrepresentations because it never *guaranteed* such performance and merely said the machines were *capable* of delivering it. The Court does not find all of the foregoing arguments persuasive.

As a general matter, it is true that "puffery" statements cannot support a claim under the CLRA, and a claim qualifies as a non-actionable puffery if it is "a [g]eneralized, vague, and unspecified assertion[] … upon which a reasonable consumer could not rely." (*Long v. Graco Children's Products* (N.D. Cal. 2013) 2013 U.S. Dist. LEXIS 121227, *4.) Thus, advertising which "merely states in general terms that one product is superior is not actionable. However, misdescriptions of specific or *absolute* characteristics of a product are actionable." (*Cook Perkiss and Liehe, Inc. v. N. Cal. Collection Serv., Inc.* (9th Cir. 1990) 911 F.2d 242, 246.) Accordingly, a "misrepresentation of fact, as opposed to mere puffery, is one which makes a specific and measurable claim, capable of being proved false or of being reasonably interpreted as a statement of objective fact." (*Rasmussen v. Apple, Inc.* (N.D Cal. 2014) 27 F.Supp.3d 1027, 1040, internal citation and quotations omitted.)

Here, Plaintiff has identified *specific, measurable* statements about the MacBook Air she purchased that were purportedly false, particularly that her laptop "would ordinarily operate at *1.2 GHz baseline*, with the ability to 'Turbo Boost' CPU speed to *3.8 GHz*." (FAC, ¶ 24, emphasis added.) This statement was false because "her laptop is unable to consistently perform at represented speeds without overheating, slowing, freezing, and/or shutting down." (*Ibid*.) Additionally, "testing shows that thermal throttling reduces the baseline clock speed of the Class Laptops by well over 60 percent and the Turbo Boost speed by almost 90 percent." (*Ibid*.) Apple states that it did not make any statement concerning the "ordinary" operation speed of the Class Laptops, including in the processor configuration menu, which Plaintiff cites in her FAC, and merely "represented options to customize the processor." While it is true that Apple did not make such a specific statement, the Court agrees with Plaintiff that whether

reasonable consumers[1] would naturally understand that a "1.1 GHz" or "1.2 GHz" laptop as listed in the processor configuration menu would *actually* operate and perform at those speeds is a question of fact. As Plaintiff queries, if the answer is no, then what meaning would these terms carry?

With regard to the "up to" statements (e.g., that the laptops offered "up to 2x faster CPU performance and up to 80 percent faster graphics performance"), Apple insists that they are not actionable misrepresentations because courts have regularly held that that such statements are not likely to deceive a reasonable consumer as a matter of law. But as Plaintiff responds, this has not held true in *all* situations in which such statements have been alleged to be deceptive. In the putative consumer class action *Herron v. Best Buy Co. Inc.* (E.D. Cal. 2013) 924 F.Supp.2d 1161, 1173, for example, the plaintiff alleged the defendants affirmatively misrepresented the battery life on his laptop as "up to 3.32 hours" even though this battery life could not be achieved in normal circumstances. The court rejected the defendants' assertion that the foregoing was not an actionable misrepresentation because it was unlikely to reasonably deceive consumers finding, as many other courts had, that "up to" representations *may* materially mislead reasonable consumers. (*Herron*, 924 F.Supp.2d at 1173, citing *Bruno v. Quten Research Inst., LLC* (C.D. Cal. 2011) 280 F.R.D. 524, 537; *Walter v. Hughes Commc'ns, Inc.* (N.D. Cal. 2010) 682 F.Supp.2d 1031, 1043, etc.) Cases that had found to the contrary, the court explained, often involved situations in which the "up to" statement was accompanied by disclosures that made clear what the particular product was *actually* capable of. (*Herron*, at 1173, citing *Maloney v. Verizon Internet Services, supra*, 413 Fed.Appx. 997.) Here, there is no indication based on what is pleaded in the FAC that Ms. West was put on notice that the laptop she purchased would not operate at "up to" the speeds represented such that her allegation that such statements were materially misleading is unreasonable.

The Court also disagrees with Apple's assertion that Plaintiff has not sufficiently alleged that the foregoing statements are false and misleading because she has in fact pleaded that the Class Laptops *cannot operate* at the performance markers represented "without throttling," overheating, slowing, freezing, and shutting down. (FAC, ¶¶ 24, 55.)

Given the foregoing, the Court concludes that Plaintiff *has* pleaded actionably false and misleading representations of fact by Apple in connection with the sale of the Class Laptops which related to the speed and performance of the laptops.

The Court also rejects Apple's contention that this claim as alleged fails to meet the heightened standard for causes of action sounding in fraud. (See *Lazar v. Superior Court* (12 Cal.4th 631, 645 [explaining that the specificity requirement for pleading fraud-based claims in California "necessitates pleading *facts* which show how, when, where, to whom, and by what means the representations were tendered"].) While the Court acknowledges that this standard applies to Plaintiff's fraud-based claims to the extent they are predicated on affirmative misrepresentations, it also notes that this standard is *significantly* relaxed in the case of fraud by concealment or omission because, as one court has explained, "[h]ow does one show 'how'

[1] The CLRA, similar to the UCL, uses the "reasonable consumer" standard for claims of deceptive practices. (*Maloney v. Verizon Internet. Servs., Inc.* (9th Cir. 2011) 413 Fed.Appx. 997, 999.) Under this standard, a plaintiff must establish that "members of the public are likely to be deceived." (*Williams v. Gerber Prods. Co.* (9th Cir. 2008) 552 F.3d 934, 938.)

and 'by what means' something didn't happen, or 'when' it never happened, or 'where' it never happened?" (*Alfaro v. Community Housing Imp. System & Planning Ass'n., Inc*. (2009) 171 Cal.App.4th 1356, 1384.) Here, Plaintiff has also pleaded that Apple fraudulently omitted facts material to the performance of the laptops. Additionally, one of the purposes of the specificity requirement is to provide "notice to the defendant, to furnish the defendant with certain definite charges which can be intelligently met." (*Committee on Children's Television, Inc. v. General Foods Corp*. (1983) 35 Cal.3d 197, 216, internal quotations omitted.) Therefore, when "it appears from the nature of the allegations that the defendant must necessarily possess full information concerning the facts of the controversy, even under strict rules of common law pleading, one of the canons was that less particularity is required when the facts lie more in the knowledge of the opposite party …." (*Id*., at p. 217.)

Here, Plaintiff has met the foregoing standard by identifying *who* failed to disclose a material defect in the Class Laptops or made materially misleading misrepresentations (Apple) (FAC, ¶¶ 144-148, 249), *what* (the Laptops and the Defect and the injuries caused by Apple's failure to disclose the latter) (FAC, ¶¶ 2-3, 24, 25, 45, 58, 66, 105, 121), *when* (Apple should have known about the Defect prior to the release of the Laptops and immediately after based on extensive consumer complaints) (FAC, ¶¶ 28, 67-79, 93-101), *where* (the Laptop was purchased online while Plaintiff was in California and she relied on statements made on Apple's website and marketing materials) (FAC, ¶¶ 14, 15, 22, 122), *how* (Apple's conduct was false and misleading because it failed to disclose material facts about the Defect and actively concealed its existence from Plaintiff and Class members) (FAC, ¶ 123) and *why* (Apple concealed information about the Defect in order to induce Plaintiff and Class members to purchase and/or lease Class Laptops) (FAC, ¶¶ 24, 31, 124). Plaintiff has additionally alleged that Apple had exclusive and early knowledge of the Defect based on its extensive qualify controls and pre-release testing process that she and other who were similarly situated could not have obtained, which is sufficient to meet the standard for fraud based on concealment or omission/nondisclosure. (FAC, ¶¶ 64-67, 78-80, 86.)

