NO. 21-16282

United States Court of Appeals for the Ninth Circuit

MAHAN TALESHPOUR, RORY FIELDING, PETER ODOGWU, WADE BUSCHER, GREGORY KNUTSON, DARIEN HAYES, LIAM STEWART and NATHAN COMBS, on behalf of themselves and all members of the putative class,

Plaintiffs-Appellants,

– v. –

APPLE INC.,

Defendant-Appellee.

ON APPEAL FROM A DECISION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, NO. 5:20-CV-03122-EJD HONORABLE EDWARD J. DAVILA

BRIEF FOR *AMICI CURIAE* COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION, NETCHOICE LLC, CONSUMER TECHNOLOGY ASSOCIATION AND CHAMBER OF PROGRESS IN SUPPORT OF APPELLEE SEEKING AFFIRMANCE

STEPHANIE A. JOYCE
POTOMAC LAW GROUP, PLLC
1300 Pennsylvania Avenue, NW,
Suite 700
Washington, DC 20004
(202) 838-3173
stephanie.joyce@potomaclaw.com

Attorney for Amici Curiae Computer & Communications Industry Association, NetChoice LLC, Consumer Technology Association and Chamber of Progress

RULE 26.1 DISCLOSURE STATEMENT

These representations are made in order that the judges of this Court may evaluate possible disqualification of recusal.

Computer & Communications Industry Association ("CCIA") is a trade association operating as a 501(c)(6) non-profit, non-stock corporation organized under the laws of Virginia. CCIA has no parent corporation and no publicly held corporation owns 10% or more of its stock.

NetChoice LLC d/b/a NetChoice is a trade association operating as a 501(c)(6) non-profit corporation organized under the laws of Washington, DC. NetChoice has no parent corporation and no publicly held corporation owns 10% or more of its stock.

Consumer Technology Association® ("CTA") is a trade association operating as a 501(c)(6) non-profit, non-stock corporation organized under the laws of Virginia. CTA has no parent corporation and no publicly held corporation owns 10% or more of its stock.

Chamber of Progress is a 501(c)(6) non-profit corporation organized under the laws of Virginia. It has no parent company and none of its shareholders are publicly traded companies.

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INTEREST OF *AMICI CURIAE*

The *amici curiae* are trade associations that represent companies offering communications, technology, Internet, and gig economy goods and services. They submit this brief pursuant to Fed. R. App. P. 29 in support of Appellee Apple Inc. ("Apple") to urge the Court to affirm the District Court's decision. The purpose of this brief is to discuss the certain, though likely unintended, consequences that adoption of Appellants' position would have for consumers, manufacturers, and retailers. A Motion for Leave to File Brief of *Amici Curiae* has been filed contemporaneously with this brief.

CCIA is an international, not-for-profit trade association representing a broad cross section of communications and technology firms. For 50 years, CCIA has promoted open markets, open systems, and open networks. CCIA members employ more than 1.6 million workers, invest more than $100 billion in research and development, and contribute trillions of dollars in productivity to the global economy. A list of CCIA members is available at https://www.ccianet.org/members.

NetChoice is a national trade association of online businesses who share the goal of promoting free speech and free enterprise on the Internet. For over two decades, NetChoice has worked to promote online commerce and speech and to increase consumer access and options through the Internet, while minimizing burdens on businesses that are making the Internet more accessible and useful.

As North America's largest technology trade association, CTA® is the tech sector. Our members are the world's leading innovators — from startups to global brands — helping support more than 18 million American jobs. CTA owns and produces CES® — the most influential tech event in the world. Find us at CTA.tech. Follow us @CTAtech.

Chamber of Progress is a tech industry coalition devoted to a progressive society, economy, workforce, and consumer climate. It is an industry organization that backs public policies that will build a fairer, more inclusive country in which all people benefit from technological leaps. Its work is supported by corporate partners, which are listed at https://progresschamber.org. None of these partners sit on the Chamber of Progress board of directors or have a vote on or veto over its positions. With regard to the instant appeal, Chamber of Progress is concerned that the increased costs to businesses will raise costs for consumers, risking inequitable access to the benefits of technology.

