

United States District Court  
Northern District of California

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

THOMAS DAVIDSON, et al.,  
Plaintiffs,  
v.  
APPLE, INC.,  
Defendant.

Case No. 16-CV-04942-LHK

**ORDER DENYING MOTION FOR  
CLASS CERTIFICATION**

Re: Dkt. No. 174

Plaintiffs bring this putative class action against Defendant Apple, Inc. (“Apple”), based on Apple’s alleged failure to disclose defects with the iPhone 6 and iPhone 6 Plus. Before the Court is Plaintiffs’ motion for class certification. Having considered the submissions of the parties, the relevant law, and the record in this case, the Court DENIES Plaintiffs’ motion for class certification.

**I. BACKGROUND**

**A. Factual Background**

Apple is the designer, manufacturer, marketer, and seller of the iPhone smartphone. ECF No. 172 ¶ 25 (Fourth Amended Class Action Complaint, or “FACC”). The iPhone utilizes a touchscreen for users to interact with the device, and use of the touchscreen is required to send text

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1 messages, capture video, browse the internet, and access applications, among other functions. *Id.*  
2 ¶¶ 26, 28. Apple released the iPhone 6 and iPhone 6 Plus on September 19, 2014. *Id.* ¶ 25. The  
3 iPhone 6 and 6 Plus both have a larger touchscreen than Apple’s prior iPhone models. *Id.* ¶ 30.  
4 Purchasers of the iPhone 6 and iPhone 6 Plus had 14 days after purchase to return their iPhones  
5 for a full refund. ECF No. 54-2.

6 According to Plaintiffs, the iPhone 6 and 6 Plus “suffer from a material manufacturing  
7 defect that causes the touchscreen to become unresponsive to users’ touch inputs” (hereinafter, the  
8 “touchscreen defect”). *Id.* ¶ 43. Plaintiffs allege that the touchscreen defect is caused by a defect in  
9 the iPhone’s external casing. *Id.* ¶ 45. Specifically, “the touchscreen function fails because the  
10 phones’ external aluminum casing, whose primary purpose is to protect the sensitive internal  
11 components from strain, is insufficient to prevent the phones from bending during normal use.”  
12 Mot. at 4. This bending causes two main forms of damage to the iPhone’s circuits: “trace cracks  
13 ... and/or solder ball cracks, both of which negatively affect the flow of electricity.” *Id.*  
14 Specifically, the damage interrupts the flow of electricity within circuits, thereby preventing the  
15 iPhone from recognizing when a user is touching the screen. *Id.* The problem is at first  
16 intermittent, but becomes permanent as time passes and the trace and solder ball cracks worsen.  
17 Eventually, the touchscreen defect “causes the touchscreen to completely fail to respond to user  
18 inputs.” *Id.* at 7.

19 Plaintiffs allege that Apple knew about the touchscreen defect before releasing the iPhone  
20 6 and iPhone 6 Plus on September 19, 2014. A consumer posted on Apple’s website about  
21 “iPhone 6 touchscreen problems” on September 18, 2014, which is the day before the iPhone 6  
22 and 6 Plus were released to the public. *Id.* ¶ 54; *see also id.* ¶¶ 66–69 (other consumer complaints  
23 from shortly after the release date). Moreover, Apple’s internal testing “determined that the iPhone  
24 6 was 3.3 times more likely to bend than the iPhone 5s (the model immediately prior to the subject  
25 iPhones) and that the iPhone 6 Plus was 7.2 times more likely to bend than the iPhone 5s.” Mot. at  
26 8. Underscoring the point, one of the major concerns Apple identified prior to launching the  
27 iPhones was that they were “likely to bend more easily when compared to previous generations,”

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something that Apple described as “expected behavior.” ECF No. 173-18 at 15.

Plaintiffs allege that within days of the iPhones’ release on September 19, 2014, “there were widespread consumer complaints about the iPhones bending.” Mot. at 8. Plaintiffs state that Apple then publicly denied that there was a bending problem, an incident the media termed “BendGate.” FACC ¶ 54; Mot. at 8. Specifically, Apple stated:

Our iPhones are designed, engineered, and manufactured to be both beautiful and sturdy. iPhone 6 and iPhone 6 Plus feature a precision engineered unibody enclosure constructed from machining a custom grade of 6000 series anodized aluminum, which is tempered for extra strength. They also feature stainless steel and titanium inserts to reinforce high stress locations and use the strongest glass in the smartphone industry. We chose these high-quality materials and construction very carefully for their strength and durability. We also perform rigorous tests throughout the entire development cycle including 3-point bending, pressure point cycling, sit, torsion, and user studies. iPhone 6 and 6 Plus meet or exceed all of our high quality standards to endure everyday, real life use.

With normal use a bend in iPhone [*sic*] is extremely rare and through our first six days of sale, a total of nine customers have contacted Apple with a bent iPhone 6 Plus. As with any Apple product, if you have questions please contact Apple.

FACC ¶ 79.

After internal investigation, Apple determined underfill was necessary to resolve the problems caused by the touchscreen defect. As Plaintiffs explain, “[u]nderfill is a bead of epoxy encapsulant that is placed on a circuit chip to reinforce its attachment to the board substrate and to stiffen the surrounding assembly. ... Underfill is used to prevent the manifestation of chip defects induced by bending because it reinforces the connections and prevents them from bending away from the substrate.” Mot. at 11 (internal citations omitted). Apple had used underfill on the preceding iPhone generation but did not start using it on the Meson (U2402) chip in the iPhone 6 and iPhone 6 Plus until May 2016. *Id.*

On November 18, 2016, Apple announced a customer service program related to the touchscreen defect called the “Multi-Touch Repair Program.” *Id.* ¶ 119. Prior to the Multi-Touch Repair Program, Apple charged approximately \$349 for a refurbished iPhone when a consumer complained of the touchscreen defect outside of Apple’s warranty. *Id.* Through Apple’s Multi-

1 Touch Repair Program, Apple has offered to repair consumers' devices for \$149 if the consumers'  
2 iPhone is otherwise working, and the screen is not broken. *Id.* Through the program, Apple also  
3 offers to reimburse consumers for amounts previously paid over \$149. *Id.* ¶ 120.

4 Plaintiffs allege that Apple did not disclose the existence of the defect despite having  
5 exposing consumers to a number of materials in which Apple could have disclosed the defect.  
6 Plaintiffs note that each new iPhone 6 and iPhone 6 Plus came in an identical box designed by  
7 Apple that contained various disclosures and advertisements about the iPhones' capabilities. *See*  
8 ECF No. 173-22 at 4–7. Inside the iPhone box, Apple included two documents that made  
9 additional representations about the iPhone. Mot. at 10. Apple also requires users to navigate  
10 through an iPhone setup process before the iPhone can be used, and periodically releases updates  
11 to the iPhones' software. ECF No. 174-4; Mot. at 10, 22. However, Apple did not disclose the  
12 defect in any of these materials.

13 Each named Plaintiff experienced the touchscreen defect after purchasing their iPhone.  
14 Below is a chart summarizing the relevant details of the six named Plaintiffs whose claims are at  
15 issue in the instant motion for class certification. Mot. at 16–17.

Name	State	Date of Purchase	Defect Presented to Apple
Eric Siegal	Illinois	December 18, 2015	September 2016
John Borzymowski	Florida	September 25, 2014	May 2016
Taylor Brown	Texas	November 11, 2014	April 2016
Justin Bauer	Colorado	March 11, 2015	November 2015
Matt Muilenberg	Washington	February 28, 2015	October 2016
William Bon	Washington	January 13, 2015	August 2016

## 24 **B. Procedural History**

25 On August 27, 2016, Plaintiffs Thomas Davison, Jun Bai, and Todd Cleary filed a putative  
26 class action complaint against Apple that alleged causes of action under (1) California's Consumer  
27

1 Legal Remedies Act, Cal. Civ. Code § 1750; (2) Unfair Competition Law, Cal Bus. & Prof. Code  
2 § 17200; (3) False Advertisement Law (“FAL”), Cal. Bus. & Prof. Code § 17500; (4) common  
3 law fraud; (5) negligent misrepresentation; (6) unjust enrichment; (7) breach of implied warranty;  
4 (8) violation of the Magnusson-Moss Warranty Act (“Magnusson-Moss Act”), 15 U.S.C. § 2301;  
5 and (9) violation of the Song-Beverly Consumer Warranty Act (“Song-Beverly Act”), Cal. Civ.  
6 Code § 17290. *See* ECF No. 1.

7 On October 7, 2016, Plaintiffs filed a First Amended Class Action Complaint that added  
8 several named Plaintiffs and added causes of action under the consumer fraud statutes of Illinois,  
9 New Jersey, Florida, Connecticut, Texas, Colorado, Michigan, New York, and Washington. *See*  
10 ECF No. 20. On December 2, 2016, Plaintiffs filed a Second Amended Class Action Complaint  
11 (“SACC”), which added a Utah Plaintiff and a cause of action under Utah’s consumer fraud  
12 statute. Plaintiffs sought to represent a Nationwide Class of “All persons or entities in the United  
13 States that purchased an Apple iPhone 6 or 6 Plus.” Alternatively, Plaintiffs sought to represent  
14 state sub-classes. *Id.*

15 Given the breadth of the Plaintiffs’ action, the parties agreed at the November 30, 2016  
16 initial case management conference to each select 5 causes of action—for a total of 10 causes of  
17 action—to litigate through summary judgment. *See* ECF No. 44. On December 5, 2016, the parties  
18 selected (1) New Jersey Consumer Fraud Act (“NJCFA”), N.J. Stat. Ann. § 56:8-1; (2) Florida  
19 Deceptive and Unfair Trade Practices Act (“FDUTPA”), Fla. Stat. § 501.201; (3) Washington  
20 Consumer Protection Act (“WCPA”), Wash. Rev. Code § 19.86.010; (4) Illinois Consumer Fraud  
21 and Deceptive Trade Practices Act (“ICFDTPA”), Ill. Comp. Stat ¶ 505; (5) Texas Deceptive  
22 Trade Practices Act (“TDTPA”), Tex. Bus. & Com. Code ¶ 17.41; (6) Colorado Consumer  
23 Protection Act (“CCPA”), Colo. Rev. Stat. § 6-1-105; (7) common law fraud; (8) breach of  
24 express warranty; (9) breach of implied warranty; (10) Magnusson-Moss Act. *See* ECF No. 44, at  
25 1–2. The parties did not select any California statutory claims. *See id.*

26 On January 6, 2017, Apple filed a motion to dismiss the SACC. ECF No. 54. On February  
27 3, 2017, Plaintiffs filed an opposition. ECF No. 58. On February 17, 2017, Apple filed a reply.

1 ECF No. 64.

2 On March 14, 2017, the Court dismissed all 10 of the selected claims with leave to amend.  
3 See ECF No. 84; *Davidson v. Apple, Inc.*, 2017 WL 976048 (N.D. Cal. Mar. 14, 2017) (“*Davidson*  
4 *I*”). The Court found that Plaintiffs had adequately alleged Article III standing to bring fraud  
5 claims. *Id.* at \*5. However, the Court concluded Plaintiffs had not adequately alleged standing to  
6 seek an injunction. *Id.* at \*6–7. The Court thus granted Apple’s motion to dismiss to the extent that  
7 Plaintiffs sought injunctive relief.

8 The Court next dismissed Plaintiffs’ fraud claims because Plaintiffs failed to satisfy Rule  
9 9(b)’s heightened pleading requirements. First, Plaintiffs’ fraud claims premised on an affirmative  
10 misrepresentation theory were not pleaded with sufficient particularity because Plaintiffs did not  
11 allege any affirmative statement to which Plaintiffs were exposed or reviewed. *Id.* at \*8. Second,  
12 with regards to Plaintiffs’ claims premised on a fraudulent omission theory, the Court held that  
13 Plaintiffs had failed to plead with particularity any fraud claim premised on fraudulent omissions  
14 because Plaintiffs had failed to plead “that they reviewed or were exposed to *any* information,  
15 advertisements, labeling, or packaging by Defendant,” and thus Plaintiffs had failed to plead that  
16 they encountered or were exposed to any material through which Apple could have made a  
17 fraudulent omission. *Id.* Accordingly, the Court granted Apple’s motion to dismiss Plaintiffs’  
18 claims for fraud under the NJCFA, FDUTPA, WCPA, ICFDTPA, TDTPA, CCPA, and common  
19 law. *Id.* at \*10.

20 Finally, the Court applied California law to Plaintiffs’ warranty claims because the parties  
21 briefed only California law. *Id.* The Court held that, with regards to Plaintiffs’ breach of express  
22 warranty claim, Plaintiffs had failed to state a claim because Plaintiffs alleged only a defect in the  
23 iPhone’s design, and Apple’s express warranty did not cover defects in design. *Id.* Moreover, the  
24 Court held that all but two Plaintiffs had failed to allege that the touchscreen defect manifested  
25 within Apple’s one-year warranty period. *Id.* at \*12. The Court rejected Plaintiffs’ argument that  
26 Apple’s one-year duration provision was unconscionable. *Id.* The Court also rejected Plaintiffs’  
27 limited warranty claim under California law because Apple had properly disclaimed limited

1 warranties and the disclaimer was not unconscionable. *Id.* The Court also dismissed Plaintiffs’  
2 Magnusson-Moss Act claim, which was dependent on Plaintiffs’ other warranty claims. *Id.*

3 Thus, the Court dismissed all 10 selected causes of action with leave to amend and ordered  
4 the parties to specify which states’ law applied to the common law causes of action. *Id.* On March  
5 21, 2017, in response to this Court’s order, Plaintiffs elected to litigate their common law breach  
6 of warranty claims under Illinois law and Apple elected to litigate its common law fraud claim  
7 under Pennsylvania law. ECF No. 85.