As none of the arguments proffered by Apple in support of its demurrer to the first cause of action for violation of the CLRA on the ground of failure to state facts sufficient to constitute a cause of action are persuasive, the demurrer is OVERRULED.

2. *Second Cause of Action: Violation of UCL*

Plaintiff's second cause of action is predicated on allegations that Apple committed unlawful, unfair and fraudulent business practices in violation of the UCL by (1) systematically breaching its warranty obligations and violating the CLRA, the FAL and the Song-Beverly Act, (2) failing to provide a permanent remedy to fix the Defect and (3) concealing the existence and nature of the Defect while representing publicly that the Class Laptops were of premium quality, reliability and performance. (FAC, ¶¶ 153-155.)

The UCL prohibits "unfair competition," which is broadly defined to include any unlawful, unfair, or fraudulent act or practice. (Bus. & Prof. Code, § 17200.) "Because the UCL is written in the disjunctive, it establishes three varieties of unfair competition- acts or practices which are unlawful, or unfair, or fraudulent. An act can be alleged to violate any or all of the three prongs of the UCL- unlawful, unfair, or fraudulent." (*Berryman v. Merit Prop. Mgm't, Inc.* (2007) 152 Cal.App.4th 1544, 1554.) The UCL "borrows" violations of other laws

and treats them as unlawful practices independently actionable under the act. (*Gafcon, Inc. v. Ponsor & Assocs.* (2002) 98 Cal.App.4th 1388, 1425, fn. 15.)

Apple submits the same arguments in support of its demurrer to Ms. West's UCL claim as her preceding claim for violation of the CLRA. For the reasons discussed above, these arguments are without merit. Moreover, because the Court has concluded that Plaintiff has stated a claim under the CLRA, and CLRA violations may serve as the predicate for "unlawful" business practices under the UCL (*Gutierrez v. Carmax Auto Superstores California* (2018) 19 Cal.App.5th 1234, 1265, the Court also finds that Plaintiff has stated a claim for violation of the UCL. Accordingly, Apple's demurrer to the second cause of action on the ground of failure to state facts sufficient to constitute a cause of action is OVERRULED.

3. *Third Cause of Action: Violation of FAL*

In the third cause of action, Plaintiff alleges that Apple violated the FAL by making false, deceptive and/or misleading statements in connection with the advertising and marketing of the Class Laptops. (FAC, ¶ 162.)

Apple again asserts the same arguments in support of its demurrer to this claim as the preceding two causes of action. As the Court has determined that these arguments lack merit, Apple's demurrer to the third cause of action on the ground of failure to state facts sufficient to constitute a cause of action is OVERRULED.

4. *Fourth Cause of Action: Breach of Express Warranty (Violation of Song-Beverly Act) and Fifth Cause of Action: Breach of Express Warranty*

In her fourth cause of action, Ms. West pleads that Apple breached its express warranty obligations under the Song-Beverly Act by supplying the Class Laptops to her and Class members with the Defect, by failing to repair the Class Laptops under warranty, and by failing to provide to her or the Class members, as a warranty replacement, a product that conforms to the qualities and characteristics that it promised when it sold the Class Laptops to her the Class members. (FAC, ¶ 181.) The fifth cause of action is predicated on similar allegations as the preceding claim, but the attendant warranty obligations are not grounded in the Song-Beverly Act (Civil Code section 1790, et seq.) but the Commercial Code. (*Id.*, ¶¶ 196, 201-203.)

In demurring to these claims, Apple maintains that both fail because (1) no such claims can be pleaded based on purported performance representations, (2) the one-year Limited Warranty and AppleCare+ extended warranty do not cover the alleged issue with the Class Laptops and (3) even if the warranties did apply, Plaintiff fails to adequately plead that Apple breached them.

With respect to its first argument, Apple more specifically argues that the statements it made concerning the performance of the MacBook Air that are challenged by Plaintiff as false and misleading are not specific enough to establish the requisite "explicit guarantee." The Court disagrees. Apple made specific statements concerning performance that consisted of *measurable* characteristics (e.g., speed) that constitute such an "explicit guarantee." (See, e.g., *McKinney v. Corsair Gaming, Inc.* (N.D. Cal. 2022) 646 F.Supp.3d 1133, 1146 [statements on

packaging and product identifying a specific "MHz" speed of memory held sufficient to plead "explicit guarantee" necessary to state breach of express warranty claim].)

With its next argument, Apple asserts that the warranties attendant to the laptops do not cover the Defect because they are expressly limited[2] to "defects in materials and workmanship" and as alleged in the FAC, the Defect is a "design" defect. In the FAC, Plaintiff pleads that the "Defect is the result of flaws in Defendants' thermal *design*." (FAC, ¶ 53 [emphasis added].) Apple explains that following its briefing on this issue in its demurrer to the original complaint, Plaintiff added conclusory allegations that the Class Laptops also had manufacturing defects. Specifically, Plaintiff alleges that the Defect is also a result of "substandard materials and/or [flaws in its] manufacturing processes." (FAC, ¶¶ 53; 57.) But these new allegations, Apple maintains, do *not* save these claims because courts have routinely held that the use of substandard materials or flawed manufacturing processes are defects in design, *not* defects in materials or workmanship. Moreover, it continues, Plaintiff is claiming that *all* Class Laptops suffer from the same problem, which is the "textbook definition of a design defect." (Dem. at 15:19-20.)

Apple's contentions are well-taken. It is clear, when the allegations of the FAC are read in toto, that the gravamen of the complaint is that the Defect is the result of a defect in *design* and *not* manufacturing, and Plaintiff's attempt to recast the design defect allegations as based in "design *and/or* manufacture" with the single, vague allegation stated above (FAC, ¶ 53) is unavailing. Courts have recognized that "even if a complaint refers to defects in 'materials,' [a plaintiff's] chosen language is not dispositive in determining whether the alleged defect is a defect in design or a defect in 'materials and workmanship.'" (*Davidson v. Apple, Inc.* (N.D. Cal. 2017) 2017 U.S Dist. LEXIS 36524, *34, citing *Troup v. Toyota Motor Corp.* (9th Cir. 2014) 545 Fed.Appx. 668, 668-669.) Because the Defect does not come within the express warranties at issue, no claims for breach of these warranties has been stated and the Court need not address Apple's remaining argument in support of its demurrer to these causes of action. Accordingly, Apple's demurrer to the fourth and fifth causes of action on the ground of failure to state facts sufficient to constitute a cause of action is SUSTAINED WITHOUT LEAVE TO AMEND.

5. *Sixth Cause of Action: Breach of Implied Warranty (Violation of Song-Beverly Act) and Seventh Cause of Action: Breach of Implied Warranty*

In the sixth cause of action, Ms. West alleges that Apple breached its implied warranty obligations under the Song-Beverly Act by selling/leasing Class Laptops that were defective and refusing to permanently replace and/or repair the Class Laptops. (FAC, ¶ 221.) In the seventh cause of action, Plaintiff alleges that Apple breached its implied warranty obligations under the Commercial Code by selling Class Laptops that are not of a merchantable quality. (*Id*., ¶ 231.)