STATEMENT OF *AMICI CURIAE*

This brief was authored entirely by the undersigned counsel and was funded entirely by the *amici curiae* on whose behalf this brief was created. No person or party other than these *amici curiae* contributed money to the creation, filing, or service of this brief. Defendant-Appellee Apple is a member of CCIA and of CTA, and is a corporate partner of Chamber of Progress, but has not provided or promised

any financial support to any of these organizations for this brief.

STANDARD OF REVIEW

The *amici* concur with and adopt the standard of review set forth in the initial brief filed by Apple.

SUMMARY OF ARGUMENT

The Court should affirm the District Court's decision in order to ensure that technology companies in the United States may continue to provide innovative goods and services without the burden of vague, unlimited, and unbounded warranty requirements for late-occurring defects that are neither dangerous nor harmful. Though the protections of express warranties remain a necessary and appropriate public good, to rule in Appellants' favor would establish perpetual, virtually limitless warranties that would likely drive firms from the market due to the accordingly limitless costs — particularly litigation costs — that these warranties would impose. Even if such express warranties were legally sound despite lacking several core terms, namely a date of termination, they would deter companies from bringing innovative products and services to market.

ARGUMENT

In addition to the legal grounds thoroughly set forth by Apple in its initial brief, the Court should affirm the District Court's decision as a matter of good public policy that will protect both consumers and the businesses that serve them.

The defect alleged here is indisputably not safety-related. *Amici* take no position on relief in cases regarding hazardous defects. Rather, *amici* present to the Court their grave concerns as to the inevitable consequences of the expanded warranty relief that undoubtedly would be expected not only from Apple, but from many of their members that provide goods and services to U.S. consumers. The approach advocated by Appellants here would have broad implications across our economy — it would raise prices, squelch innovation, and thus harm the very people whose interests the Appellants wish to protect.

I. ADOPTING APPELLANTS' POSITION WOULD IMPOSE AN UNENDING, LIKELY INSUPERABLE COST ON COMMUNICATIONS AND TECHNOLOGY COMPANIES, WHICH WILL DETER THEM FROM BRINGING THEIR GOODS AND SERVICES TO MARKET.

The District Court dismissed all claims against Apple on the ground that, *inter alia*, the one-year express warranty that Appellants obtained for their MacBooks had expired prior to their alleged experience of diminished visibility on the devices' screens. Order Granting Motion to Dismiss Third Am. Compl. at 2-3 (July 19, 2021). In seeking to overturn that ruling, Appellants want the right to lodge warranty claims against manufacturers and service providers for virtually any product defect for an undefinable period of time. This drastic change of law would create fatally vague warranties, resulting in a crushing cost burden and a roadblock to innovation for all purveyors of goods and services in America.

A. Express Warranties, Such as the Expired Warranties at Issue Here, Are Bargains Between Consumer and Seller That Must Have Defined Boundaries.

Warranties exist for the benefit of consumers and are a cost of doing business that companies willingly accept. Express warranties define the standard of performance for products and services that manufacturers must attain and they help consumers make informed choices in the market. At their essence, express warranties are a bargain that companies and consumers reach at the time of purchase. Though closely regulated by the corpus of warranty law, express warranties are contracts. *E.g.*, *Hauter v. Zogarts*, 534 P.2d 377, 385 (Cal. 1975) (*en banc*) ("express warranties, which are basically contractual in nature"); *Anthony's Pier Four, Inc. v. Crandall Dry Dock Eng'rs, Inc.*, 489 N.E.2d 172, 175 (Mass. 1986) ("an express warranty claim is and generally has been understood to be an action of contract"); *Medical City Dallas, Ltd. v. Carlisle Corp. d/b/a Carlisle Syntec Sys.*, 251 S.W.3d 55, 60 (Tex. 2008) ("an express warranty … is nonetheless a part of the basis of a bargain and is contractual in nature"); *Elizabeth N. v Riverside Grp., Inc.*, 585 So. 2d 376, 380-81 (Fla. Dist. Ct. App. 1991) (express warranties are contracts governed by limitations period applicable to contract claims); *Rust-Pruf Corp. v. Ford Motor Co.*, 431 N.W.2d 245, 247 (Mich. Ct. App. 1988) ("Ford's express warranty establishes the contractual relationship between the parties.").