8 On April 4, 2017, Plaintiffs filed the Third Amended Class Action Complaint (“TACC”).  
9 ECF No. 86. Plaintiffs alleged in the TACC that, prior to their iPhone purchases, Plaintiffs viewed  
10 a variety of information from Apple, such as Apple’s press releases about the iPhone, Apple’s  
11 keynote address about the iPhone, and television commercials about the iPhone. *See id.* ¶¶ 8–20.  
12 Immediately after their purchase—and within the time window for returning their iPhone free of  
13 charge—Plaintiffs reviewed the iPhone box and information within the box. *See id.* ¶¶ 8–20.  
14 Further, either prior to their purchase or within the time window in which they could have returned  
15 their iPhones free of charge, all Plaintiffs viewed Apple’s September 25, 2014 “BendGate”  
16 statement. *See id.*

17 On April 18, 2017, Apple moved to dismiss the TACC. *See* ECF No. 87. On May 16,  
18 2017, Plaintiffs filed an opposition. ECF No. 93. On June 6, 2017, Apple filed a reply. ECF No.  
19 97.

20 On July 25, 2017, the Court granted in part and denied in part Apple’s motion to dismiss.  
21 *See* ECF No. 103; *Davidson v. Apple, Inc.*, 2017 WL 3149305 (N.D. Cal. July 25, 2017)  
22 (“*Davidson II*”). To start, the Court found that some Plaintiffs lacked standing to seek injunctive  
23 relief enjoining Apple’s allegedly fraudulent misrepresentations and omissions about the iPhones  
24 because they did not intend to buy a new phone or participate in Apple’s Multi-Touch Repair  
25 Program. *Id.* at \*7–8. Conversely, other Plaintiffs did have standing to seek injunctive relief  
26 because they intended to participate in the Multi-Touch Repair Program, or were at least willing to  
27 consider doing so. *Id.* at \*8–9.



1           The Court then turned to Plaintiffs’ fraud claims. First, the Court dismissed Plaintiffs’  
2 fraud claims based on affirmative misrepresentations “because Plaintiffs have failed to identify an  
3 actionable misrepresentation in the September 25, 2014 statement—and because this statement is  
4 the only statement that forms the basis of Plaintiffs’ affirmative misrepresentation claims.” *Id.* at  
5 \*13. Second, the Court declined to dismiss Plaintiffs’ fraud claims based on an omission theory  
6 because “Plaintiffs have sufficiently alleged the information about the iPhone to which Plaintiffs  
7 were exposed either prior to their purchase or immediately after their purchase and within the time  
8 window in which they could have returned their iPhone for a full refund.” *Id.* at \*14. The Court  
9 also found that Plaintiffs had adequately alleged that Apple knew of the touchscreen defect at the  
10 time of the Plaintiffs’ purchases. *See id.* at \*14–15.

11           The Court next dismissed Plaintiffs’ claims under the NJCFA and Pennsylvania common  
12 law fraud with prejudice. Plaintiffs’ NJCFA claim failed because the only New Jersey Plaintiff  
13 experienced the touchscreen defect after the expiration of Apple’s one year limited warranty  
14 period, and New Jersey law provides that “[a] defendant cannot be found to have violated the CFA  
15 when it provided a part—alleged to be substandard—that outperforms the warranty provided.”  
16 *Perkins v. DaimlerChrysler Corp.*, 890 A.2d 997, 1004 (N.J. App. Div. 2006). The Court  
17 dismissed Plaintiffs’ claim for common law fraud under Pennsylvania because it was barred by the  
18 economic loss doctrine, which bars a plaintiff “from recovering in tort economic losses to which  
19 their entitlement flows only from a contract.” *Werwinski v. Ford Motor Co.*, 286 F.3d 661, 670  
20 (3d Cir. 2002).

21           Finally, the Court dismissed Plaintiffs’ breach of express and implied warranty claims  
22 under Illinois law with prejudice. After finding that the limited warranty was not unconscionable,  
23 the Court dismissed the breach of express warranty claim because the limited warranty excluded  
24 design defects, and Plaintiffs alleged only a design defect. *Davidson II*, 2017 WL 3149305 at \*24.  
25 Similarly, the Court dismissed the breach of implied warranty claim because the limited warranty  
26 was not unconscionable and it expressly disclaimed an implied warranty. *Id.* at \*26. The Court  
27 also dismissed Plaintiffs’ claim under California’s Magnusson-Moss Act because the parties did  
28



1 not dispute that the claim rose or fell with Plaintiffs' express and implied warranty claims under  
2 state law. *Id.*

3 Thus, five causes of action (all premised on a fraudulent omissions theory) survived  
4 Apple's motion to dismiss the TACC: (1) a Colorado Consumer Protection Act ("CCPA") claim;  
5 (2) a Florida Deceptive and Unfair Trade Practices Act ("FDUTPA") claim; (2) an Illinois  
6 Consumer Fraud and Deceptive Trade Practices Act ("ICFDTPA") claim; (3) Texas Deceptive  
7 Trade Practices Act ("TDTPA") claim; and (4) a Washington Consumer Protection Act  
8 ("WCPA") claim. These claims are now at issue in the instant motion for class certification.

9 On December 21, 2017, the Court granted the parties' stipulation to file a Fourth Amended  
10 Class Action Complaint ("FACC"). ECF No. 169. The FACC was materially identical to the Third  
11 Amended Class Complaint save for the substitution of Plaintiff Eric Siegal, an Illinois resident, for  
12 Adam Benelhachem, the previous Illinois Plaintiff. *See* FACC. On January 3, 2018, Plaintiffs filed  
13 the FACC. ECF No. 172. On January 17, 2018, Apple filed its Answer to the FACC. ECF No.  
14 177.

15 On January 5, 2018, Plaintiffs filed the instant motion for class certification. ECF No. 174  
16 ("Mot."). Plaintiffs seek to certify the following proposed class:

- 17 • Any person residing in Colorado, Florida, Illinois, Washington, or Texas who  
18 purchased an Apple iPhone 6 or iPhone 6 Plus from Apple or an Apple Authorized  
19 Service Provider (listed on <https://locate.apple.com/>) that was manufactured  
20 without underfill under the U2402 (Meson) integrated circuit chip.

21 *Id.* at 3.<sup>1</sup> Plaintiffs argue in the alternative that the Court should certify subclasses to account for  
22 differences between the states' laws. *Id.* at 23 n. 13; TACC ¶ 129 ("In the alternative, Plaintiffs  
23 seek to represent the following state sub-classes."). On February 10, 2018, Apple filed its  
24 opposition. ECF No. 183 ("Opp."). On March 2, 2018, Plaintiffs filed their reply. ECF No. 199  
25 ("Reply").<sup>2</sup>

26 <sup>1</sup> Plaintiff excludes from the class "governmental entities, Apple and its affiliates, subsidiaries,  
27 employees, current and former officers, director, agents, representatives, and members of this  
28 Court and its staff." Mot. at 3.

<sup>2</sup> Apple has also filed a motion to exclude Plaintiffs' expert reports and testimony. ECF No. 187.  
That motion is set for hearing on July 26, 2018.

## II. LEGAL STANDARD

Class actions are governed by Rule 23 of the Federal Rules of Civil Procedure. Rule 23 does not set forth a mere pleading standard. To obtain class certification, plaintiffs bear the burden of showing that they have met each of the four requirements of Rule 23(a) and at least one subsection of Rule 23(b). *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186, *amended by* 273 F.3d 1266 (9th Cir. 2001). “A party seeking class certification must affirmatively demonstrate . . . compliance with the Rule[.]” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011).

Rule 23(a) provides that a district court may certify a class only if: “(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.” Fed. R. Civ. P. 23(a). That is, the class must satisfy the requirements of numerosity, commonality, typicality, and adequacy of representation to maintain a class action. *Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 588 (9th Cir. 2012).

If all four prerequisites of Rule 23(a) are satisfied, the Court must also find that the plaintiff “satisf[ies] through evidentiary proof” at least one of the three subsections of Rule 23(b). *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013). The Court can certify a Rule 23(b)(1) class when plaintiffs make a showing that there would be a risk of substantial prejudice or inconsistent adjudications if there were separate adjudications. Fed. R. Civ. P. 23(b)(1). The Court can certify a Rule 23(b)(2) class if “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.” Fed. R. Civ. P. 23(b)(2). Finally, the Court can certify a Rule 23(b)(3) class if the Court finds that “questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3).

“[A] court’s class-certification analysis must be ‘rigorous’ and may ‘entail some overlap

1 with the merits of the plaintiff’s underlying claim[.]” *Amgen Inc. v. Connecticut Ret. Plans & Tr.*  
2 *Funds*, 568 U.S. 455, 465–66 (2013) (quoting *Dukes*, 564 U.S. at 351); *see also Mazza*, 666 F.3d  
3 at 588 (“Before certifying a class, the trial court must conduct a ‘rigorous analysis’ to determine  
4 whether the party seeking certification has met the prerequisites of Rule 23.” (quoting *Zinser*, 253  
5 F.3d at 1186)). This “rigorous” analysis applies to both Rule 23(a) and Rule 23(b). *Comcast*, 569  
6 U.S. at 34 (stating that Congress included “addition[al] . . . procedural safeguards for (b)(3) class  
7 members beyond those provided for (b)(1) or (b)(2) class members (e.g., an opportunity to opt  
8 out)” and that a court has a “duty to take a ‘close look’ at whether common questions predominate  
9 over individual ones”).

10 Nevertheless, “Rule 23 grants courts no license to engage in free-ranging merits inquiries  
11 at the certification stage.” *Amgen*, 568 U.S. at 466. “Merits questions may be considered to the  
12 extent—but only to the extent—that they are relevant to determining whether the Rule 23  
13 prerequisites for class certification are satisfied.” *Id.* If a court concludes that the moving party has  
14 met its burden of proof, then the court has broad discretion to certify the class. *Zinser*, 253 F.3d at  
15 1186.

### 16 **III. DISCUSSION**

17 Apple opposes Plaintiffs’ motion for class certification on nearly every front. Apple first  
18 advances a threshold argument that Plaintiffs lack standing, and then challenges whether Plaintiffs  
19 have satisfied the typicality, adequacy, and commonality requirements of Rule 23(a). Apple then  
20 contends that Plaintiffs have failed to establish Rule 23(b)(3) predominance and superiority,  
21 focusing in particular on class members’ exposure to the alleged omissions, reliance on them, and  
22 flaws in Plaintiffs’ damages model. Finally, Apple argues that Plaintiffs have waived their request  
23 for injunctive relief, and that the Court should deny Plaintiffs’ attempt to certify a class under Rule  
24 23(c)(4).

25 The Court rejects Apple’s standing argument. The Court then explains why Plaintiffs’  
26 Colorado claim is categorically barred. The Court then finds that Plaintiffs’ remaining claims  
27 under Florida, Illinois, Washington, and Texas law satisfy Rule 23(a), but that Plaintiffs’ claims

1 fail to satisfy Rule 23(b)(3). The Court subsequently denies Plaintiffs’ request for injunctive relief,  
2 and denies certification under Rule 23(c)(4).<sup>3</sup> The Court begins with standing.

### 3 **A. Standing**

4 “[A] suit brought by a plaintiff without Article III standing is not a ‘case or controversy,’  
5 and an Article III federal court therefore lacks subject matter jurisdiction over the suit.” *Cetacean*  
6 *Cmty. v. Bush*, 386 F.3d 1169, 1174 (9th Cir. 2004). In order to have standing under Article III, “a  
7 plaintiff must show (1) it has suffered an “injury in fact” that is [ ] concrete and particularized and  
8 [ ] actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the  
9 challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the  
10 injury will be redressed by a favorable decision.” *Friends of the Earth, Inc. v. Laidlaw Envtl.*  
11 *Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000); *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547  
12 (2016) (same). In class actions, “standing is satisfied if at least one named plaintiff meets the  
13 requirements.” *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) (citation  
14 omitted); *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013 (9th Cir. 2011) (“[O]ur law keys on the  
15 representative party, not all of the class members, and has done so for many years.”).

16 Apple challenges Plaintiffs’ standing on three grounds. First, Apple contends that Plaintiffs  
17 lack standing to assert claims based on the iPhone 6 because no class representative purchased an  
18 iPhone 6. Second, Apple contends that class representative Eric Siegal lacks standing to represent  
19 the Illinois class because Siegal did not buy his iPhone. Third, Apple argues that class certification  
20 is prohibited because the class would contain members who lack standing. The Court examines  
21 each of Apple’s arguments in turn, and finds that none are persuasive.

#### 22 **1. Class Representative Standing**

23 “[T]here is no controlling authority in the Ninth Circuit on the issue of whether a named  
24 plaintiff in a class action has standing to assert claims based on products he or she did not  
25

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26 <sup>3</sup> Although the Court previously indicated it would conduct a choice-of-law analysis, doing so has  
27 since become unnecessary. *Davidson I*, 2017 WL 976048, at \*10 n.3; *Davidson II*, 2017 WL  
28 3149305, at \*3 n.1. Plaintiff neither seeks to certify a nationwide class nor contends that  
California law should be applied classwide.