Apple asserts that its demurrer to these claims should be sustained because (1) Apple disclaimed any statutory and implied warranties and (2) they are insufficiently pled. Neither of these arguments are well taken.

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[2] The one-year Limited Warranty and AppleCare+ extended warranty are incorporated by reference into the FAC. (FAC, ¶¶ 109, 114.)

First, a disclaimer of implied warranties, which is permissible under the Commercial Code (Comm. Code, § 2314), must be conspicuous *and* disclosed "*before* the bargain is complete" in order to be enforceable. (*Burr v. Sherwin Williams Co.* (1954) 42 Cal.2d 683, 693; Comm. Code, § 2316(2).) Here, Plaintiff pleads that she was unaware of Apple's disclaimer of implied warranties because she did not receive or view the disclaimer *prior* to her purchase. (FAC, ¶¶ 29, 111; see *W. Emulsions, Inc. v. BASF Corp.* (C.D. Cal. 2007) 2007 U.S. Dist. LEXIS 48376 [holding disclaimers were void because they "were not provided at the time of purchase: and thus "were not bargained for in the agreement between the parties"].) While Apple does not dispute this, its assertion that Ms. West cannot maintain this claim because she had a reasonable period *after* receiving and reading the warranty documents to return the laptop is an argument rejected by various courts. (See, e.g., *Clark v. LG Elec. U.S.A., Inc.* (S.D Cal. 2013) 2013 U.S Dist. LEXIS 155179, *41-42, citing *Dorman v. Int'l Harvester Co.* (1975) 46 Cal.App.3d 11, 19-20.) This Court is inclined to follow the approach of these cases in rejecting this argument, particularly given the significance of the conspicuousness requirement in the Commercial Code for the disclaiming of implied warranties.

Apple next asserts that the implied warranty claims are insufficiently pleaded because Plaintiff admits that she can and did use her laptop daily and has not pleaded that it did not work at all or even most of the time. The implied warranty of merchantability, Apple explains, does not "impose a general requirement that goods precisely fulfill the expectation of the buyer. Instead, it provides for a minimum level of quality." (Apple Dem. Memo. at 20:3-5, citing *American Suzuki Motor Corp. v. Superior Court* (1995) 37 Cal.App.4th 1291, 1295-1296.)

The warranty of merchantability implied by the Commercial Code is that goods "[a]re fit for ordinary purposes for which such goods are used." (Comm. Code, § 2314(2), subd. (c).) The implied warranty provides for, as Apple asserts, a "minimum level of quality" (*American Suzuki, supra,* at 1296) and a breach of this warranty occurs if the product lacks even the most basic degree of fitness for ordinary use" (*Mocek v. Alfa Leisure, Inc.* (2003) 114 Cal.App.4th 402, 406). But the fact that Ms. West pleads that she was able to use her laptop sometimes is not necessarily fatal to her claim for breach of the implied warranty of merchantability. While a defect must be "fundamental" to implicate the implied warranty, "this does not mean the alleged defect must preclude *any* use of the product at all." (*Stearns v. Select Comfort Retail Corp.* (N.D. Cal. 2009) 2009 U.S. Dist. LEXIS 48367, *8.) Importantly, "[t]here are a number of examples of courts which have held that a defect can render a product unfit notwithstanding the fact the product at issue could, in a technical sense, perform its base function. These courts have found that the implied warranty can be breached when, although *capable* of performing its ordinary function, the product nonetheless fails in a *significant* way to perform as a reasonable consumer would expect." (*In re Carrier IQ, Inc., Consumer Privacy Litig.* (N.D. Cal. 2015) 78 F.Supp.3d 1051, 1109 [emphasis added], citing *Stearns, supra; Long v. Graco Children's Products, Inc.* (N.D. Cal. 2013) 2013 U.S. Dist. LEXIS 121227; and *Isip v. Mercedes-Benz USA* (2007) 155 Cal.App.4th 19.) The Court believes that Plaintiff has alleged that that her laptop significantly failed to perform as a reasonable consumer would expect by pleading, among other things, that she frequently experienced (i.e., multiple times a day) thermal throttling that caused a marked slowdown in speed and/or complete unresponsiveness, the forced quitting of various programs, the loss of unsaved work and the inability to use the laptop for 30 minutes to 1 hour while it cooled. (FAC, ¶¶ 23, 25, 27.)

Because neither of Apple's arguments are persuasive, its demurrer to the sixth and seventh causes of action on the ground of failure to state facts sufficient to constitute a cause of action is OVERRULED.

6. *Eighth Cause of Action: Fraud By Concealment*

Plaintiff's eighth cause of action is predicated on allegations that Apple fraudulently concealed and suppressed material facts concerning the quality of the Class Laptops and the cooling system therein, i.e., the Defect, which was latent in nature such that Class members would not have been able to inspect or otherwise detect it prior to purchase. (FAC, ¶ 236.)

Apple makes the same arguments in support of its demurrer to this claim as it did to the CLRA, UCL and FAL causes of action; these arguments lacks merit for the reasons discussed above. Apple additionally argues that its demurrer to the eighth cause of action should be sustained because it had no duty to disclose the thermal design of its products unless failing to do rendered the statements it made materially misleading, and the claim is barred by the economic loss rule.

With respect to the first argument, the essential elements of a fraud cause of action based on concealment, nondisclosure or omission are: "(1) the defendant concealed or suppressed a material fact; (2) the defendant was under a duty to disclose the fact to the plaintiff; (3) the defendant intentionally concealed or suppressed the fact with the intent to defraud the plaintiff; (4) the plaintiff was unaware of the fact and would not have acted as he or she did if the plaintiff had known of the concealed or suppressed fact; and (5) as a result of the concealment or suppression of the fact, the plaintiff sustained damage." (*Burch v. CertainTeed Corp*. (2019) 34 Cal.App.5th 341, 348, citing *Bigler-Engler v. Breg, Inc*. (2017) 7 Cal.App.5th 276, 310-311.) "With respect to concealment, there are four circumstances in which nondisclosure or concealment may constitute actionable fraud: (1) when the defendant is in a fiduciary relationship with the plaintiff; (2) when the defendant had exclusive knowledge of material facts not known to the plaintiff; (3) when the defendant actively conceals a material fact from the plaintiff; and (4) when the defendant makes partial representations but also suppresses some material facts. The latter three circumstances presuppose the existence of some other relationship between the plaintiff and defendant in which a duty to disclose can arise. This relationship has been described as a transaction, such as that between seller and buyer, employer and prospective employee, doctor and patient, or parties entering into any kind of contractual arrangement." (*Id*. at pp. 349-350, internal quotations and citations omitted.)

Here, the Court agrees with Plaintiff that she *has* adequately alleged that Apple had a duty to disclose that the Class Laptops were not actually capable of performing in the manner represented due to the Defect because it had exclusive knowledge of this fact based on *both* its extensive pre-production and pre-release testing processes for the laptops and feedback from consumers immediately after their release that was amongst the data it regularly collected. (FAC, ¶¶ 68-79, 89-94.)