In order to be an enforceable contract, a transactional agreement between

parties must contain a few key components, including what will be supplied (subject matter), when it will be supplied (performance), and what the supplier will receive (consideration). Restatement (Second) of Contracts §§ 17 (Requirement of a Bargain), 71 (Requirement of Exchange). For promises that endure after the initial transaction, a key component is the length of time that such promises will endure. *Id*. § 232 (When It Is Presumed That Performances Are to Be Exchanged Under an Exchange of Promises); *see also Western Homes, Inc. v. Herbert Ketell, Inc*., 236 Cal. App. 2d 142, 145 (Cal. Ct. App. 1965) (contract lacking termination date was unenforceable). An agreement that is missing **all** of these components is not an enforceable contract.

In this case, the MacBook express warranty that Apple offered and Appellants accepted expired after one year, and the alleged defect affected only the clarity of MacBook screens. Order Granting Motion to Dismiss Third Am. Compl. at 2-3 (July 19, 2021) (the "July 19 Order"). As explained in the following sections, stretching the express warranty in a way that entitles Appellants to relief under those circumstances would create an unenforceable bargain — or at the least an extremely confusing one — inuring to the benefit of no one.

It bears mention that the law of implied warranty in California is secured to consumers by statute, rather than by contract, and this appeal does not threaten to displace those protections. At stake here are the express bargains that vendors and

consumers accept at point of sale and the question is whether Appellants' proposed expansion of those bargains is workable.

B. Appellants' Position Eliminates Two Core Parameters of the Warranty Bargain — a Defined Time Period and a Predictable Set of Eligible Defects.

The position advanced by Appellants is that the MacBook express warranty should last until each Appellant deems the MacBooks to have exceeded their expected lifespans and should cover any issue that each Appellant believes would render the MacBooks incapable of use. Both of these requested warranty revisions necessarily are governed by the subjective opinion of each consumer. As such, the Court is offered no defining or limiting principle to the novel relief that Appellants seek. The applicability of the warranty would lie in the eye of the beholders (every consumer).

In addition, the amended warranty that Appellants seek would create a fatally vague bargain between manufacturer/service provider and consumer that would be injurious to both parties. Appellants seek warranty-based relief for non-hazardous defects even after the agreed-upon term of a warranty expires, thus abolishing warranty periods altogether. In addition, Appellants want to significantly expand the universe of the late-occurring, alleged defects that would be covered by the now-perpetual warranties. These twin requests would create a fatally vague amended warranty whose subject matter and term of coverage would be virtually infinite.

Leaving aside the strictures of the statutes and rules governing warranty, as a simple matter of contracts the deal would be unenforceable. An unenforceable contract helps no one, certainly not the consumers whose interests Appellants represent. For even if the Court adopts Appellants' unbounded interpretation of the Apple express warranty at issue here, a great deal of confusion and uncertainty would be introduced for other products and services and in other jurisdictions, imposing a costly burden for all market participants.

There was no question in the District Court as to the time period of the MacBook warranties or the fact that, as to each Appellant, those warranties had expired. July 19 Order at 13. Nor was there a question whether the alleged, post-warranty defects are non-hazardous. *Id*. Appellants therefore ask this Court to re-write the warranties by holding that Appellants are entitled to relief at any time that their device does not perform as they would like them to do. In other words, Appellants want perpetual contracts of warranty for any device that might, over time, stop working perfectly. *Amici* urge the Court not to adopt this position.

C. Expanding an Express Warranty in the Manner Appellants Propose Would Place Manufacturers and Service Providers Under the Crushing Weight of Limitless Warranties.