1 purchase.” *Shank v. Presidio Brands, Inc.*, 2018 WL 510169, at \*6 (N.D. Cal. Jan. 23, 2018).  
2 However, “[t]he majority of the courts in this district and elsewhere in California reject the  
3 proposition that a plaintiff can not suffer injury in fact based on products that the plaintiff did not  
4 buy.” *Coleman-Anacleto v. Samsung Elecs. Am., Inc.*, 2016 WL 4729302, at \*9 (N.D. Cal. Sept.  
5 12, 2016). Instead, “a Plaintiff may have standing to assert claims for unnamed class members  
6 based on products he or she did not purchase so long as the products and alleged  
7 misrepresentations are substantially similar.” *Young v. Cree, Inc.*, 2018 WL 1710181, at \*9 (N.D.  
8 Cal. Apr. 9, 2018) (quoting *Brown v. Hain Celestial Grp., Inc.*, 913 F. Supp. 2d 881, 890 (N.D.  
9 Cal. 2012)); *see also Astiana v. Dreyer’s Grand Ice Cream, Inc.*, 2012 WL 2990766, at \*11 (N.D.  
10 Cal. 2012) (“[T]he critical inquiry seems to be whether there is sufficient similarity between the  
11 products purchased and not purchased.”). Both parties agree this is the correct standard. Opp. at  
12 10; Reply at 10–11.

13 This Court has consistently applied the “substantially similar” approach when analyzing  
14 standing challenges. *See, e.g., Coleman-Anacleto*, 2016 WL 4729302, at \*10; *Philips v. Ford*  
15 *Motor Co.*, 2015 WL 4111448, at \*6–7 (N.D. Cal. July 7, 2015) (“*Philips I*”); *Bruton v. Gerber*  
16 *Prods. Co.*, 2014 WL 172111, at \*8 (N.D. Cal. Jan. 15, 2014); *Kane v. Chobani*, 2013 WL  
17 5289253, at \*10–11 (N.D. Cal. Sept. 19, 2013); *Brazil v. Dole Food Co.*, 2013 WL 5312418, at  
18 \*7–8 (N.D. Cal. Sept. 23, 2013). As explained in the Court’s prior orders, “in asserting claims  
19 based on products a plaintiff did not purchase, but which are nevertheless substantially similar to  
20 products a plaintiff did purchase, a plaintiff is not suing over an injury she did not suffer. Rather, a  
21 plaintiff in that scenario is suing over an injury she personally suffered and asserting that others  
22 who purchased similar products suffered substantially the same injury, even if the products that  
23 caused the injury were not identical in every respect.” *Bruton*, 2014 WL 172111, at \*8.

24 It is undisputed that the proposed class representatives all purchased an iPhone 6 Plus and  
25 that none purchased an iPhone 6. It follows that the class representatives can only assert claims  
26 based on the iPhone 6 if the iPhone 6 is substantially similar to the iPhone 6 Plus. Apple argues  
27 the two iPhones are not substantially similar because (1) the iPhone 6 Plus is larger (2) the iPhone

1 6 Plus has a slightly different internal configuration; (3) the iPhone 6 Plus has a higher defect rate.  
2 Opp. at 10.

3 The Court is unpersuaded. At bottom, Apple argues that small differences between the  
4 iPhones' size, configuration, and response to physical stress mean iPhone 6 and iPhone 6 Plus are  
5 not substantially similar. This Court rejected a similar argument less than a year ago, finding that  
6 "the iPhone 4 and iPhone 4S are 'substantially similar' products for purposes of the Article III  
7 standing analysis." *Grace v. Apple Inc.*, 2017 WL 3232464, at \*9 (N.D. Cal. July 28, 2017); *see*  
8 *also Giuliano v. SanDisk Corp.*, 2014 WL 4685012, at \*3 (N.D. Cal. Sept. 19, 2014) (finding  
9 plaintiff had standing to bring claims based on the purchase of different memory cards because the  
10 relevant "flash memory products are related" and because "the asserted injury to purchasers of  
11 both [products] is predicated on the same alleged wrongful conduct").

12 Strikingly similar arguments have also been raised and rejected in class actions alleging  
13 vehicle defects. Specifically, automakers have claimed that configuration differences between  
14 models (*e.g.* Ford Fusion and Ford Focus) mean that the different models are not substantially  
15 similar, even though the defect at issue is present across all the models. Courts, including this one,  
16 have rejected those claims and concluded that the different models are substantially similar. *See*,  
17 *e.g.*, *Philips I*, 2015 WL 4111448, at \*6–7; *Glenn v. Hyundai Motor Am.*, 2016 WL 3621280, at  
18 \*15–16 (C.D. Cal. June 24, 2016); *Lohr v. Nissan N. Am., Inc.*, 2017 WL 1037555, at \*4 (W.D.  
19 Wash. Mar. 17, 2017).

20 In sum, Plaintiffs have made a strong case as to why the iPhone 6 and iPhone 6 Plus are  
21 substantially similar, and the allegedly distinguishing features are little more than minor  
22 configuration and size differences. The Court therefore finds that the iPhone 6 and iPhone 6 Plus  
23 are substantially similar.

## 24 **2. Eric Siegal**

25 Apple next contends putative Illinois class representative Eric Siegal lacks standing  
26 because Siegal's employer—not Siegal—bought Siegal's iPhone 6 Plus. Mot. at 11. Put otherwise,  
27 because the injury alleged is overpayment for iPhones, Siegal lacks an injury because Siegal did



1 not actually pay for an iPhone. In turn, no Illinois class can be certified because the proposed class  
 2 representative lacks standing. *Cornett v. Donovan*, 51 F.3d 894, 897 n.2 (9th Cir. 1995) (“[I]f the  
 3 representative parties do not have standing, the class does not have standing.”). Apple is correct on  
 4 the law, but wrong on the facts. As Plaintiffs point out, the iPhone 6 Plus purchased by Siegal’s  
 5 employer failed due to the touchscreen defect, so Siegal personally purchased a second iPhone 6  
 6 Plus which immediately exhibited the touchscreen defect. ECF No. 199-8 at 9–11. Thus, Siegal  
 7 has suffered the same harm as the Illinois class members he seeks to represent.

### 8 **3. Class Member Standing**

9 Finally, Apple argues that no class can be certified because the class would include  
 10 members who lack standing. Apple’s argument rests on the Ninth Circuit’s statement in *Mazza*  
 11 that “[n]o class may be certified that contains members lacking Article III standing.” 666 F.3d at  
 12 594. Like many others, this Court has long noted that *Mazza*’s statement “appears to contradict the  
 13 Ninth Circuit’s prior decisions” in *Bates* and *Stearns*. *Moore v. Apple Inc.*, 309 F.R.D. 532, 541  
 14 (N.D. Cal. 2015); *see id.* (collecting cases). More precisely, “the *Bates* and *Stearns* courts’  
 15 holdings that a single named plaintiff’s standing can satisfy Article III standing for the class is at  
 16 odds with a reading of *Mazza* that requires even absent class members to demonstrate Article III  
 17 standing for jurisdictional purposes.” *Id.*; *accord Ehret v. Uber Techs., Inc.*, 148 F. Supp. 3d 884,  
 18 903–04 (N.D. Cal. 2015) (discussing *Mazza* and reaching same conclusion).

19 Fortunately, the Ninth Circuit has since clarified that *Mazza*’s “statement taken in context  
 20 signifies only that it must be possible that class members have suffered injury, not that they did  
 21 suffer injury, or that they must prove such injury at the certification phase.” *Torres v. Mercer*  
 22 *Canyons Inc.*, 835 F.3d 1125, 1137 n.6 (9th Cir. 2016). Significantly, *Torres* cited both *Stearns*  
 23 and *Bates*, underscoring the cases’ continued vitality. *Id.* (citing *Stearns*, 655 F.3d at 1021; *Bates*,  
 24 511 F.3d at 985); *see also Ollier v. Sweetwater Union High Sch. Dist.*, 768 F.3d 843, 865 (9th Cir.  
 25 2014) (post-*Mazza* decision citing *Bates* as good law).

26 Thus, “to the extent Defendant relies on *Mazza*’s statement as overruling the Ninth  
 27 Circuit’s prior decisions in *Bates* and *Stearns*, the Court concludes that Defendant’s interpretation



1 of *Mazza* is incorrect.” *Moore*, 309 F.R.D. at 541. Instead, in line with *Bates*, *Stearns*, and *Mazza*,  
 2 it is sufficient for jurisdictional purposes that “at least one named plaintiff must satisfy Article III  
 3 standing.” *Id.* at 542; accord *Ramirez v. Trans Union, LLC*, 2016 WL 6070490, at \*5 (N.D. Cal.  
 4 Oct. 17, 2016) (discussing *Mazza* and concluding that it did not overturn *Bates* and *Stearns*); *In re:*  
 5 *Lenovo Adware Litig.*, 2016 WL 6277245, at \*15 (N.D. Cal. Oct. 27, 2016) (citing *Torres* and  
 6 finding the *Mazza* statement merely means that it must be possible that class members have  
 7 suffered injury).<sup>4</sup> The Court has already concluded that all six named plaintiffs have standing.  
 8 Thus, Apple’s challenge fails.

#### 9 4. Summary

10 In sum, the Court finds that (1) the iPhone 6 and iPhone 6 Plus are substantially similar,  
 11 and hence that the class representatives may assert claims based on the iPhone 6; (2) Siegal has  
 12 standing because he personally bought an iPhone 6 Plus that exhibited the touchscreen defect; and  
 13 (3) the named plaintiffs’ standing is enough to satisfy Article III.

#### 14 B. Colorado Consumer Protection Act

15 Apple contends that Plaintiffs’ claim under the Colorado Consumer Protection Act  
 16 (“CCPA”) is barred because the CCPA bars class claims for money damages. Colo. Rev. Stat. § 6-  
 17 1-113(2) (noting defendants are liable for damages “[e]xcept in a class action”); *In re Myford*  
 18 *Touch Consumer Litig.*, 2016 WL 7734558, at \*26 (N.D. Cal. Sept. 14, 2016) (“*Myford Touch I*”)  
 19 (“Colorado law prohibits class actions for monetary damages based on the Consumer Protection  
 20 Act”).

21 The United States Supreme Court has held that federal procedural rules trump state  
 22 procedural rules in some circumstances. *See Shady Grove Orthopedic Associates, P.A. v. Allstate*  
 23 *Ins. Co.*, 559 U.S. 393 (2010). Federal courts engage in a two-step process to decide if they are  
 24 facing such a circumstance. First, courts ask “whether the federal and state rules can be reconciled  
 25

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26 <sup>4</sup> Indeed, the facts of *Mazza* underscore that the class has standing. The Ninth Circuit found that  
 27 “[t]o the extent that class members were relieved of their money by Honda’s deceptive conduct—  
 28 as Plaintiffs allege—they have suffered an ‘injury in fact.’” 666 F.3d at 595 (quoting *Stearns*, 655  
 at 1021).

1 (because they answer different questions) ...” *Id.* at 410. If the two rules cannot be reconciled,  
 2 courts are to proceed to the second step. Unfortunately, the *Shady Grove* Court fractured over  
 3 what the second inquiry should be. Subsequent decisions have determined that Justice Stevens’s  
 4 concurrence controls because it provides the narrowest ground for the holding. *See, e.g., Myford*  
 5 *Touch I*, 2016 WL 7734558, at \*26–27 (explaining why in further detail and providing examples);  
 6 *Garman v. Campbell Cty. Sch. Dist. No. 1*, 630 F.3d 977, 983 n.6 (10th Cir. 2010) (finding Justice  
 7 Stevens’s concurrence controlling). The second step is therefore to determine whether the state  
 8 statute (here, Colorado’s CCPA class action bar) is “procedural in the ordinary use of the term but  
 9 is so intertwined with a state right or remedy that it functions to define the scope of the state-  
 10 created right.” *Shady Grove*, 559 U.S. at 423 (Stevens, J., concurring).

11 The first step is relatively straightforward in this case. The CCPA class action bar “cannot  
 12 be reconciled with Federal Rule of Civil Procedure 23. The former forbid[s] class actions, and the  
 13 latter permits them.” *Myford Touch I*, 2016 WL 7734558, at \*26. The second step is more  
 14 complex, but the Court is persuaded by the *Myford Touch I* analysis of the CCPA class action bar:

15 Colorado’s limitation on class actions is intertwined with the state right. First,  
 16 Colorado’s limitation on class actions appears in the substantive section of the  
 17 code, rather than in court rules. *See In re Cty. of Orange*, 784 F.3d 520, 532 (9th  
 18 Cir. 2015) (where rule regarding the right to a jury trial was contained in the  
 19 California Constitution, it was substantive rather than procedural and not trumped  
 20 by the Federal Rules); *United Food & Commercial Workers Local 1776 &*  
 21 *Participating Employers Health & Welfare Fund v. Teikoku Pharma USA, Inc.*, 74  
 22 F. Supp. 3d 1052, 1084 (N.D. Cal. 2014) (where limitation on class actions was  
 23 part of state substantive law, FRCP did not trump). Second, the limitation is part of  
 24 the same paragraph which would otherwise make it possible for Plaintiffs to sue for  
 25 damages. *See Colo. Rev. Stat. Ann. § 6-1-113(2)* (“Except in a class action ... any  
 26 person who, in a private civil action, is found to have engaged in or caused another  
 27 to engage in any deceptive trade practice listed in this article shall be liable....”).  
 28 Where the limitation is “incorporated in the same statutory provision as the  
 underlying right,” courts find it substantive rather than procedural. *Local 1776*, 74  
 F. Supp. 3d at 1084. Finally, the limitation applies only to Colorado’s Consumer  
 Protection Act, suggesting it reflects a substantive policy judgment as to the area of  
 the law by the legislature, not a rule of general procedure. *See id.*

*Id.* at \*27; accord *Friedman v. Dollar Thrifty Auto. Grp., Inc.*, 2015 WL 8479746, at \*2–5 (D.  
 Colo. Dec. 10, 2015) (applying Justice Stevens’s *Shady Grove* analysis and concluding “the class

1 action restriction in the CCPA is substantive ... [and] [a]ccordingly the state statute controls rather  
2 than Fed. R. Civ. P. 23, and the class action restriction is enforceable”).