The Court also is not persuaded that this claim is barred by the economic loss rule. This rule generally "requires a purchaser to recover in contract [rather than tort] for purely economic loss due to disappointed expectations, *unless* [s]he can demonstrate harm above and

beyond a broken contractual promise." (*Robinson Helicopter Co., Inc. v. Dana Corp.* (2004) 34 Cal.4th 979, 988, emphasis added.) For example, the tort of fraudulent misrepresentation, while typically related to the formation of a contract, is exempted from the economic loss rule because it is *separate* from a breach of the subject contract. (*Id*.) Courts are split on the application of the economic loss rule to fraudulent concealment claims, and the issue is currently pending before the California Supreme Court. (See *Raggatan v. Uber Techs, Inc.* (9th Cir. 2021) 19 F.4th 1188, 1191, 1193 [certifying the question of whether "claims for fraudulent concealment [are] exempted from the economic loss].) However, in the recently decided case of *Dhital v. Nissan N. Am., Inc.* (2022) 84 Cal.App.5th 828, the Court of Appeal held that the answer to this question is "yes." (*Dhital*, at 843.) While this question remains pending, the Court will defer to the most recent published Court of Appeal authority on the issue and therefore will not sustain Apple's demurrer to the eighth cause of action on the ground that it is barred by the economic loss rule.

In accordance with the foregoing, Apple's demurrer to the eighth cause of action on the ground of failure to state facts sufficient to constitute a cause of action is OVERRULED.

7. *Ninth Cause of Action: Unjust Enrichment*

In her remaining cause of action, Plaintiff alleges that Apple has been unjustly enriched by her and Class members purchasing the Class Laptops and replacement parts. (FAC, ¶ 248.) Apple asserts that this claim fails because Plaintiff has an adequate remedy at law for her (and the Class members') alleged injuries, unjust enrichment is not a cause of action, and the claim is duplicative of the other causes of action.

While it is a correct statement of law that unjust enrichment is not a cause of action, it is synonymous with restitution, and California courts are instructed overlook labels and determine if the plaintiff has pleaded a basis for restitution. (See, *McBride v. Boughton* (2004) 123 Cal.App.4th 379, 387-388.) "Restitution may be awarded where the defendant obtained a benefit form the plaintiff by *fraud*, duress, conversion, or similar conduct." (*Id*. at 388, emphasis added.) Here, Ms. West has alleged that Apple engaged in fraudulent conduct by making affirmative misrepresentations concerning the performance capabilities of the Class Laptops and concealing and/or failing to disclose the Defect. Consequently, she has stated an entitlement to restitution and therefore Apple's demurrer to the ninth cause of action on the ground of failure to state facts sufficient to constitute a cause of action is OVERRULED.

III. CONCLUSION

Apple's demurrer to the FAC and the claims asserted therein is SUSTAINED IN PART and OVERRULED IN PART. The motion is SUSTAINED WITHOUT LEAVE TO AMEND as to the fourth and fifth causes of action and OVERRULED as to the remaining claims.

The Court will prepare the order.

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LAW AND MOTION HEARING PROCEDURES

Parties may appear in person or remotely. Remote appearances must be made through Microsoft Teams, unless otherwise arranged with the Court. Please go to https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml to find the appropriate link.

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Calendar Line 2

Case Name: *Alysha Jaramillo v. Marriott International, Inc., et al.*
Case No.: 19CV349023

Plaintiff Alysha Jaramillo brings a claim under the Private Attorneys General Act ("PAGA") against Defendants Marriott International, Inc. and SJMEC, Inc. Plaintiff alleges that Defendants violated Labor Code section 1198 and relevant portions of the California Code of Regulations by failing to provide her and aggrieved employees with suitable seating on the job.

Before the Court is Plaintiff's motion for approval of PAGA settlement, which is unopposed. As discussed below, the Court GRANTS the motion.

IV. BACKGROUND

According to the operative Third Amended Complaint ("TAC"), Marriott and SJMEC own and operate a chain of hotels under various brands nationwide and throughout California, including approximately 52 Marriott hotel locations in California. (TAC, ¶ 26.) Defendants maintain their corporate headquarters in Bethesda, Maryland, with a centralized Human Resources department responsible for recruiting and hiring employees, as well as communicating and implementing Defendants' company-wide policies to employees throughout California. (*Id*., ¶¶ 27-28.)

Ms. Jaramillo worked for Defendants at their hotel in San Jose as an hourly, non-exempt Front Desk Agent, from approximately October 2016 t0 March 11, 2019. (TAC, ¶ 7.) She typically worked 4 to 8 hours per day, 6 days per week, with job duties that included greeting hotel guests as they entered and exited the concierge lounge and providing customer service to the hotel's patrons. (*Ibid*.)

Ms. Jaramillo alleges that the front desk, registration desk, concierge desk, and concierge areas of Defendants' California hotels are generally similar in their layout and design, and have space for the presence and use of a seat or stool by employees assigned to perform duties in these areas. (TAC, ¶ 29.) Ms. Jaramillo and other aggrieved employees spend a substantial portion of their days in these areas, and according to Ms. Jaramillo, their assignments can reasonably be accomplished from a seated position. (*Id*., ¶ 30.) Defendants could have provided Ms. Jaramillo and other aggrieved employees with a seat or stool with reasonable or no modification to these work areas, but instead denied them seating and forced them to stand throughout the day. (*Id*., ¶ 29.)

Based on these allegations, Ms. Jaramillo asserts two causes of action under PAGA: (1) failure to provide suitable seating in Violation of Labor Code section 1198 and California Code of Regulations, title 8, section 11050(14)(A); and (2) failure to provide suitable seating in Violation of Labor Code section 1198 and California Code of Regulations, title 8, section 11050(14)(B). SJMEC was not named in the original complaint but was added in the First Amended Complaint, to which it subsequently demurred. The demurrer was sustained with leave to amend on August 12, 2020. Plaintiff filed amended pleadings and SJMEC demurred to the Second and Third Amended Complaints, the latter of which was sustained without leave to amend on November 1, 2021.

Judgment was entered in favor of SJMEC on November 23, 2021, and Plaintiff timely appealed from that judgment. While Defendants' motion for summary judgment was pending, the parties negotiated a settlement.

V. LEGAL STANDARD FOR APPROVING PAGA SETTLEMENT

Under PAGA, an aggrieved employee may bring a civil action personally and on behalf of other current or former employees to recover civil penalties for Labor Code violations. (*Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal.4th 348, 380, overruled on other grounds by *Viking River Cruises, Inc. v. Moriana* (2022) ___U.S.___, 2022 U.S. LEXIS 2940.) 75 percent of any penalties recovered go to the Labor and Workforce Development Agency (LWDA), leaving the remaining 25 percent for the employees. (*Ibid.*) PAGA is intended "to augment the limited enforcement capability of [LWDA] by empowering employees to enforce the Labor Code as representatives of the Agency." (*Id.* at p. 383.) A judgment in a PAGA action binds all those, including nonparty aggrieved employees, who would be bound by a judgment in an action brought by the government. (*Id.* at p. 381.)

Labor Code section 2699, subdivision (l)(2) provides that "[t]he superior court shall review and approve any settlement of any civil action filed pursuant to" PAGA. The court's review "ensur[es] that any negotiated resolution is fair to those affected." (*Williams v. Superior Court* (2017) 3 Cal.5th 531, 549.) "[C]lass certification is not required" in this context as in a class action. (*Haralson v. U.S. Aviation Servs. Corp*. (N.D. Cal. 2019) 383 F. Supp. 3d 959, 971 (*Haralson*).)