The protections that consumers acquire when they accept an express warranty are, as stated above, the burden that manufacturers and service providers take on when they bring products and services to market. That burden is chiefly born as

cost: the cost of development, the cost of production, and the cost of post-sale warranty compliance. These costs become a component of the price-setting processes for goods and services.

To accept Appellants' request for a blanket, *post hoc* revision to the term and subject matter of their MacBook express warranties would open a floodgate of warranty revisions that no manufacturer or service provider could have anticipated. Flowing through that floodgate would be enormous, incalculable costs that no manufacturer or service provider could cover. Among those costs would be the cost of defending the inevitable onslaught of litigation. Appellants essentially are offering a deal that no rational company could accept: companies will receive a finite price for a good or service, but they will face almost infinite warranty exposure for any defect consumers believe will impede their use of the purchased item, regardless of when it occurs.

Were such boundless warranties to become law in this Circuit, the effect on consumers would be swift and severe. Companies would face a choice: either raise prices dramatically to account for these perpetual obligations or exit the market. Consumers would similarly suffer in the form of unaffordable goods and services, the total absence of those goods and services, or both. And the immediate consequence for the nation's economy would be a significant decrease in both productivity and innovation.

The expansion of warranty relief that this Court has been asked to grant will shrink consumer choice and consumers' access to goods and services. For this reason, the District Court should be affirmed.

II. PERMITTING CONSUMERS TO SUE FOR RELIEF BASED ON NON-HAZARDOUS DEFECTS OCCURRING AFTER WARRANTY EXPIRATION WILL SQUELCH INNOVATION.

The relief Appellants seek will also disincentivize, if not prevent, the innovation that has long been the hallmark of the communications and technology industries in the United States. The dramatically increased warranty costs discussed above are doubly harmful for firms that wish to be innovators.

All rational market participants evaluate risk when deciding whether to introduce new products and services. They consider, for example, the risk that consumers will not like the new product and the risk that another provider will beat them to market. At stake in this appeal is the risk that the express warranty attached to the new product or service will, being bounded only by the subjective expectation of each consumer, be so broadly and severely applied so as to punish the manufacturer or service provider from attempting anything new.

The lesson from this case, if Appellants prevail, will be that every new feature and product, no matter how valuable and revolutionary, must be and remain perfect forever. The burden on innovation, which is always founded on tremendously costly R&D, will be redoubled in the form of unbounded warranties. Faced with this now-

doubled burden of cost that will be little ameliorated by unit prices, companies will have very little incentive to innovate. Indeed, they might feel punished for innovating. Nothing in that outcome serves consumer welfare.

CONCLUSION

For all these reasons, in addition to those set forth in Appellee's merits brief, the Court should affirm the District Court's dismissal.

Dated: January 12, 2022

By: /s/Stephanie A. Joyce
Stephanie A. Joyce, Esq.
POTOMAC LAW GROUP, PLLC
1300 Pennsylvania Avenue, N.W.
Suite 700
Washington, DC 20004
Tel. 202.838.3173
Fax 202.318.7707

Attorney for the Computer & Communications Industry Association, NetChoice LLC, Consumer Technology Association, and Chamber of Progress

CERTIFICATE OF COMPLIANCE

In compliance with Fed. R. App. P. 29(a)(4), I certify that, according to the word-count function of Microsoft Word, the foregoing brief *Amici Curiae* contains 2365 words, which is less than one-half the number of words that Fed. R. Civ. P. 32(a)(7) generally affords to a party for its principal brief.

/s/Stephanie A. Joyce
Stephanie A. Joyce, Esq.

CERTIFICATE OF SERVICE

I certify that on January 12, 2022, the foregoing brief *Amici Curiae* was filed with the Clerk of the U.S. Court of Appeals for the Ninth Circuit via CM/ECF. I further certify that the foregoing brief *Amici Curiae* was served electronically via CM/ECF on all parties' counsel who have appeared and are registered in the CM/ECF system.

/s/Stephanie A. Joyce
Stephanie A. Joyce, Esq.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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