3 Plaintiffs do not dispute that the CCPA contains a bar on class actions for damages.  
4 Instead, Plaintiffs note that (1) some Colorado courts have adjudicated motions for class  
5 certification without referring to the CCPA bar, and (2) at least one district court has found that the  
6 CCPA bar does not apply. *Friedman*, 2015 WL 8479746, at \*5 (collecting cases that have ignored  
7 the CCPA bar); *Andren v. Alere, Inc.*, 2017 WL 6509550, at \*21–22 (S.D. Cal. Dec. 20, 2017)  
8 (citing *In re Hydroxycut Mktg. and Sales Practices Litig.*, 299 F.R.D. 648, 653–54 (S.D. Cal.  
9 2014)) (finding CCPA bar does not apply under *Shady Grove*).

10 This is unpersuasive. First, Plaintiffs point to no Colorado decision actually holding that  
11 the CCPA bar is inapplicable or explaining why the CCPA bar can be ignored. Absent such  
12 authority, the Court is not inclined to overlook the statute’s plain language.

13 Second, the Court is not persuaded by *Andren*’s examination of the CCPA bar. *Myford*  
14 *Touch I* and *Friedman* considered the issue in more detail, and the Court finds their analyses more  
15 compelling. *Andren* also derives from the holding in *Hydroxycut* that “the only binding aspect of  
16 the splintered [*Shady Grove*] decision is its specific result.” *Hydroxycut*, 299 F.R.D. at 653.  
17 Although other courts have agreed, *Hydroxycut*’s interpretation appears to be the minority view.  
18 *Wittman v. CBI, Inc.*, 2016 WL 3093427, at \*5 (D. Mont. June 1, 2016) (collecting cases).  
19 *Hydroxycut* is also in tension with the Ninth Circuit’s approving citation of Justice Stevens’s  
20 *Shady Grove* concurrence in *Makaeff v. Trump University, LLC*, 736 F.3d 1180, 1187 n. 8 (9th  
21 Cir. 2013); *see also Garman*, 630 F.3d at 983 n.6 (expressly adopting Justice Stevens’s *Shady*  
22 *Grove* opinion as controlling); *Godin v. Schencks*, 629 F.3d 79, 86–87 (1st Cir. 2010) (suggesting  
23 same). Given that the weight of authority seems to point towards *Myford Touch I* and *Friedman*,  
24 and given that *Andren* rests on a case adopting the minority view of Justice Stevens’s concurrence,  
25 the Court will follow *Myford Touch I* and *Friedman* and hold that the CCPA bar applies here. *Cf.*  
26 *In re Anthem, Inc. Data Breach Litig.*, 162 F. Supp. 3d 953, 975 (N.D. Cal. 2016) (noting when  
27 faced with two plausible interpretations of unsettled state law, federal courts generally opt for the

1 path that restricts liability rather than expands it). Thus, Plaintiffs' class claims for money  
2 damages under the Colorado Consumer Protection Act ("CCPA") are barred.

3 The Court now turns to the heart of this case—whether Plaintiffs' remaining state law  
4 claims satisfy the requirements of Rule 23(a) and Rule 23(b)(3)

### 5 **C. Rule 23(a) Requirements**

6 Rule 23(a) provides that a district court may certify a class only if the class will satisfy the  
7 requirements of numerosity, commonality, typicality, and adequacy of representation. *Mazza*, 666  
8 F.3d at 588. The Court takes each requirement in turn.

#### 9 **1. Numerosity**

10 Pursuant to Rule 23(a)(1), Plaintiffs must show that "the class is so numerous that joinder  
11 of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Apple does not contest that the  
12 numerosity requirement is met in the instant case. Additionally, Plaintiffs have produced evidence  
13 that through the third quarter of 2017 Apple sales of iPhone 6 and iPhone 6 Plus units throughout  
14 Colorado, Illinois, Washington, Texas, and Florida far exceeded 40. ECF No. 173-7; *see Twegbe*  
15 *v. Pharmaca Integrative Pharmacy, Inc.*, 2013 WL 3802807, \*3 (N.D. Cal. July 17, 2013) ("[T]he  
16 numerosity requirement is usually satisfied where the class comprises 40 or more members."<sup>5</sup>)

#### 17 **2. Commonality**

18 Rule 23(a)(2) states that "[o]ne or more members of a class may sue or be sued as  
19 representative parties on behalf of all members only if ... there are questions of law or fact  
20 common to the class." Fed. R. Civ. P. 23(a)(2). This requirement has "been construed  
21 permissively, and all questions of fact and law need not be common to satisfy the rule." *Ellis v.*  
22 *Costco Wholesale Corp.*, 657 F.3d 970, 986 (9th Cir. 2011) (internal quotation marks and  
23 alteration omitted). Indeed, "for purposes of Rule 23(a)(2), even a single common question will  
24 do." *Dukes*, 564 U.S. at 359 (alteration and quotation marks omitted); *Mazza*, 666 F.3d at 589  
25 ("[C]ommonality only requires a single significant question of law or fact."). Specifically,

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26  
27 <sup>5</sup> Even if Colorado and Texas residents are not considered, the sales in the remaining states  
28 exceeded 40.

1 Plaintiffs must demonstrate the existence of common questions and “the capacity of a classwide  
 2 proceeding to generate common *answers* apt to drive the resolution of the litigation.” *Ellis*, 657  
 3 F.3d 986 (quotation marks omitted) (emphasis in original). Nevertheless, the “common contention  
 4 need not be one that will be answered, on the merits, in favor of the class.” *Alcantar v. Hobart*  
 5 *Serv.*, 800 F.3d 1047, 1053 (9th Cir. 2015) (internal quotation marks omitted).

6 In their motion for class certification, Plaintiffs identify a number of issues that are  
 7 common to the class, including whether Apple defectively designed the iPhones, whether Apple  
 8 knew of the touchscreen defect, whether Apple had a duty to disclose the touchscreen defect,  
 9 whether Apple concealed the defect, whether the touchscreen defect is the type of information a  
 10 buyer would be expected to rely upon in deciding to purchase an iPhone, whether concealment  
 11 was likely to deceive a reasonable consumer, and whether Apple is liable for punitive damages.  
 12 Mot. at 15.

13 This Court has previously found that two of the issues Plaintiffs identify, “the existence of  
 14 a defect and [Apple’s] knowledge of the defect are enough to meet ‘the relatively minimal  
 15 showing required to establish commonality.’” *Philips v. Ford Motor Co.*, 2016 WL 7428810, at \*7  
 16 (N.D. Cal. Dec. 22, 2016) (quoting *Ries v. Ariz. Beverages USA LLC*, 287 F.R.D. 523, 537 (N.D.  
 17 Cal. 2012)) (“*Philips II*”). That conclusion fully applies here, given that Apple vigorously disputes  
 18 Plaintiffs’ claim that the iPhones were defective and that Apple knew of the problem beforehand.  
 19 Consequently, because “one or more [of these] questions yield common answers which can drive  
 20 the litigation, commonality is satisfied.” *Myford Touch I*, 2016 WL 7734558, at \*9 (citing *Dukes*,  
 21 564 U.S. at 350).

### 22 **3. Typicality**

23 Under Rule 23(a)(3) a representative party must have claims or defenses that are “typical  
 24 of the claims or defenses of the class.” Fed. R. Civ. P. 23(a)(3). Typicality is satisfied “when each  
 25 class member’s claim arises from the same course of events, and each class member makes similar  
 26 legal arguments to prove the defendants’ liability.” *Rodriguez v. Hayes*, 591 F.3d 1105, 1122 (9th  
 27 Cir. 2010) (citations omitted). This requirement is “permissive and requires only that the

1 representative's claims are reasonably co-extensive with those of the absent class members; they  
2 need not be substantially identical." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir.  
3 1998). "[C]lass certification is inappropriate where a putative class representative is subject to  
4 unique defenses which threaten to become the focus of the litigation." *Hanon v. Dataproducts*  
5 *Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) (citations omitted). "The purpose of the typicality  
6 requirement is to assure that the interest of the named representative aligns with the interests of the  
7 class." *Id.*

8 Plaintiffs have established typicality. The class representatives, like the class as a whole,  
9 purchased an iPhone 6 or iPhone 6 Plus and subsequently encountered the touchscreen defect. Of  
10 course, the class representatives' touchscreen defect may not have manifested at exactly the same  
11 time as class members or in exactly the same way. However, this is unproblematic. "[D]istinctions  
12 about how the defects manifested... are irrelevant to Plaintiffs' theory of liability. ... Plaintiffs'  
13 theory is that they were harmed at the point of purchase, and therefore each of the named Plaintiffs  
14 may have a valid claim 'regardless of the manifestation of the defect.'" *Philips II*, 2016 WL  
15 7428810, at \*11 (quoting *Wolin v. Jaguar Land Rover North America, LLC*, 617 F.3d 1168, 1174  
16 (9th Cir. 2010)). Similarly, whether the defect manifested "at six months, nine months, or later  
17 goes to the extent of [class representatives'] damages and not whether [they] 'possess the same  
18 interest and suffered the same injury as the class members.'" *Wolin*, 617 F.3d at 1175 (quoting *E.*  
19 *Tex. Motor Freight Sys. Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977)).

20 Apple's arguments to the contrary are unpersuasive. Apple contends that the class  
21 members are not typical because they bought the iPhone 6 Plus instead of the iPhone 6, and claims  
22 that Siegal did not pay for his iPhone 6 Plus at all. The Court has previously considered and  
23 rejected these claims in the standing context; they are no more persuasive here. *See Philips II*,  
24 2016 WL 7428810, at \*11 (finding that differences between Ford Focus and Ford Fusion vehicles  
25 do not defeat typicality because the Electronic Power Assisted Steering alleged to be defective was  
26 substantially similar in both vehicles). The Court therefore concludes that Plaintiffs have  
27 established typicality.



#### 4. Adequacy

Finally, Rule 23(a)(4) requires “the representative parties [to] fairly and adequately protect the interests of the class.” Fed. R. Civ. P. 23(a)(4). This requirement turns upon resolution of two questions: “(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?” *Hanlon*, 150 F.3d at 1020.

Apple does not contest adequacy. Nevertheless, the Court finds that Plaintiff Siegal, Plaintiff Borzymowski, Plaintiff Brown, Plaintiff Bauer, Plaintiff Muilenberg, and Plaintiff Bon are adequate class representatives. The class representatives have the same claims and interest in obtaining relief, and have vigorously pursued relief on behalf of the proposed class. In particular, the class representatives “share an interest with members of the proposed class in proving that the [iPhones] were defective and that the proposed class was damaged by the defects.” *Philips II*, 2016 WL 7428810, at \*12. Apple does not contend that the class representatives have any conflicts of interest with other class members. Thus, the Court finds that the class representatives meet the adequacy requirement.

Additionally, the Court finds that Plaintiffs’ counsel has experience in prosecuting consumer protection actions involving claims similar to those in the instant case. ECF No. 48 at 3 (“McCune Wright is experienced in class action litigation, including class actions that, like the instant case, involve product defects. . . . Moreover, in this case, McCune Wright has investigated the potential class action claims, consulted with experts, drafted the first amended complaint, and taken a leadership role among the law firms involved in this action.”); *see also* ECF No. 25-1 (McCune Wright firm resume). Plaintiffs’ counsel has vigorously litigated this case from the beginning, and Apple does not contest that Plaintiffs’ counsel will continue to do so. Thus, the Court finds that Plaintiffs’ counsel meets the adequacy requirement.

#### 5. Summary

In sum, the Court finds that Plaintiffs have satisfied the Rule 23(a) requirements of numerosity, commonality, typicality, and adequacy of representation. The Court now turns to Rule



1 23(b)(3), beginning with the predominance requirement.

2 **D. Rule 23(b)(3) Predominance**

3 **1. Principles Governing the Predominance Analysis**

4 Under Rule 23(b)(3), plaintiffs must show “that the questions of law or fact common to  
5 class members predominate over any questions affecting only individual members.” Fed. R. Civ.  
6 P. 23(b)(3). “The Rule 23(b)(3) predominance inquiry” is meant to “tes[t] whether proposed  
7 classes are sufficiently cohesive to warrant adjudication by representation.” *Amchem Prods., Inc.*  
8 *v. Windsor*, 521 U.S. 591, 623 (1997). The Ninth Circuit has held that “there is clear justification  
9 for handling the dispute on a representative rather than an individual basis” if “common questions  
10 present a significant aspect of the case and they can be resolved for all members of the class in a  
11 single adjudication.” *Hanlon*, 150 F.3d at 1022. In ruling on a motion for class certification based  
12 on Rule 23(b)(3), a district court must conduct a rigorous analysis to determine whether the class  
13 representatives have satisfied both the predominance and superiority requirements. *See Zinser*, 253  
14 F.3d at 1186. The predominance analysis focuses on “the legal or factual questions that qualify  
15 each class member’s case as a genuine controversy” to determine “whether proposed classes are  
16 sufficiently cohesive to warrant adjudication by representation.” *Amchem Prods.*, 521 U.S. at 623;  
17 *see also* Fed. R. Civ. P. 23(b)(3) (to certify a class, the court must find that “questions of law or  
18 fact common to class members predominate over any questions affecting only individual  
19 members”).