Similar to its review of class action settlements, the Court must "determine independently whether a PAGA settlement is fair and reasonable," to protect "the interests of the public and the LWDA in the enforcement of state labor laws." (*Moniz v. Adecco USA, Inc.* (2021) 72 Cal.App.5th 56, 76–77 (*Moniz*).) It must make this assessment "in view of PAGA's purposes to remediate present labor law violations, deter future ones, and to maximize enforcement of state labor laws." (*Id.* at p. 77; see also *Haralson, supra,* 383 F. Supp. 3d at p. 971 ["when a PAGA claim is settled, the relief provided for under the PAGA [should] be genuine and meaningful, consistent with the underlying purpose of the statute to benefit the public …."], quoting LWDA guidance discussed in *O'Connor v. Uber Technologies, Inc.* (N.D. Cal. 2016) 201 F.Supp.3d 1110 (*O'Connor*).)

The settlement must be reasonable in light of the potential verdict value. (See *O'Connor, supra,* 201 F.Supp.3d at p. 1135 [rejecting settlement of less than one percent of the potential verdict].) But a permissible settlement may be substantially discounted, given that courts often exercise their discretion to award PAGA penalties below the statutory maximum even where a claim succeeds at trial. (See *Viceral v. Mistras Group, Inc.* (N.D. Cal., Oct. 11, 2016, No. 15-CV-02198-EMC) 2016 WL 5907869, at *8–9.)

VI. PLAINTIFF'S INVESTIGATION, SETTLEMENT PROCESS, AND THE PARTIES' AGREEMENT

Plaintiff's counsel engaged in a thorough investigation of the factual and legal issues implicated by her seating claim which allowed them to objectively assess the reasonableness of

the settlement. Plaintiff's efforts included propounding discovery, both formally and informally, on Defendants which resulted in the production of employee demographic data and policy documents. Additionally, Plaintiff's counsel retained a private investigator to observe employees at work and take photos of the San Jose Marriott Hotel's interior and front desk workspace. The parties also undertook several depositions. As stated above, after the parties engaged in various motion practice, they reached the settlement now before the Court while Defendants' motion for summary judgment was pending.

Pursuant to that settlement, Defendants will pay a gross amount of $95,000, $31,667 in attorneys' fees, $24,411.80 in litigation expenses, and $5,000 in administration costs. The named Plaintiff will receive $10,000 in consideration for general release of all claims she may have against Defendants arising out of her employment. The net settlement amount of $23,921.20 will be distributed 75 percent ($17,940.90) to the LWDA and 25 percent ($5,980.30) to "aggrieved employees" on a pro-rata basis using the number of pay periods worked by those employees during the PAGA period.

"Aggrieved employees" are defined as: "All non-exempt, hourly-paid persons who were employed by Defendants in any of the Covered Positions at the San Jose Marriott at any time during the PAGA Period and who received pay for at least 2 regular hours of work during a PAGA Pay Period." The "PAGA Period," in turn, is defined the period from April 13, 2018 through the date of Court approval of the settlement.[3] The approximately 100 Aggrieved Employees will receive an average payment of $59.80.

In exchange for the settlement, the Aggrieved Employees will release:

> [A]ny and all claims for PAGA civil penalties that have or could reasonably have been asserted by Plaintiff, any Aggrieved Employee, or the State of California against any Released Party based on the facts stated in Plaintiff's Complaint filed June 17, 2019, Plaintiff's First Amended Complaint filed June 25, 2020, Plaintiff's Second Amended Complaint filed March 26, 2021, Plaintiff's Third Amended Complaint filed June 1, 2021, or in Plaintiff's PAGA Notice (and any other notices to the LWDA), including all claims for seating-related provisions of California's Wage Orders. The time period governing the PAGA Released Claims shall be any time during the PAGA Period.

The release is appropriately tailored to the allegations at issue, and does not release any claims other than those for PAGA penalties. (See *Amaro v. Anaheim Arena Management, LLC* (2021) 69 Cal.App.5th 521, 537; *Moniz, supra*, 72 Cal.App.5th at p. 82 [release of "all known and unknown claims under PAGA … that were or could have been pled based on the allegations of the Complaint" was appropriately approved].)

VII. DISCUSSION

A. Potential Verdict Value

[3] The end of the PAGA Period is defined as the earlier of June 15, 2023 or the date of Court approval of the Settlement; as June 15, 2023 has long since passed, the conclusion of the PAGA Period is the latter date.

Based on information and evidence produced by Defendants during discovery, Plaintiff's counsel determined that Aggrieved Employees worked an aggregate total of approximately 8,000 pay periods during the PAGA statute of limitations period. Assuming a 100 percent violation rate, Plaintiff calculated total exposure of $800,000 (8,000 pay periods x $100 penalty for each Aggrieved Employee per pay period)

A court can decline to award the full amount of PAGA penalties where, "if, based on the facts and circumstances of the particular case, to do otherwise, would result in an award that is unjust, arbitrary and oppressive, or confiscatory." (See, e.g., *Carrington v. Starbucks Corp.* (2018) 390 Cal.App.5th 504, 517 [affirming trial court's 90% reduction of maximum PAGA penalty amount given employer's good faith attempt at complying with the law].) After calculating Defendants' maximum exposure, Plaintiff discounted that exposure for settlement purposes to account for the risks of continued litigation, including, but not limited to, the strength of Defendants' defenses on the merits. These defenses included Defendants' contention that they should not be penalized for paying employees more frequently (i.e., on a weekly basis) than other employees (a due process challenge), that employees were provided with seats they could use when not directly interacting with guests, and standing during guest interactions was reasonable, and that any claim against SJMEC was time-barred (an issue on appeal when the parties agreed to settle).

In consideration of the foregoing, the history of various similar PAGA decisions in which potential penalties were significantly reduced (i.e., in excess of 80%), and the risk that Plaintiff may recover nothing, the Court finds that the proposed settlement- which does not extinguish any individual wage and hour claims- is fair to those affected and is genuine, meaningful, and reasonable in light of the statute's purposes.

B. Attorney Fees

While the PAGA statute does not expressly require judicial review of claimed attorney fees, the Court believes it cannot adequately fulfill its statutory duty to review the penalties associated with PAGA settlements without also considering attorney fees. The Court thus finds that it must scrutinize the attorney fee arrangement associated with a PAGA settlement. This is consistent with the observation of many courts that PAGA claims are analogous to "*qui tam*" suits like those under the federal False Claims Act: when reviewing settlements of *qui tam* claims, courts should and do consider any associated attorney fee arrangement. (See *U.S. v. Texas Instruments Corp.* (9th Cir. 1994) 25 F.3d 725, 728 [attorney fee award must be considered by the trial court as part of its review of the "entire settlement arrangement"].)