20 This Court has previously identified five principles that guide the Court’s predominance  
21 inquiry:

22 First, and most importantly, the critical question that this Court must answer is  
23 whether common questions predominate over individual questions. *Amgen*, 133 S.  
24 Ct. at 1191. In essence, this Court must determine whether common evidence and  
25 common methodology could be used to prove the elements of the underlying cause  
26 of action. *Id.* Second, in answering this question, this Court must conduct a  
27 “rigorous” analysis. *Comcast Corp.*, 133 S. Ct. at 1432. This analysis may overlap  
28 with the merits, but the inquiry cannot require Plaintiffs to prove elements of their  
substantive case at the class certification stage. *Amgen*, 133 S. Ct. at 1194. Third,  
this Court must determine not only the admissibility of expert evidence that forms  
the basis of the methodology that demonstrates whether common questions

1 predominate. *Ellis*, 657 F.3d at 982. Rather, this Court must also determine whether  
 2 that expert evidence is persuasive, which may require the Court to resolve  
 3 methodological disputes. *Id.*; see also *In re Rail Freight Fuel Surcharge Antitrust*  
 4 *Litig.*, 725 F.3d 924, 255 (D.C. Cir. 2013). Fourth, the predominance inquiry is  
 5 not a mechanical inquiry of “bean counting” to determine whether there are more  
 6 individual questions than common questions. *Butler v. Sears, Roebuck & Co.*, 727  
 7 F.3d 796, 801 (7th Cir. 2013). Instead, the inquiry contemplates a qualitative  
 8 assessment, which includes a hard look at the soundness of statistical models. *Id.*;  
 9 *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d at 255. Fifth, Plaintiffs  
 10 are not required to show that each element of the underlying cause of action is  
 11 susceptible to classwide proof. *Amgen*, 133 S. Ct. at 1196. Rather, they need only  
 12 show that common questions will predominate with respect to their class as a  
 13 whole. *Id.*

14 *In re High-Tech Empl. Antitrust Litig.*, 985 F. Supp. 2d 1167, 1186–87 (N.D. Cal. 2013). With  
 15 these principles in mind, the Court turns to the parties’ predominance arguments.

## 16 2. Analysis

17 Plaintiffs argue that common issues predominate in their proposed class. Specifically,  
 18 Plaintiffs claim that this suit turns on common questions of “whether the iPhone 6 and iPhone 6  
 19 Plus suffer from the [touchscreen] defect, whether Apple had a duty to disclose the defect, whether  
 20 Apple knowingly concealed the defect, and whether this was a material omission.” Mot. at 18.

21 Apple contends that common issues do not predominate over individual ones for several  
 22 reasons. First, Apple argues that individual inquiries into whether class members relied on the  
 23 alleged omissions will be required. Second, Apple argues that individual inquiries into whether  
 24 class members were exposed to the alleged omissions will be required. Third, Apple argues that  
 25 individual inquiries into whether a given class member’s iPhone problems were caused by the  
 26 touchscreen defect will be required. Fourth, Apple argues that Plaintiffs’ damages model is  
 27 inadequate. The Court addresses each of Apple’s arguments in turn. The Court finds that common  
 28 issues do not predominate for claims arising under the Texas Deceptive Trade Practices Act and  
 therefore denies certification of Texas class members. However, the Court finds that Plaintiffs  
 have shown that common issues do not predominate for their remaining Illinois, Florida, and  
 Washington claims.<sup>6</sup>

<sup>6</sup> Apple does not meaningfully dispute that statutory requirements other than reliance and exposure

1                   **i. Reliance**

2                   Plaintiffs’ motion for class certification contends “that reliance may be inferred classwide”  
 3 if Plaintiffs prove uniform exposure to a material omission. Mot. at 22. Apple responds that the  
 4 state statutes at issue prohibit such an inference, that absent such an inference individualized  
 5 inquiries into class members’ reliance will be necessary, and that those individualized inquiries are  
 6 fatal to Rule 23(b)(3) predominance. The Court agrees that individualized inquiries would be  
 7 necessary and that they would defeat predominance. *See Mazza*, 666 F.3d at 596 (“We vacate the  
 8 class certification decision on this ground because common questions of fact do not predominate  
 9 where an individualized case must be made for each member showing reliance.”); *Philips II*, 2016  
 10 WL 7428810, at \*16 (denying class certification in part because reliance on misrepresentations  
 11 would vary from class member to class member). Nonetheless, the Court disagrees with Apple’s  
 12 contention that the state statutes prohibit inferring reliance on a classwide basis. Although Apple is  
 13 correct that Texas prohibits inferring reliance, Illinois, Florida, and Washington have no such  
 14 prohibition.<sup>7</sup>

15                   The Illinois Consumer Fraud and Deceptive Trade Practices Act (“ICFDTPA”), does not  
 16 require a plaintiff to prove reliance. *Id.* (collecting cases). On the contrary, “the Illinois Supreme  
 17 Court has repeatedly held that, unlike a claim for common law fraud, reliance is not required to  
 18 establish [an ICFDTPA] consumer fraud claim.” *Cozzi Iron & Metal, Inc. v. U.S. Office Equip.,*  
 19 *Inc.*, 250 F.3d 570, 576 (7th Cir. 2001). Granted, the ICFDTPA does require proof of causation  
 20 which in practice is similar to reliance. *See Mednick v. Precor, Inc.*, 320 F.R.D. 140, 150 (N.D. Ill.  
 21 2017) (“While it is true, as Plaintiffs argue, that the [ICFDTPA] does not require reliance, the  
 22 statute does require proximate causation.”). However, in ICFDTPA class actions “where the  
 23 representation being challenged was made to all putative class members, Illinois courts have

24  
 25 can be established on a classwide basis, and the Court discerns nothing in the state statutes that  
 26 would prove problematic. Thus, the Court’s analysis centers on reliance and exposure.

27 <sup>7</sup> Apple briefly suggests that the existence of an online User Guide that discloses that iPhones may  
 28 be damaged if not handled with care would require individual inquiries because class members  
 may have seen it prior to purchase. This is unpersuasive, given that Apple concedes that the User  
 Guide was inside the iPhone box, which was not opened until *after* purchase.

1 concluded that causation is susceptible of classwide proof and that individualized inquiries  
 2 concerning causation do not predominate if plaintiffs are able to adduce sufficient evidence that  
 3 the representation was material.” *In re ConAgra*, 90 F. Supp. 3d at 997 (collecting cases). Thus, if  
 4 Plaintiffs can show that Apple’s omission was material, “they will be able to prove proximate  
 5 cause on a classwide basis as well.” *Id.* at 999.

6 The Florida Deceptive and Unfair Trade Practices Act (“FDUTPA”) does not require proof  
 7 of individual reliance. *Cold Stone Creamery, Inc. v. Lenora Foods I, LLC*, 332 F. App’x 565, 567  
 8 (11th Cir. 2009) (“[T]he FDUTPA does not require a plaintiff to prove actual reliance on the  
 9 alleged conduct.”). Rather, FDUTPA claims “are governed by a ‘reasonable consumer’ standard,  
 10 obviating the need for proof of individual reliance by putative class members.” *In re ConAgra*, 90  
 11 F. Supp. 3d at 996 (collecting cases). Thus, Plaintiffs can prove reliance classwide because all  
 12 Plaintiffs must do is “show that [Apple’s] allegedly misleading representation was ‘likely to  
 13 mislead a reasonable consumer acting reasonably under the circumstances, *i.e.*, the plaintiff’s  
 14 circumstances.”” *Id.* at 996–97 (quoting *In re Motions to Certify Classes Against Court Reporting*  
 15 *Firms for Charges Relating to Word Indices*, 715 F.Supp.2d 1265, 1282 (S.D. Fla. 2010)). Nor is  
 16 causation problematic, because “the Eleventh Circuit has said that the FDUTPA does not require a  
 17 plaintiff to prove the misrepresentation caused them to do anything; rather, the causation  
 18 requirement is resolved based on how an objective reasonable person would behave under the  
 19 circumstances.” *Fitzpatrick v. Gen. Mills, Inc.*, 263 F.R.D. 687, 694–95 (S.D. Fla. 2010), *rev’d on*  
 20 *other grounds*, 635 F.3d 1279 (11th Cir. 2011).

21 The Washington Consumer Protection Act (“WCPA”) presumes reliance. More precisely,  
 22 although the Washington Supreme Court has not definitively held that there is a presumption of  
 23 reliance in WCPA cases based on omissions, federal and state cases interpreting the WCPA have  
 24 found that there is a “a rebuttable presumption of reliance for [W]CPA fraud claims.” *Blough v.*  
 25 *Shea Homes, Inc.*, 2014 WL 3694231, at \*13 (W.D. Wash. July 23, 2014); *Grays Harbor*  
 26 *Adventist Christian Sch. v. Carrier Corp.*, 242 F.R.D. 568, 573 (W.D. Wash. 2007) (employing  
 27 rebuttable presumption of reliance in WCPA fraud case); *Deegan v. Windermere Real Estate/Ctr.-*

1 *Isle, Inc.*, 391 P.3d 582, 589–90 (Wash. App. 2017) (same). This presumption also renders  
 2 causation unproblematic because in omissions cases the presumption of reliance resolves  
 3 causation problems—plaintiffs are presumed to have relied on omissions, and thus the omissions  
 4 are presumed to have proximately caused plaintiffs’ harm. *See Deegan*, 391 P.3d at 587–88;  
 5 *Blough*, 2014 WL 3694231, at \*13.

6 In theory, the Texas Deceptive Trade Practices Act (“TDTPA”) permits a classwide  
 7 inference of reliance. *See In re ConAgra*, 90 F. Supp. 3d at 1016 (“[T]he Texas Supreme Court has  
 8 held that reliance and causation can be proved on a classwide basis when appropriate.”). In  
 9 practice, the TDTPA does not. Both parties focus their attention on *Henry Schein, Inc. v.*  
 10 *Stromboe*, 102 S.W.3d 675 (Tex. 2003). *See* ECF No. 199-11 at 24–25. Plaintiffs contend that  
 11 *Henry Schein* permits an inference of reliance and causation. However, Plaintiffs’ argument is  
 12 premised on a selective reading of the Texas Supreme Court’s decision. In fact, *Henry Schein* held  
 13 that “the 20,000 class members in the present case are held to the same standards of proof of  
 14 reliance—and for that matter all the other elements of their claims—that they would be required to  
 15 meet if each sued individually.” *Id.* at 693. Subsequent Texas decisions confirm that while *Henry*  
 16 *Schein* “did not entirely preclude class actions in which reliance was an issue, ... it did make such  
 17 cases a near-impossibility.” *Fid. & Guar. Life Ins. Co. v. Pina*, 165 S.W.3d 416, 423 (Tex. App.  
 18 2005); *Texas South Rentals, Inc. v. Gomez*, 267 S.W.3d 228, 237 (Tex. App. 2008) (finding  
 19 same).<sup>8</sup> This Court therefore concludes that “Texas courts require individualized proof of reliance  
 20 and reject the idea that reliance may be inferred from the fact that a reasonable person would find  
 21 the misrepresentation to be important to his decision-making process.” *Brazil v. Dell Inc.*, 2010  
 22 WL 8816312, at \*5 (N.D. Cal. Mar. 29, 2010); *accord Myford Touch I*, 2016 WL 7734558, at \*23  
 23 n.23 (“Texas requires individualized proof of reliance. Certification would thus be inappropriate  
 24 even if the Court presumed classwide exposure.” (internal citations omitted)). Plaintiffs’ class

25 \_\_\_\_\_  
 26 <sup>8</sup> *Henry Schein* did so by holding that “reliance upon misrepresentations made to consumers must  
 27 be proved with class-wide proof; class-wide proof requires the existence of class-wide evidence.  
 28 Class-wide evidence requires that there be no differences in how individual members of the class  
 relied on the misrepresentation.” *Pina*, 165 S.W.3d at 423 (internal citations omitted).

1 claims under the Texas Deceptive Trade Practices Act therefore fail to satisfy Rule 23(b)(3)  
2 predominance.

3 In sum, the Court finds that Illinois’s ICFDTPA, Florida’s FDUTPA, and Washington’s  
4 WCPA permit a classwide determination of reliance and causation. However, the Court finds that  
5 individual inquiries would be required to prove reliance under Texas’s TDTPA and that common  
6 issues therefore do not predominate for Texas class members. Therefore, the Court denies  
7 certification of Plaintiffs’ TDTPA class claims.

### 8 ii. Exposure

9 All three remaining state statutes—the ICFDTPA, FDUTPA, and WCPA—require proof  
10 of exposure to the allegedly fraudulent omissions. *Barbara’s Sales, Inc. v. Intel Corp.*, 879 N.E.2d  
11 910, 927 (2007) (finding ICFDTPA class action requires plaintiffs to “prove that each and every  
12 consumer who seeks redress actually saw and was deceived by the statements in question.”);  
13 *Montgomery v. New Piper Aircraft, Inc.*, 209 F.R.D. 221, 229 (S.D. Fla. 2002) (noting FDUTPA  
14 liability requires that “each putative class member was exposed to the Defendants’ advertising and  
15 marketing materials alleged to constitute a deceptive trade practice”); *Helde v. Knight Transp.,*  
16 *Inc.*, 2013 WL 5588311, at \*5 (W.D. Wash. Oct. 9, 2013) (proving causation under the WCPA  
17 requires “testimony from each class member to determine what, if any, advertising he or she  
18 saw”).

19 Plaintiffs point to four materials that allegedly omitted the touchscreen defect: (1) the  
20 iPhone box, (2) materials inside the box, (3) the iPhone setup process, and (4) subsequent software  
21 updates.<sup>9</sup> Apple contends that the only source of exposure is the iPhone box itself, because the  
22 iPhone box is the only source of information class members would have seen before purchasing  
23

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24 <sup>9</sup> Plaintiffs’ description of the materials alleged to contain the omissions varies over the course of  
25 the briefing. To facilitate analysis, the Court construes the materials as consisting of the iPhone  
26 box, the materials inside the iPhone box, the setup process, and subsequent software updates.  
27 *Compare* Mot. at 16 (indicating omissions on “Box, Documents, and Set Up Software”) *with id.* at  
28 2, 22 (contending omissions on iPhone box, setup process, and subsequent software updates) *and*  
Reply at 2 (alleging omissions on “product packaging (including the box inserts), a setup process  
requiring email input, and numerous subsequent communications between Apple and consumers  
(via software updates, press releases, and emails).”).



1 the iPhone. Plaintiffs do not rebut Apple’s argument on the facts. Instead, Plaintiffs contend  
 2 Apple’s argument is irrelevant for two reasons. First, Plaintiffs argue that class members’  
 3 exposure to the omissions need not precede the iPhone purchase, but rather can occur at any time  
 4 during Apple’s 14 day return period for the iPhone. Second, Plaintiffs contend that all the class  
 5 members saw the iPhone box before purchase, and that this is enough to establish exposure.  
 6 Plaintiffs’ first argument is unpersuasive, but the Court agrees with Plaintiffs’ second argument.

7 The Court begins with Plaintiffs’ first argument. If Plaintiffs are correct, they have likely  
 8 established exposure because class members undoubtedly saw at least one of the four materials  
 9 during the two weeks following their iPhone purchase. The problem, however, is that Plaintiffs do  
 10 not provide authority establishing that exposure can occur anytime during the 14 day return  
 11 period. Plaintiffs instead rely entirely on a California Court of Appeal decision and a strained  
 12 reading of the last substantive order in this case. Reply at 1–2 (citing *Weinstat v. Dentsply Int’l,*  
 13 *Inc.*, 103 Cal. Rptr. 3d 614 (Cal. Ct. App. 2010); *Davidson II*, 2017 WL 3149305). A California  
 14 Court of Appeal decision is at best secondarily relevant given that the claims at issue arise under  
 15 the laws of Illinois, Florida, and Washington. Moreover, *Weinstat* does not actually say that  
 16 exposure can occur at any time during a return window. *See Weinstat*, 103 Cal. Rptr. 3d at 1229–  
 17 30 (finding that in some cases a warranty handed over after purchase can be said to be part of the  
 18 basis of the bargain). As for *Davidson II*, contrary to Plaintiffs’ framing, the Court did not hold  
 19 that exposure could occur any time during the return window. All the Court found was that  
 20 Plaintiffs’ allegations of exposure were sufficient to survive Apple’s motion to dismiss where the  
 21 non-moving party receives the benefit of all inferences. *Davidson II*, 2017 WL 3149305, at \*14 &  
 22 n.5. Consequently, Plaintiffs have not established that exposure could occur after sale.

23 The Court now turns to Plaintiffs’ argument that class members were exposed to the  
 24 iPhone box before purchase. Courts interpreting the ICFDTPA, FDUTPA, and WCPA presume  
 25 class members who purchased products with misleading packaging (*i.e.* the iPhone box) were  
 26 exposed to misleading statements on that packaging. *Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750,  
 27 752–53 (7th Cir. 2014) (reversing exposure-based denial of class certification in ICFDTPA case



1 because alleged misrepresentations were on coffee pods’ packaging); *Mednick v. Precor, Inc.*, 320  
 2 F.R.D. 140, 151 (N.D. Ill. 2017) (presuming class members were exposed to treadmills’ packaging  
 3 in ICFDTPA case); *Smith v. Wm. Wrigley Jr. Co.*, 2010 WL 2401149, at \*4 (S.D. Fla. June 15,  
 4 2010) (FDUTPA case presuming class members were exposed to uniform misrepresentations  
 5 because they were made on chewing gum packaging); *see Torres*, 835 F.3d at 1137 (9th Cir. 2016)  
 6 (WCPA case noting that existence of common policy or practice is evidence class as a whole was  
 7 exposed to allegedly misleading omissions); *In re: Premera Blue Cross Customer Data Sec.*  
 8 *Breach Litig.*, 2017 WL 539578, at \*4–5 (D. Or. Feb. 9, 2017) (presuming exposure in WCPA  
 9 misrepresentation case where misrepresentations to class members were substantially identical).

10 That approach is commonplace in class actions that derive from product packaging. For  
 11 instance, this Court has previously found that “all class members [who] purchased the product ...  
 12 were ‘necessarily exposed’ to the defendant’s omissions [on the packaging] prior to purchase in  
 13 the same way.” *Butler v. Porsche Cars N. Am., Inc.*, 2017 WL 1398316, at \*11 (N.D. Cal. Apr. 19,  
 14 2017); *Ehret*, 148 F. Supp. 3d at 895 (“[I]n numerous cases involving claims of false-advertising,  
 15 class-wide exposure has been inferred because the alleged misrepresentation is on the packaging  
 16 of the item being sold.”); *Rikos v. Procter & Gamble Co.*, 799 F.3d 497, 511 (6th Cir. 2015)  
 17 (agreeing misrepresentation made to all class members “[b]ecause, by definition, every member of  
 18 the class must have bought one of the Products and, thus, seen the packaging.” (citation omitted));  
 19 *McCrary v. Elations Co., LLC*, 2014 WL 1779243, at \*13 (C.D. Cal. Jan. 13, 2014) (“[A]  
 20 presumption of exposure is inferred where, as here, the alleged misrepresentations were on the  
 21 outside of the packaging of every unit for an extended period.”); *Johns v. Bayer Corp.*, 280 F.R.D.  
 22 551, 558 (S.D. Cal. 2012) (“[A]ll class members necessarily saw Bayer’s prostate claim, since it  
 23 appeared prominently on the packaging itself.”). Plaintiffs seek to certify a class consisting of  
 24 individuals “who purchased an Apple iPhone 6 or iPhone 6 Plus from Apple or an Apple  
 25 Authorized Service Provider ... .” Mot. at 3. The Court will therefore follow the prevailing  
 26 interpretation of the ICFDTPA, FDUTPA, and WCPA, and infer that class members who by  
 27 definition bought an iPhone also saw the box.

1 Apple argues against this inference by contending Plaintiffs were not, in fact, uniformly  
2 exposed to the iPhone box. Apple relies on the declaration of Gershon Glezer, an Apple “Store  
3 Leader,” that details the purchase process for the iPhone 6 and iPhone 6 Plus. ECF No. 184-22  
4 (Declaration of Gershon Glezer, or “Glezer Decl.”). Glezer’s declaration makes three salient  
5 points. First, Glezer states online iPhone buyers paid for the iPhone before it was delivered, and  
6 thus before the purchasers had the iPhone box in their possession. *Id.* ¶ 3. Second, Glezer states  
7 the iPhone 6 and iPhone 6 Plus boxes were kept in the back of Apple Stores and were not visible  
8 until they were brought out so a customer could buy one. Glezer adds that Apple Store employees,  
9 absent a customer’s request to hold the iPhone box, would then scan the iPhone box in front of  
10 customers. *Id.* ¶¶ 4–5. Third, Glezer states that Apple “did not require that third-party iPhone 6 or  
11 iPhone 6 Plus retailers follow specific procedures during online or in-store sales transactions,”  
12 Glezer Decl. ¶ 9, thus there must have been variation in how class members were exposed to  
13 iPhone boxes when they purchased iPhones from third-party retailers.

14 These points are not persuasive. First, Apple’s online argument closely resembles the one  
15 rejected by the court in *Brickman v. Fitbit, Inc.*, 2017 WL 5569827 (N.D. Cal. Nov. 20, 2017).  
16 Fitbit there argued against uniform exposure on the grounds that some of its devices were sold  
17 online, and that online purchasers may not have read the allegedly deceptive statements. *Id.* at \*5.  
18 The district court rejected this theory and granted certification because “Fitbit offers no evidence  
19 to back up this theory,” was “entirely vague about which channel—either its own sales or third-  
20 party retail sales—is supposedly afflicted with this online issue,” and in any case “presents no  
21 evidence that its statements were in any way not visible to potential buyers.” *Id.* The same holds  
22 true here. Neither Glezer nor Apple offer evidence as to what buyers may or may not have seen  
23 when buying the iPhone online.

24 Apple’s second and third arguments fare no better. Apple does not dispute that in-store  
25 customers were present as Apple Store employees held the iPhone box to scan it and complete the  
26 sale. Thus, class members who bought their iPhones in store saw the iPhone box. Finally, the fact  
27 that Apple did not impose specific procedures on third-party iPhone retailers is irrelevant, absent  
28

1 some indication of what third-party retailers actually did or did not display online. *Cf. Suchanek*,  
2 764 F.3d at 758 (“Often the online ‘store’ shows an image of the package that the customer can  
3 examine in detail; if that was done here, then the online group may be in essentially the same  
4 position as those who bought in physical stores.”).

5 Perhaps more fundamentally, the decisions upon which Apple principally relies in arguing  
6 against common exposure are factually dissimilar from the instant case. *Mazza*, 666 F.3d 581; *In*  
7 *re Hyundai & Kia Fuel Economy Litigation*, 881 F.3d 679 (9th Cir. 2018). *Mazza* is inapposite  
8 because it concerned advertisements, not packaging. Reflecting this, *Mazza* reversed the district  
9 court’s order granting class certification because “it is likely that many class members were never  
10 exposed to the allegedly misleading advertisements, insofar as advertising of the challenged  
11 system was very limited.” 666 F.3d at 596. Similarly, *In re Hyundai* concerned advertising and  
12 disclosure stickers that may or may not have been provided to class members. 881 F.3d at 704.  
13 Here, by contrast, the omissions are alleged to be on packaging class members were directly  
14 exposed to in the course of buying their iPhones. This is sufficient to establish exposure.

### 15 **iii. Manifestation**

16 Apple next argues that individual issues predominate because individual inquiries will be  
17 necessary in order to establish whether (1) a given class member actually encountered the  
18 touchscreen defect, and (2) whether a given class member’s iPhone malfunction was the result of  
19 the touchscreen defect or some other cause (*e.g.* dropping the iPhone). The Court takes each  
20 argument in turn.

21 First, Apple argues that Florida and Texas law preclude certification of a class if the class  
22 includes individuals who never actually encountered the underlying defect. Significantly, Apple  
23 does not argue that classwide manifestation is required by Illinois and Washington law, and the  
24 Court has previously explained why Plaintiffs’ Texas claim fails on reliance grounds. In practice  
25 then, Apple’s argument only applies to Plaintiffs’ claims under Florida law.

26 Apple relies on *Kia Motors America Corp. v. Butler*, 985 So. 2d 1133 (Fla. Dist. Ct. App.  
27 2008), which reversed an order granting class certification because the class “seeks compensation

1 not only for class members whose brakes have manifested a deficiency, but also for those whose  
2 brakes have performed satisfactorily.” *Id.* at 1139. However, subsequent cases have disagreed with  
3 *Butler* and thrown its holding into question. *In re: Gen. Motors LLC Ignition Switch Litig.*, 2016  
4 WL 3920353, at \*25 (S.D.N.Y. July 15, 2016) (disagreeing with *Butler* and finding putative class  
5 had stated a claim under FDUTPA based on vehicle defect that had not manifested in all class  
6 vehicles). In particular, *Carriuolo v. Gen. Motors Co.*, 823 F.3d 977, 985–87 (11th Cir. 2016),  
7 rejected the argument that a plaintiff could only recover under the FDUTPA if a defect had  
8 manifested. Instead, the Eleventh Circuit explained that FDUTPA damages should be the  
9 difference between the product as represented and the product as received, and that this “benefit of  
10 the bargain” model should be applied whether or not a class member had encountered the defect.  
11 *Id.* at 986–87. *Carriuolo* is the more recent case, and so the Court adopts its interpretation of the  
12 FDUTPA and rejects Apple’s claim that manifestation is necessary for recovery. *See Ignition*  
13 *Switch Litig.*, 2016 WL 3920353, at \*25–27 (doing same).

14 This conclusion is in line with the Ninth Circuit’s decision in *Wolin*, which held “that  
15 proof of the manifestation of a defect is not a prerequisite to class certification.” 617 F.3d at 1173;  
16 *see Philips II*, 2016 WL 7428810, at \*18 (noting same). Apple’s argument is therefore at odds  
17 with both Florida law and the Ninth Circuit’s approach to manifestation. *See also Keegan v. Am.*  
18 *Honda Motor Co.*, 284 F.R.D. 504, 529 (C.D. Cal. 2012) (“While it is true that *Wolin* addressed  
19 the substantive law of Michigan and Florida[,] the Ninth Circuit’s application of Rule 23(b) did  
20 not turn on the substantive law at issue. Indeed, the court’s discussion of predominance and  
21 superiority makes almost no reference to the substantive law underlying plaintiffs’ claims; it is  
22 mentioned only in connection with the court’s description of the allegations in the complaint.”).  
23 The Court therefore rejects Apple’s argument that individualized inquiries into whether the defect  
24 has manifested will be necessary because manifestation is not required under the law of Illinois,  
25 Washington, or Florida.