Plaintiff seeks a fee award of $31,667, one-third of the gross settlement, which is not an uncommon contingency fee allocation in similar actions. This award is facially reasonable under the "common fund" doctrine, which allows a party recovering a fund for the benefit of others to recover attorney fees from the fund itself. Plaintiff also submits a lodestar figure of $265,747.50, based on 347.3 hours spent on this case by counsel billing at rates of $625-950 per hour. This amount far exceeds the fee requested by Plaintiff here, resulting in negative multiplier. Accordingly, the lodestar cross check supports the percentage fee actually requested and this amount is approved. (See *Laffitte v. Robert Half Intern. Inc.* (Cal. 2016) 1 Cal.5th 480, 488, 503-504 [trial court did not abuse its discretion in approving fee award of 1/3 of the common fund, cross-checked against a lodestar resulting in a multiplier of 2.03 to 2.13].)

C. Other Costs and Expenses

Counsel's request for actual litigation costs of $24,411.80 appears reasonable based on the supporting declarations provided and is approved, as is the request for $5,000 in administrative costs. Because the amount of actual litigation costs is less than the maximum in the settlement agreement ($25,000), the difference will be distributed to the LWDA and Aggrieved Employees.

VIII. ADMINISTRATION PROCESS

The parties have agreed that Defendants will deposit the gross settlement amount with the settlement administrator, ILYM Group, Inc., by the latter of (a) 30 business days after the "Effective Date" (defined as the date when the Court enters judgment on its order approving the PAGA settlement *and* that judgment is final), or (b) 15 business days after the date the administrator notifies Defendants that it has established the Qualified Settlement Fund and provides wiring instructions. Within 30 calendar days after the Effective Date, Defendants will provide the administrator with the list of the Aggrieved Employees and their relevant identifying and contact information.

Within 14 days after the gross settlement amount is funded, the administrator will disburse payments to each Aggrieved Employee by check via First Class U.S. Mail, accompanied by a copy of the agreed-upon explanatory letter. Any checks returned as non-deliverable will be re-mailed to any updated address located by using the National Change of Address database, a skip trace, direct contact by the administrator with the Aggrieved Employees, or any other reasonably available sources and methods. The checks shall remain valid for 120 days, and thereafter, will be cancelled, with the associated funds transmitted to the *cy pres* beneficiary, the Children's Miracle Network.

These administrative procedures are appropriate and are approved.

IX. ORDER AND JUDGMENT

In accordance with the above, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT:

Plaintiff's motion for approval of the parties' PAGA settlement is GRANTED. The "Aggrieved Employees" are: "All non-exempt, hourly-paid persons who were employed by Defendants in any of the Covered Positions at the San Jose Marriott at any time during the PAGA Period and who received pay for at least 2 regular hours of work during a PAGA Pay Period." The "PAGA Period," in turn, is defined the period from April 13, 2018 through the date of Court approval of the settlement.

Judgment shall be entered through the filing of this order and judgment. (Code Civ. Proc., § 668.5.) Plaintiffs shall take from their consolidated complaint only the relief set forth in the parties' settlement agreement and this order and judgment. The Court retains jurisdiction over the parties to enforce the terms of the PAGA settlement agreement and the final order and judgment.

The Court sets a compliance hearing for **July 11, 2024 at 2:30 P.M.** in Department 1. At least ten court days before the hearing, Plaintiff's counsel and the settlement administrator shall submit a summary accounting of the net settlement fund identifying distributions made as ordered herein; the number and value of any uncashed checks; amounts remitted to the Controller's Office; the status of any unresolved issues; and any other matters appropriate to bring to the Court's attention. Counsel may appear at the compliance hearing remotely.

The Court will prepare the order.

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LAW AND MOTION HEARING PROCEDURES

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Calendar Line 3

Case Name:
Case No.:

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Calendar Line 4

Case Name: *Realtek Semiconductor Corporation v. Advanced Micro Devices, Inc., et al.*
Case No.: 23CV413107

This is an action for breach of contract by Plaintiff Realtek Semiconductor Corporation ("Realtek") based on Defendant Advanced Micro Devices, Inc.'s ("AMD") alleged failure to abide by its commitment to license any patent essential to the Adaptive Scalable Texture Compression ("ASTC") standard on a royalty-free basis.

Before the Court is AMD and Defendant ATI Technologies, ULC's ("ATI") (collectively, the "AMD Defendants") demurrer to the operative complaint ("Complaint") and motion to dismiss or stay for forum non conveniens. As discussed below, the Court GRANTS the AMD Defendants' motion to stay or dismiss this action for forum non conveniens. Consequently, the Court will not issue a ruling on the demurrer to the Complaint.

X. BACKGROUND

A. Factual

Plaintiff Realtek, a Taiwanese corporation, is a leading designer and supplier of integrated circuits, including Systems-on-Chip ("SoCs"). (Complaint, ¶¶ 11-12.) AMD acquired ATI in October 2006 and, in August 2010, announced that it would retire the ATI brand and that all products formerly known as ATI products would be identified as AMD products. (*Id*., ¶¶ 16, 19.) ATI purports to be the holder of U.S. Patent No. 11,184,628 ("the '628 patent"), which is related to the claims at bar. This patent is titled "Texture Decompression Techniques" and purportedly "cover[s] novel architectures for graphics processing unit [GPU] circuitry." (*Id*., ¶ 57.)

AMD is identified as a "Promoter Member" of The Khronos Group ("Khronos"), an industry organization "focused on the creation of royalty-free open standards to enable to applications to access the power of 3Dgraphics, Virtual and Augmented Reality, Parallel Computing, Machine Learning, and Vision Processing on a wide variety of platforms and devices." (Complaint, ¶¶ 28, 30.) Membership in Khronos is governed by the Membership Agreement. (*Id*., ¶ 38, Exhibit 1.) Attachment A to the Membership Agreement governs the intellectual property rights between and amongst Khronos members and Section 2.2 and 2.3 of Attachment A, in particular, provide each member a royalty-free "Reciprocal License" to all "Necessary Patent Claims" unless the member takes explicit actions to *exclude* operation of the license, including submitting an "IP Disclosure Certificate." (*Id*., ¶¶ 38-43.) Neither AMD nor ATI ever submitted an IP Disclosure Certificate for the '628 patent and never excluded this patent from the scope of the Reciprocal License under Attachment A, section 2.2. (*Id*., ¶ 44.) Consequently, AMD, on behalf of itself and its affiliates, granted to Khronos members, including third-parties in those members' distribution stream, like Realtek, a royalty-free license to the '628 patent. (*Id*., ¶ 45.)

Arm Limited ("Arm"), a U.K semiconductor and software design company, supplies Realtek with GPU designs to incorporate into its SoCs and is a "Promoter Member" in Khronos. (Complaint, ¶¶ 50-52.) Realtek, pursuant to various confidential license agreement, is a licensee of Arm's intellectual property. (*Id*., ¶ 53.)

On May 5, 2022, the AMD Defendants filed a complaint with the International Trade Commission ("ITC") which became an investigation (the "1318 Investigation") and was based on their contention that Realtek and other parties infringed various patents, including the '628 patent. (Complaint, ¶ 55.) That same day, the AMD Defendants filed a companion case in the U.S. District Court, Eastern District of Texas (the "Texas Action"), in which they similarly allegedly that Realtek and others were infringing on various patents, including the '628 patent. (*Id*., ¶ 56.) On September 12, 2022, the district court stayed the Texas Action pending resolution of the ITC proceedings. (*Ibid*.)