26 Second, Apple argues that individualized inquiries will be necessary to determine whether  
27 a given class member’s iPhone malfunction was the result of the touchscreen defect or some other

1 cause (e.g. dropping the iPhone). *Wolin* rebuts this claim. The plaintiffs in *Wolin* alleged certain  
2 Land Rover vehicles were defective because the vehicles had a “defective alignment geometry”  
3 that caused the tires to wear more quickly than usual. *Wolin*, 617 F.3d at 1170. Land Rover argued  
4 that common issues did not predominate for the purposes of class certification because “the  
5 evidence w[ould] demonstrate that the prospective class members’ vehicles do not suffer from a  
6 common defect, but rather, from tire wear due to individual factors such as driving habits and  
7 weather.” *Id.* at 1173. The Ninth Circuit rejected this argument, noting that the plaintiffs  
8 “assert[ed] that the defect exists in the alignment geometry, not in the tires, [and] that Land Rover  
9 failed to reveal material facts in violation of consumer protection laws.” *Id.* *Wolin* therefore held  
10 that “[a]lthough individual factors may affect premature tire wear, they do not affect whether the  
11 vehicles were sold with an alignment defect” and thus that “all of [the plaintiffs’] allegations are  
12 susceptible to proof by generalized evidence.” *Id.*

13 The same is true in the instant case. Individual factors may affect class members’ iPhones’  
14 performance, but these individual factors do not affect the ultimate question whether the iPhones  
15 were sold with a defective touchscreen. Like Land Rover in *Wolin*, what Apple argues in the  
16 instant case “is whether class members can win on the merits.” *Id.* Plaintiffs argue that class  
17 members’ iPhones are defective because the iPhones’ “external aluminum casing, whose primary  
18 purpose is to protect the sensitive internal components from strain, is insufficient to prevent the  
19 phones from bending during normal use, thereby causing the touchscreen to fail. Mot. at 4. Apple  
20 responds that there is no defect in the iPhone 6 or iPhone 6 Plus and that the true cause of any  
21 touchscreen issues is users dropping their iPhones. Opp. at 2; see also *Philips II*, 2016 WL  
22 7428810, at \*14 (similar argument raised by defendant that alleged defect was due to individual  
23 factors).

24 The Court need not decide at this stage which party is correct. See *Amgen Inc. v.*  
25 *Connecticut Retirement Plans and Trust Funds*, 133 S. Ct. 1184, 1194–95 (2013) (“Merits  
26 questions may be considered to the extent—but only to the extent—that they are relevant to  
27 determining whether the Rule 23 prerequisites for class certification are satisfied.”). In order to

1 determine whether Rule 23(b)(3)'s predominance requirement is met, the Court needs only to  
 2 consider Plaintiffs' theory of the case and the type of evidence that Plaintiffs will use to prove this  
 3 theory. Plaintiffs allege that the iPhone 6 and iPhone 6 Plus suffer from a single design defect, and  
 4 as in *Wolin*, whether this allegation is true can be determined on a common basis. Thus, Apple's  
 5 argument that there was no common defect does not defeat predominance for Plaintiffs' claims  
 6 under Illinois, Washington, or Florida law. *See Philips II*, 2016 WL 7428810, at \*14 (reaching  
 7 same conclusion in response to similar argument). The Court now turns to Plaintiffs' damages  
 8 theories.

#### 9 **iv. Damages Model**

10 Apple's final predominance argument is that Plaintiffs' damages model fails to satisfy the  
 11 requirements set forth in *Comcast*. The Court concludes that Apple is correct.<sup>10</sup>

12 Although individual damages calculations alone do not make class certification  
 13 inappropriate under Rule 23(b)(3), *see Leyva v. Medline Indus., Inc.*, 716 F.3d 510, 514 (9th Cir.  
 14 2013) ("[T]he amount of damages is invariably an individual question and does not defeat class  
 15 action treatment."), the United States Supreme Court has held a plaintiff bears the burden of  
 16 providing a damages model showing that "damages are susceptible of measurement across the  
 17 entire class for purposes of Rule 23(b)(3)." *Comcast*, 569 U.S. at 35. The damages model "must  
 18 measure only those damages attributable to" the plaintiff's theory of liability. *Id.* If the plaintiff  
 19 does not offer a plausible damages model that matches her theory of liability, "the problem is not  
 20 just that the Court will have to look into individual situations to determine the appropriate measure  
 21 of damages; it is that Plaintiffs have not even told the Court what data it should look for." *Myford*  
 22 *Touch I*, 2016 WL 7734558, at \*15.

23 Plaintiffs' theory of liability is that "Apple failed to disclose the [touchscreen defect] in the  
 24

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25 <sup>10</sup> Plaintiffs argue in a footnote that the Court should also certify the class based on the damages  
 26 theory advanced in the expert report of Jessa Jones. ECF No. 174-38. This argument is not well  
 27 taken. Jones's report states that she was hired "to offer expert opinion on the history and  
 28 mechanism of the iPhone 6/6+ touch system fault from my extensive experience." *Id.* at 2. There  
 is no reference to a damages model in the report.



1 iPhone 6 and 6 Plus, causing consumers to pay more for those products than they otherwise would  
 2 have.” Mot. at 26 (citing FACC ¶¶ 5, 188, 200, 213, 270). Accordingly, Plaintiffs’ damages  
 3 expert, Dr. Stefan Boedeker, proposes a “Choice-Based Conjoint Analysis” damages model. ECF  
 4 No. 174-46 (Declaration of Stefan Boedeker, or “Boedeker Decl.”). As Boedeker notes, “[t]he  
 5 general idea behind Conjoint Analysis is that consumers’ preferences for a particular product are  
 6 driven by features or descriptions of features associated with that product.” *Id.* at 20. Survey  
 7 respondents are therefore asked to choose between different sets of product attributes, the  
 8 responses are aggregated, and statistical methods are then used to determine the value (often  
 9 termed “part-worth”) that consumers attach to each specific attribute. *Id.* at 20–21; *In re NJOY,*  
 10 *Inc. Consumer Class Action Litig.*, 120 F. Supp. 3d 1050, 1073 (C.D. Cal. 2015) (discussing  
 11 conjoint analysis).

12 In this case, Boedeker asked survey respondents to choose between hypothetical phones  
 13 that differed in storage capacity (32, 64, or 128 gigabytes), screen size (4.7, 5.5, or 5.8 inches),  
 14 talk time (10 or 14 hours), price (\$400, \$550, \$700, or \$850), and defectiveness (no defect, defect  
 15 costing \$100 to repair or replace, or defect costing \$200 to repair or replace). Boedeker Decl. at  
 16 38–40. Boedeker then isolated the (negative) value associated with defectiveness and found that  
 17 the economic loss was \$323 for the \$100 defect, and \$432 for the \$200 defect. *Id.* at 50–51.<sup>11</sup>  
 18 Economic loss could also be expressed in terms of the phone’s overall price, in which case the loss  
 19 was 51.7 percent of the phone’s price for the \$100 defect, and 69.2 percent of the phone’s price for  
 20 the \$200 defect. *Id.*

21 Apple advances three arguments as to why Boedeker’s methodology fails to satisfy  
 22 *Comcast*. First, Apple criticizes Boedeker’s analysis for failing to include as phone attributes  
 23 “brand” and “operating system” when those are two of the most important reasons that consumers  
 24 buy iPhones. Opp. at 25. The Court is unpersuaded. Boedeker expressly recognized the  
 25

26 \_\_\_\_\_  
 27 <sup>11</sup> It is unclear why this estimate diverges so dramatically from the cost to repair the hypothetical  
 28 phones. Indeed, Plaintiffs’ own technical expert, Jessa Jones, estimates that repair costs should be  
 around \$150, including parts and labor. ECF No. 174-38 at 25.



1 importance of brand and operating system, and held them constant by limiting survey participation  
2 to “iPhone users, which all purchased the same brand and operating system. Therefore, I do not  
3 include brand and operating system as attributes.” Boedeker Decl. at 33. Apple does not explain  
4 why deciding to control for the two factors in this way is problematic. Thus, the Court rejects  
5 Apple’s argument.

6 Second, Apple argues Boedeker based his analysis solely on survey respondents’  
7 subjective willingness to pay, or demand, without considering the supply side of the equation.  
8 Apple contends that this merely measures consumers’ subjective valuation of a defective iPhone,  
9 whereas the “[t]he ultimate price of a product is a combination of market demand and market  
10 supply.” *Apple, Inc. v. Samsung Elecs. Co.*, 2014 WL 976898, at \*2 (N.D. Cal. Mar. 6, 2014); *see*  
11 *In re NJOY*, 120 F. Supp. 3d at 1119 (discussing same issue).

12 Apple’s premise is flawed; Boedeker accounts for the supply side of the equation.  
13 Boedeker’s report discusses the role of supply in conjoint analysis at length. Underscoring the  
14 point, this section of Boedeker’s report is actually titled “Note on the Consideration of the Supply  
15 Side in the Economic Damages Model.” Boedeker Decl. at 9. Boedeker explains that he assumes  
16 that “[t]he supply curve in the damages model is identical” whether Apple did or did not disclose  
17 the defect to consumers, because disclosure “has no impact on the marginal costs of the supplier,  
18 and therefore, the supply curve remains unchanged.” *Id.* at 18. A supplier’s marginal cost is “the  
19 cost the manufacturer incurred when producing an additional unit of the product.” *Id.* at 9. As  
20 another court in this district explains, Boedeker is thus “measur[ing] the difference in value by  
21 assuming that the supply—the quantity—was fixed. In terms of economic theory, the portion of  
22 the supply curve that concerns Mr. Boedeker’s analysis is effectively vertical—supply is fixed  
23 regardless of price in this region of the graph.” *In re MyFord Touch Consumer Litig.*, 291 F. Supp.  
24 3d 936 (N.D. Cal. 2018) (“*MyFord Touch IP*”). Assuming Apple would have sold the same  
25 number of iPhones despite the drop in what consumers were willing to pay is not especially  
26 farfetched because the marginal cost of producing an iPhone could still have been below  
27 consumers’ willingness to pay.

1 This examination of the supply side of the market distinguishes Plaintiffs’ expert from the  
 2 cases on which Apple relies. *See, e.g., Saavedra v. Eli Lilly & Co.*, 2014 WL 7338930, at \*5 (C.D.  
 3 Cal. Dec. 18, 2014) (rejecting conjoint analysis model because it failed to consider “willingness to  
 4 sell”); *In re NJOY*, 120 F. Supp. 3d at 1119 (rejecting conjoint analysis damages model because it  
 5 “completely ignores the price for which NJOY is willing to sell its products”). Nor is the Court  
 6 persuaded by Apple’s contention that Boedeker’s model fails to incorporate the actual prices paid  
 7 by iPhone 6 or iPhone 6 Plus buyers. *Opp.* at 26–27. As Plaintiffs note, Boedeker also expressed  
 8 economic loss as a percentage of a phone’s cost, and Apple does not explain why this could not  
 9 easily be applied to the actual price a given consumer paid for an iPhone. Boedeker Decl. at 50–  
 10 51.

11 Third, Apple contends that Boedeker’s methodology is fatally flawed because it assumes  
 12 that the touchscreen defect will manifest in all iPhones. Here, the Court agrees. Plaintiffs’ theory  
 13 of liability is that “Apple failed to disclose [touchscreen defect] in the iPhone 6 and 6 Plus,  
 14 causing consumers to pay more for those products than they otherwise would have.” *Mot.* at 26  
 15 (citing FACC ¶¶ 5, 188, 200, 213, 270). More precisely, Plaintiffs contend Apple failed to disclose  
 16 the existence of a touchscreen defect that manifests in approximately 5.6 percent of the iPhone 6  
 17 Plus (after two years of use) and at a somewhat lower rate for the iPhone 6. *Mot.* at 7.<sup>12</sup> In line  
 18 with *Comcast*’s requirement that damages models “must measure only those damages attributable  
 19 to” the plaintiff’s theory of liability, Boedeker’s damages model should measure how much  
 20 consumers overpaid for iPhones assuming a roughly 5.6 percent or less chance that consumers  
 21 would experience the touchscreen defect. Instead, Boedeker’s model measures how much  
 22 consumers overpaid for a touchscreen defect that is certain to manifest in *all* iPhones. Boedeker  
 23 Decl. at 40. Specifically, Boedeker asked survey respondents to place a value on a hypothetical  
 24 smartphone containing the following attributes:

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25  
 26 <sup>12</sup> Plaintiffs subsequently attempt to distance themselves from these figures. Reply at 14 n.29.  
 27 However, Plaintiffs nowhere suggest that the touchscreen defect occurs in all or most iPhones, and  
 28 Plaintiffs nowhere provide an alternative estimate of the manifestation rate.

1 a. “The smartphone operates without any defects while you own it.”

2 b. “The smartphone becomes inoperable due to a defect that manifests while you  
3 own it. This requires you to find a repair shop or have the smartphone replaced at  
the store. The repair or replacement will cost an additional \$100.”

4 c. “The smartphone becomes inoperable due to a defect that manifests while you  
5 own it. This requires you to find a repair shop or have the smartphone replaced at  
the store. The repair or replacement will cost an additional \$200.”

6 *Id.* Missing from these options is any suggestion that defect might not manifest. This absence puts  
7 Boedeker’s damages model at odds with Plaintiffs’ theory of liability because Plaintiffs’ theory of  
8 liability rests on the risk that the defect might manifest, not that the defect is certain to manifest.  
9 Thus, the model fails to satisfy *Comcast*.

10 Even leaving this aside, other flaws in Boedeker’s damages model provide an independent  
11 basis for finding that Plaintiffs have failed to satisfy *Comcast*. To start, Boedeker’s model assumes  
12 that the touchscreen defect renders affected iPhones inoperable. However, this assumption is at  
13 odds with the experience of the named Plaintiffs because none of the named Plaintiffs have  
14 experienced complete iPhone inoperability as a result of the touchscreen defect. Justin Bauer’s  
15 iPhone experiences the touchscreen defect “over 30 percent of the time,” Taylor Brown’s iPhone  
16 experiences the touchscreen defect “approximately 50% of the time,” William Bonn’s iPhone  
17 “experiences the Touchscreen Defect about 65% of the time,” Eric Siegal’s iPhone was  
18 “unresponsive to user inputs approximately 75% of the time,” Matt Muilenburg experiences the  
19 touchscreen defect “approximately 80% of the time,” and John Borzymowski experiences the  
20 touchscreen defect “approximately 95% of the time.” FACC ¶¶ 10, 12, 14, 15, 18, 19.