In the 1318 Investigation, the AMD Defendants accuse Realtek of infringing the '628 patent because the GPUs in Realtek's SoC implement the ASTC standard. Their complaint in the Texas Action relies on the same standard as the basis of its infringement claims. (Complaint, ¶ 58.) By alleging as much, the AMD Defendants have "made plain that the '628 patent is a 'Necessary Patent Claim" as defined under the Membership Agreement. (*Id*., ¶ 63.) Because Arm is a Khronos member, Realtek's use of the accused Arm GPU's to implement the ASTC standard is protected by the royalty-free Reciprocal License that the Membership Agreement granted to Arm and its customers. (*Id.*, ¶ 65.) By its own terms, the Membership Agreement's royalty-free Reciprocal License extends to Realtek because it grants Arm the right to sell products that practice ASTC, such as the Arm GPUs, and the right, without royalty, "to sublicense to third parties (a) the right to distribute [such products] through the normal tiers of distribution to end users or to resellers, distributors, dealers and authorized manufactures and others in the distribution channel[.]" (*Id*., ¶ 66, citing Exhibit 1, Attachment A § 1.) Consequently, Realtek alleges, the AMD Defendants have breached the Membership Agreement and terms of the granted license by asserting patent infringement damages against it based on its use of Arm processors to implement the ASTC and OpenGL ES Standards.

B. Procedural

Based on the foregoing allegations, Realtek initiated the instant action on March 13, 2023 with the filing of the Complaint asserting the following causes of action: (1) breach of contract; (2) promissory estoppel; (3) declaratory judgment; and (4) unfair competition (Bus. & Prof. Code § 17200).

XI. REQUEST FOR JUDICIAL NOTICE

Both parties make requests for judicial notice.

First, in connection with their opening memorandum, the AMD Defendants requests that the Court take judicial notice of various items filed in connection with the 1318 Investigation (Realtek's response, AMD's list of exhibits, Realtek's exhibits, deadline extension) (Exhibits 1-4) and the Texas Action (Order Granting Motion to Stay Pending Resolution of ITC Investigation, Order Granting Motion for Discretionary Stay, disclosures served by Realtek on AMD, Second Amended Complaint and Order Denying Relief from Stay) (Exhibits 5-9). The Court may properly take judicial notice of these items as court records and the proceedings of a federal administrative agency. (See. Evid. Code, § 452, subds. (c) and (h); *Smiley v. Citibank (s.D.), N.A.* (1995) 11 Cal.4th 138, 145, fn. 2.) However, the Court cautions that such notice is limited to the *existence* of these items and not the truth of

any factual allegations contained therein.[4] (See, e.g., *Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort* (2001) 91 Cal.App.4th 875, 882 [while courts are free to take judicial notice of the existence of each document in a court file, including the truth of the results reached, they may not take judicial notice of the truth of hearsay statements in decisions and court files].)

In connection with their reply, the AMD Defendants request that the Court take judicial notice of three additional items filed in connection with the 1318 Investigation (AMD's Motion for Summary Determination, Realtek's response to the foregoing, and Public Exhibit 43 to AMD's Complaint) (Exhibits 1-3). In accordance with the foregoing, the AMD Defendants' requests for judicial notice are GRANTED.

In support of its opposition, Realtek requests that the Court take judicial notice of the public version of Order No. 59: Denying [the AMD Defendants]'Motion for Summary Determination that Respondents Have Not Met Their Burden Regarding '628 Patent License in the 1318 Investigation. This request is GRANTED. (Evid. Code, § 452, subd. (c).)

XII. MOTION TO STAY OR DISMISS FOR FORUM NON CONVENIENS

The AMD Defendants move to dismiss or stay this action for forum non conveniens pursuant to Code of Civil Procedure sections 410.30 and 418.10 on the following grounds: (1) the Eastern District of Texas is a more suitable forum to address Plaintiff's claims; and (2) the forum selection clause in the Khronos Membership Agreement does not apply to Realtek because it is not a party to the agreement and this action does not arise out of it. In the Second Amended Complaint ("SAC") filed in the Texas Action, which is the operative pleading, the AMD Defendants allege, among other things, that Realtek infringed on and continues to infringe on the '628 Patent, and seek a judgment to that effect.

A. Legal Standard

"Forum non conveniens is an equitable doctrine invoking the discretionary power of a court to decline to exercise the jurisdiction it has over a transitory cause of action when it believes that the action may be more appropriately and justly tried elsewhere." (*Stangvik v. Shiley, Inc.* (1991) 54 Cal.3d 744, 751, citing *Leet v. Union Pac. R.R. Co.* (1944) 25 Cal.2d 605, 609.) The calculus utilized by courts to answer the question of whether an action should be tried elsewhere has been described thusly:

> In determining whether to grant a motion based on forum non conveniens, a court must first determine whether the alternate forum is a "suitable" place for trial. If it is, the next step is to consider the private interests of the litigants and the interests of the public in retaining the action for trial in California. The private interest factors are those that make trial and the enforceability of the ensuing judgment expeditious and relatively inexpensive, such as the ease of access to proof, the cost of obtaining attendance of witnesses. The public interest factors include avoidance of overburdening local courts with congested

[4] Realtek objects to the AMD Defendants' request for judicial notice of Exhibit 8, the Second Amended Complaint in the Texas Action, to the extent that it asks the Court to take judicial notice of any allegations therein as fact.

> calendars, protecting the interests of potential jurors so that they are not called upon to decide cases in which the local community has little concern, and weighing the competing interests of California and the alternate jurisdiction in litigation.

(*Stangvik, supra,* 54 Cal.3d at 751.)

The AMD Defendants, as the moving party, bears the burden of proof on this motion. (*Id*. at 752.)

B. Discussion

1. *Suitable Alternative Forum*

Given the foregoing, the first question to answer is whether the Eastern District of Texas is a "suitable" place for this dispute to be heard. "The threshold issue of suitability of the alternative forum is … determined by a two-pronged test: There must be jurisdiction over the defendant and the assurance that the action will not be barred by the statute of limitations. A forum is suitable where an action can be brought, although not necessarily won." (*Hahn v. Diaz-Barba* (2011) 194 Cal.App.4th 1177, 1187 [internal citation and quotation marks omitted].)

Here, the Court agrees with the AMD Defendants that the Eastern District of Texas is a suitable forum. The AMD Defendants and Realtek are already parties in the Texas Action, with the latter having made its appearance *and*, among other actions, having opposed the AMD Defendants' motion to stay that action pending resolution of the 1318 Investigation. (See *Century Indem. Co. v. Bank of Am.* (1997) 58 Cal.App.4th 408, 412 [explaining that "where all the parties were, even prior to the filing of suit in California, part of a declaratory relief suit brought in Hawaii over the meaning of the same insurance policies there is no dispute Hawaii is a suitable alternative forum."].) There is no indication that any cross-claims have actually been asserted by Realtek in the Texas Action,[5] but there is nothing which suggests that such claims could not be maintained due to the applicable statutes of limitation.

2. *Balancing of Private and Public Interest Factors*

Next, the Court must consider and weigh the private and public interest factors of California and the alternate jurisdiction, the Eastern District of Texas, to determine the appropriate forum for the action.

"The private and public interest factors must be applied flexibly, without giving undue emphasis to any one element. A court should not decide that there are circumstances in which the doctrine will always apply or never apply. Otherwise, the flexibility of the doctrine would be threatened, and its application would be based on identification of a single factor rather than the balancing of several." (See *Stangvik v. Shiley Inc*., *supra*, 54 Cal.3d at p. 753.) "The

[5] The AMD Defendants state that Realtek's claims here are compulsory counterclaims to AMD's claims in the Texas Action and have been identified by Realtek in that action in its initial disclosures.

private interest factors are those that make trial and the enforceability of the ensuing judgment expeditious and relatively inexpensive, such as the ease of access to sources of proof, the cost of obtaining attendance of witnesses, and the availability of compulsory process for attendance of unwilling witnesses." (See *Roulier v. Cannondale, supra,* 101 Cal.App.4th at p. 1188.) The public interest factors include avoidance of overburdening local courts with congested calendars, protecting the interests of potential jurors so that they are not called upon to decide cases in which the local community has little concern, and weighing the competing interests of California and the alternate jurisdiction in the litigation. (*Ibid*.)

The AMD Defendants maintain that despite it bringing this action in California, Realtek cannot claim any presumption in favor of its chosen forum because it is a foreign company. (See Complaint, ¶ 11 [alleging that Realtek was organized and is based in Taiwan]; see *Quanta Compuer Inc. v. Japan Communications Inc.* (2018) 21 Cal.App.5th 438, 447 [explaining that where "the plaintiff resides in a foreign country, … the plaintiff's choice of forum is much less reasonable and is not entitled to the same preference as a resident of the state where the action is filed. At best, therefore … the fact that plaintiff[] chose to file [its] complaint in California is not a substantial factor in favor of retaining jurisdiction here."].) Other than the forum selection clause in the Membership Agreement, which Realtek cites as the basis for its filing suit in California and the primary reason the Court should deny the AMD Defendants' motion, Realtek does not appear to have any particular connection to California over Texas such that the State has a meaningful public interest in retaining and/or allowing this action to proceed while the Texas Action is pending.

The AMD Defendants further insist that it would be more judicious to find the Eastern District of Texas to be the proper forum to hear this case because whether Realtek possesses a license to use the '628 patent is intertwined in the patent infringement dispute that *is* the Texas Action. In the instant action, they continue, for the Court to determine whether Realtek has a license to use the aforementioned patent based on the Membership Agreement would require it to engage in the *exact same analysis* pending in the Texas Action, which would be inefficient and could create conflicting rulings. Indeed, litigating this issue in California would require advancing patent-infringement and licensing rulings currently charged with the Texas Action for adjudication, which is presently under a stay until resolution of the action before the ITC, and unnecessarily duplicates resources already required for adjudication in the Texas Action. The Texas Action *already* includes the parties in this action, the same complex infringement issues, and the same Membership Agreement, which supports the AMD Defendants' contention that the instant action is largely duplicative of the Texas Action such that it would be a waste of resources for this Court to allow the matter to proceed while that action is pending.

In its opposition, citing to *Implicit, LLC v. Imperva, Inc.* (E.D. Cal. 2020) 2020 U.S. Dist. LEXIS 257153, Realtek argues that the Eastern District of Texas is "likely to enforce the Membership Agreement's forum selection clause, rendering Texas an unsuitable forum." (Opp. at 15.) In *Implicit*, which involved claims for patent infringement, the defendants successfully moved to transfer the action to the District of Delaware based on their contention that they were third-party beneficiaries of a license agreement and thus were entitled to assert the forum selection clause it contained. The court reached its conclusion after determining that the defendants established that they were third-party beneficiaries under Delaware law (which was applied due to a choice of law provision in the license agreement). Realtek similarly

maintains and has alleged in the Complaint that it is a third-party beneficiary under the Membership Agreement; this is in fact the entire basis of its claim that it has a royalty-free reciprocal license to sell products that practice the ASTC standard that implicates the '628 patent. However, the Court is not so persuaded given the differences between language of the license agreement in *Implicit* and the language of the Membership Agreement.

First, the license agreement in *Implicit* contained "broad language" which "suggest[ed] that [the alleged third-party beneficiaries] may assert the forum selection clause" (*Implicit*, 2020 U.S. Dist. LEXIS 257153 at *16), and the language of the clause *itself* was such that it applied to "*all* disputes and litigation regarding this Agreement and matters connected with its performance." (*Id*. at *15.) Second, the license agreement in *Implicit* provided language on releases in which it expressly called out certain parties as "third party beneficiaries" and also stated that "the contracting parties intended that the third party would benefit from the contract" and the "intent to benefit the third party is a material part of the contracting parties' purpose in entering the contract." (*Id*. at *13-14.) In the Membership Agreement, in contrast, while the term "third-party" appears frequently, there is *no* language which contemplates or pertains to third-party *beneficiaries* specifically. Under California law, an individual or entity that is not a party to a contract may sue to enforce that agreement as a third party beneficiary if it establishes:

> [N]ot only (1) that is likely to benefit from the contract, but also (2) that a motivating purpose of the contracting parties is to provide a benefit to the third party, and further (3) that permitting the third party to bring its own breach of contract action against a contracting party is consistent with the objectives of the contract and the reasonable expectations of the contracting parties.

(*Goonewardene v. ADP, LLC* (2019) 6 Cal.5th 817, 830.)

With respect to the second element, "the contracting parties must have a motivating purpose to benefit the third-party, and not simply knowledge that a benefit to the third party may follow from the contract." (*Id*.) In the absence of any language which specifically contemplates third-party beneficiaries, the Court is not persuaded, at least at first blush, that Realtek has a basis to assert the forum selection clause. But even assuming, for the sake of argument, that the Court were to conclude that that Realtek *does* have the ability to enforce this clause, it is not persuaded that California represents a more appropriate forum for the parties' dispute than the Eastern District of Texas. There is no indication, outside of the forum selection clause, that Realtek maintains *any* connection to the state of California, and while it alleges that AMD has such a connection because its principal place of business is in the state (see Complaint, ¶ 13), AMD deliberately chose to litigate the issue of Realtek's purported patent infringement elsewhere. Given this, the Court is not persuaded that California has any meaningful public interest in retaining the action. This fact, in concert with the fact that the question of whether Realtek possesses a royalty-free reciprocal license to use the '628 Patent must necessarily be decided in order to adjudicate the patent infringement claims in the Texas Action, compels this Court to conclude that this action should be stayed on forum non conveniens grounds pending resolution of the proceedings in the Eastern District of Texas. Consequently, the Court will not rule on the AMD Defendants' demurrer to the Complaint.

XIII. CONCLUSION

The AMD Defendants' motion to stay or dismiss for forum non conveniens is GRANTED. This action is stayed pending resolution of the proceedings in the Eastern District of Texas.

The Court will prepare the order.

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LAW AND MOTION HEARING PROCEDURES

Parties may appear in person or remotely. Remote appearances must be made through Microsoft Teams, unless otherwise arranged with the Court. Please go to https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml to find the appropriate link.

State and local rules prohibit recording of court proceedings without a court order. These rules apply while in court and also while participating or listening in a hearing remotely. No court order has been issued which would allow recording of any portion of this motion calendar.

The Court does not provide court reporters for proceedings in the complex civil litigation departments. Any party wishing to retain a court reporter to report a hearing may do so in compliance with this Court's October 13, 2020 Policy Regarding Privately Retained Court Reporters. The court reporter can either be in person or appear remotely.

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