21 Moreover, Boedeker’s survey questions only asked respondents about a *generic* defect  
22 instead of one specifically affecting a phone’s touchscreen. That necessarily assumed that  
23 respondents would value all defects equally. That assumption is inconsistent with *Comcast*’s  
24 requirement that damages models measure “only those damages attributable” to Plaintiffs’ theory  
25 of liability because it unmoors Plaintiffs’ damages from the specific touchscreen defect alleged to  
26 have harmed them. *Comcast*, 569 U.S. at 35; see *Opperman v. Kong Techs., Inc.*, 2017 WL  
27 3149295, at \*12 (N.D. Cal. July 25, 2017) (rejecting conjoint analysis under *Comcast* because the

1 conjoint analysis measured the value of “privacy generally” instead of the specific allegedly  
2 misrepresented security features at issue).

3 For the foregoing reasons, the Court finds that Plaintiffs have failed to provide a damages  
4 model that is “consistent with [their] liability case” and that measures “only those damages  
5 attributable” to Plaintiffs’ theory of liability. *Comcast*, 569 U.S. at 35.

#### 6 v. Summary

7 In sum, the Court finds that Plaintiffs have not satisfied the Rule 23(b)(3) predominance  
8 requirement for Plaintiffs’ claims arising under the law of Texas, Illinois, Florida, and  
9 Washington. Specifically, Plaintiffs’ Texas claim does not satisfy Rule 23(b)(3) predominance  
10 because Texas law does not permit a classwide inference of reliance, and Plaintiffs’ Illinois,  
11 Florida, and Washington claims all fail to satisfy Rule 23(b)(3) predominance because Plaintiffs’  
12 damages model is inadequate. Although Plaintiffs have therefore failed to satisfy Rule 23(b)(3)  
13 more broadly, the Court now turns to Rule 23(b)(3) superiority in the interest of thoroughness.

#### 14 E. Rule 23(b)(3) Superiority

15 Rule 23(b)(3) provides four factors that a court must consider in determining whether a  
16 class action is superior to other methods of adjudication. These factors are:

17 (A) the class members’ interests in individually controlling the prosecution or  
18 defense of separate actions;

19 (B) the extent and nature of any litigation concerning the controversy already begun  
20 by or against class members;

21 (C) the desirability or undesirability of concentrating the litigation of the claims in  
22 the particular forum; and

23 (D) the likely difficulties in managing a class action.

24 Fed. R. Civ. P. 23(b)(3). “[T]he purpose of the superiority requirement is to assure that the class  
25 is the most efficient and effective means of resolving the controversy.” *Wolin*, 617 F.3d at 1175  
26 (quoting 7AA Charles Wright, Arthur Miller & Mary Kay Kane, *Federal Practice and Procedure*, §  
27 1779 at 174 (3d ed. 2005)). “In cases in which plaintiffs seek to recover relatively small sums and  
28 the disparity between litigation costs and the recovery sought may render plaintiffs unable to

1 proceed individually, ‘class actions may permit the plaintiffs to pool claims which would be  
2 uneconomical to bring individually.’” *Moore v. Ulta Salon, Cosmetics & Fragrance, Inc.*, 311  
3 F.R.D. 590, 622 (C.D. Cal. 2015) (quoting *Local Joint Executive Bd. Of Culinary/Bartender Tr.*  
4 *Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1163 (9th Cir. 2001)). Apple contests only the  
5 manageability factor. Opp. at 28–29. Even so, the Court examines each of the four factors and  
6 finds that Plaintiffs have established superiority.

7 The first factor is each class member’s interest in “individually controlling the prosecution  
8 or defense of separate actions.” Fed. R. Civ. P. 23(b)(3)(A). “Where recovery on an individual  
9 basis would be dwarfed by the cost of litigating on an individual basis, this factor weighs in favor  
10 of class certification.” *Wolin*, 617 F.3d at 1175. Class members’ individual damages are unlikely  
11 to exceed the \$432 estimate provided by Boedeker, an amount that pales in comparison to the cost  
12 of litigation. Consequently, this factor points towards certification.

13 The second factor is “the extent and nature of any litigation concerning the controversy  
14 already commenced by or against members of the class.” Fed. R. Civ. P. 23(b)(3)(B). Neither  
15 party suggests any other cases have been brought. Thus, this factor too weighs in favor of  
16 certification.

17 The third factor is “the desirability or undesirability of concentrating the litigation of the  
18 claims in the particular forum.” Fed. R. Civ. P. 23(b)(3)(C). This factor likewise weighs in favor  
19 of certification because Apple is based in this district.

20 The fourth factor is manageability, which requires that courts consider “the likely  
21 difficulties in managing a class action.” Fed. R. Civ. P. 23(b)(3)(D). However, there is a “well-  
22 settled presumption that courts should not refuse to certify a class merely on the basis of  
23 manageability concerns.” *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1128 (quoting *Mullins*  
24 *v. Direct Digital, LLC*, 795 F.3d 654, 663 (7th Cir. 2015)); *see also In re Visa*  
25 *Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 141 (2d Cir. 2001) (listing “management tools  
26 available to” district courts).

27 Apple argues the presumption *Briseno* identifies has been rebutted here, and that Plaintiffs

28

1 have not proven superiority because the proposed class is unmanageable. Specifically, Apple  
2 argues the proposed class is unmanageable because of (1) individual issues concerning exposure,  
3 reliance, manifestation, and causation, and (2) Plaintiffs’ decision to attempt to certify a class  
4 under five different statutory schemes. The Court has already considered and rejected Apple’s  
5 arguments concerning the individual issues. The Court therefore turns to Apple’s argument that  
6 statutory differences preclude a finding of manageability.

7 “Although there are some differences in state consumer protection statutes, the factual and  
8 legal questions to be answered are substantively the same.” *Saltzman v. Pella Corp.*, 257 F.R.D.  
9 471, 485 (N.D. Ill. 2009), *aff’d*, 606 F.3d 391 (7th Cir. 2010) (certifying class under consumer  
10 fraud laws of six states, including Florida and Illinois, and creating a subclass for each state’s  
11 law). In particular, each state’s law will require determination of whether the iPhones were  
12 defective, whether Apple knew the iPhones were defective, whether Apple had a duty to disclose,  
13 and whether the information was material. Apple is correct that the states’ laws contain some  
14 differences—Illinois, for instance, does not require proof of reliance. However, these differences  
15 are for the most part relatively minor and there is a “well-settled presumption that courts should  
16 not refuse to certify a class merely on the basis of manageability concerns.” *Briseno*, 844 F.3d  
17 1121, 1128 (quoting *Mullins*, 795 F.3d at 663).

18 In sum, Plaintiffs have established that a class action is superior to other methods of  
19 adjudication.

#### 20 **F. Injunctive Relief**

21 The Court now turns to Plaintiffs’ request for injunctive relief. Plaintiffs’ sole reference to  
22 injunctive relief in their 31-page motion for class certification is in a footnote. The Court excerpts  
23 it in full:

24 The Court also ruled that Plaintiffs Brown (Texas), Baker (New York), Cleary  
25 (California), Benelhachemi (Illinois), Bauer (Colorado), and Heirloom Estate  
26 Services (Michigan) may seek injunctive relief as a remedy. ECF No. 103, at 51.  
27 Because Plaintiffs’ Baker’s, Cleary’s, and Heirloom Estate Services’ claims were  
28 not selected for the initial round of motions to dismiss, ECF 44, at 1-2, Plaintiffs do



1 not include New York, California, and Michigan in the classes defined in this round  
2 of class certification motions.

3 Mot. at 3 n.1. This footnote nowhere explains why injunctive relief is warranted, or even requests  
4 it, despite acknowledging that the Court found two of the named plaintiffs at issue here—Taylor  
5 Brown and Justin Bauer—had standing to pursue injunctive relief. Plaintiffs’ failure to raise the  
6 issue in the opening brief means that they have waived it. *Bazuaye v. INS*, 79 F.3d 118, 120 (9th  
7 Cir. 1996) (“Issues raised for the first time in the reply brief are waived.”); *Zamani v. Carnes*, 491  
8 F.3d 990, 997 (9th Cir. 2007) (“The district court need not consider arguments raised for the first  
9 time in a reply brief.”); *John–Charles v. California*, 646 F.3d 1243, 1247 n.4 (9th Cir. 2011)  
10 (holding party “failed to develop any argument on this front, and thus has waived it”); *see*  
11 *Diacakis v. Comcast Corp.*, 2013 WL 1878921, at \*9 (N.D. Cal. May 3, 2013) (finding injunctive  
12 relief request in motion for class certification “not well taken” when “request[ed] in a footnote  
13 which is devoid of any meaningful analysis”).

14 **G. Rule 23(c)(4)**

15 The Court now turns to Plaintiffs’ request to certify a Rule 23(c)(4) issues class. Mot. at  
16 29. Plaintiffs request certification of a Rule 23(c)(4) class only if the Court rejects Plaintiffs’  
17 damages model. *Id.* at 27–28. Plaintiffs seek certification on the questions of “whether (1) the  
18 iPhones suffer from the Multi-Touch defect; (2) Apple was aware of the defect; (3) Apple had a  
19 duty to disclose the defect; (4) Apple’s omission was material; and (5) Apple’s omission had the  
20 likelihood or capacity to deceive a reasonable consumer[.]” *Id.* In other words, Plaintiffs seek  
21 certification of a liability class under Rule 23(c)(4).

22 Rule 23(c)(4) provides that, “[w]hen appropriate, an action may be brought or maintained  
23 as a class action with respect to particular issues.” A Rule 23(c)(4) issues class “must still meet the  
24 requirements of Rule 23(a) and (b) (except for the predominance requirement of Rule 23(b)(3)).”  
25 *Tasion Commc’ns, Inc. v. Ubiquiti Networks, Inc.*, 308 F.R.D. 630, 633 (N.D. Cal. 2015).  
26 “Certification of an issues class under Rule 23(c)(4) is ‘appropriate’ only if it ‘materially advances  
27 the disposition of the litigation as a whole.’” *Rahman v. Mott’s LLP*, 693 F. App’x 578, 579 (9th  
28 Cir. 2017) (quoting William B. Rubenstein, 2 *Newberg on Class Actions* 4:90 (5th ed. 2012)). In

1 particular, “[c]ourts faced with a proposed issue class should consider ‘whether the adjudication of  
2 the certified issues would significantly advance the resolution of the underlying case, thereby  
3 achieving judicial economy and efficiency.’” *Kamakahi v. Am. Soc’y for Reprod. Med.*, 305 F.R.D.  
4 164, 193 (N.D. Cal. 2015) (quoting *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1229 (9th  
5 Cir. 1996).

6 Here, the Court finds that adjudication of the certified issues would not advance the  
7 resolution of the underlying case. To start, certifying a liability class under the Texas Deceptive  
8 Trade Practices Act (“TDTPA”) would not resolve individual issues concerning reliance. In turn,  
9 because reliance is an essential component of TDTPA liability, the ultimate question of Apple’s  
10 liability under the TDTPA—in addition to damages—would still have to be resolved on an  
11 individual basis.

12 Nor are things different for Plaintiffs’ claims under the Illinois Consumer Fraud and  
13 Deceptive Trade Practices Act (“ICFDTPA”), Florida Deceptive and Unfair Trade Practices Act  
14 (“FDUTPA”), and Washington Consumer Protection Act (“WCPA”). Although the reliance issue  
15 is absent, Plaintiffs still have not articulated “why a bifurcated proceeding would be more efficient  
16 or desirable.” *Rahman v. Mott's LLP*, 2014 WL 6815779, at \*9 (N.D. Cal. Dec. 3, 2014), *aff’d*, 693  
17 F. App’x 578 (9th Cir. 2017). Indeed, the reasoning in *Rahman* is fully applicable here. The  
18 plaintiff there sought certification of a liability class under Rule 23(c)(4) after being denied  
19 certification of a damages class under Rule 23(b)(3). The district court denied the request because  
20 the plaintiff was vague as to how damages would ultimately be determined. Moreover, the plaintiff  
21 failed to explain how “allowing myriad individual damages claims to go forward ... [would be] a  
22 reasonable or efficient alternative, particularly in a case such as this where the average class  
23 member is likely to have suffered less than a hundred dollars in damages.” *Id.* Granted, damages  
24 in the instant case may exceed the hundred dollars in damages in *Rahman*—but given that the cost  
25 of repair in the instant case is \$150 per Plaintiffs’ technical expert and Plaintiffs’ damages expert  
26 estimated damages at \$432, the *Rahman* rationale still applies here. ECF No. 174-38 at 25. It is far  
27 from clear that resolving liability on a classwide basis would advance the underlying resolution of  
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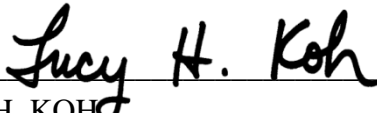
1 the instant case. The bottom line is that Plaintiffs' perfunctory request for Rule 23(c)(4)  
2 certification fails to show why certification would materially advance the litigation as a whole.  
3 The Court therefore denies Rule 23(c)(4) certification.

4 **IV. CONCLUSION**

5 For the foregoing reasons, the Court DENIES Plaintiffs' motion to certify a Rule 23(b)(3)  
6 class, DENIES Plaintiffs' request for injunctive relief, and DENIES certification of a Rule  
7 23(c)(4) class.

8 **IT IS SO ORDERED.**

9  
10 Dated: May 7, 2018

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12 \_\_\_\_\_  
13 LUCY H. KOH  
14 United States District Judge

United States District Court  
Northern District of California

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