Slip Copy, 2013 WL 6916891 (D.N.J.)
(Cite as: 2013 WL 6916891 (D.N.J.))

United States District Court, D. New Jersey.
Frederick K. BERMAN and Sandra Berman, husband and wife, Plaintiffs,
v.
ADT LLC, f/k/a Adt Security Services, Inc., as successor in interest To Holmes Protection Group, Inc.; John Does 1–10; John Does 11–20, ABC Corporation; and XYZ Partnership, Defendants.

Civil No. 12–7705 (RBK/JS).
Dec. 13, 2013.

Thomas A. Shovlin, Riley & Shovlin, PA, Blackwood, NJ, for Plaintiffs.

Charles Carson Eblen, Jason Robert Scott, Shook Hardy & Bacon LLP, Kansas City, MO, Joanna Terese Vassallo, Shook Hardy & Bacon LLP, Philadelphia, PA, for Defendants.

OPINION

KUGLER, District Judge.

***1** This matter arises out of the alleged burglary of a residence in Cherry Hill, New Jersey. Frederick and Sandra Berman ("Plaintiffs") brought suit against Defendant ADT LLC f/k/a ADT Security Services, Inc., as successor-in-interest to Holmes Protection Group, Inc., for willful and wanton conduct, negligence, breach of contract, breach of express and implied warranties, and violations of the New Jersey Consumer Fraud Act. Currently before the Court is Defendant's Motion to Dismiss Counts II, III, and IV of Plaintiffs' Second Amended Complaint for failure to state a claim to which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6), and also a motion to limit liability to the parties' contractually agreed-upon sum. (Doc. No. 29.) For the following reasons, Defendant's motion is **GRANTED IN PART** and **DENIED IN PART.**

I. FACTUAL AND PROCEDURAL BACKGROUND

On a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the Court must "accept all factual allegations as true and construe the complaint in the light most favorable to the Plaintiff." Accordingly, the following facts are taken from Plaintiffs' Second Amended Complaint. *See Phillips v. Cnty. of Allegheny,* 515 F.3d 224, 231 (3d Cir.2008).

Plaintiffs are husband and wife who reside and own a jewelry store in Cherry Hill, New Jersey. (Second Am. Compl. ¶¶ 1, 41.) In February 1997, Plaintiffs entered into an alarm services agreement with Holmes Protection, Inc.—ADT LLC's predecessor—for their jewelry store, which included "certain recurring services in the form of central station monitoring." (*Id.* ¶¶ 42–43.) In March 1997, in conjunction with this contract, Plaintiffs also "entered into an alarm monitoring service agreement" with Lydia Security Monitoring, Inc. d/b/a COPS Monitoring, executed by Holmes representative Michael J. Haney, on behalf of COPS.[FN1] (*Id.* ¶¶ 44–45.) In May 1997, Holmes provided Plaintiffs with a proposal to provide a security system for Plaintiffs' residence. That proposal stated that the "new DMP 1912XR Security/Fire System is the same system installed in [Plaintiffs'] business." (*Id.* Ex. A, ¶ 46.)

FN1. The terms of this monitoring agreement with COPS specified that the monitoring services would consist "of the calling by telephone of third party professional agencies" or other persons designated by the Subscriber, "no more than once every fifteen (15) minutes for no more than one (1) hour"

> after receiving a signal from the alarm. Additionally, if the subscriber did not receive notification of the signal of the alarm, then COPS "shall telephone the Subscriber ... no more than once every hour for no more than four (4) hours...." (Sec. Am. Compl. Ex. D ¶ 14.)

On May 28, 1997, Plaintiffs signed an Alarm Services Agreement with Holmes for the "purchase, installation, monitoring, and repair of the residential burglary and fire alarm system" for their residence. (*Id.* ¶ 13; Ex. B.) In this residential service contract, Plaintiffs agreed to pay a one-time installation fee of $2,283.24 and a $30.00 monthly monitoring fee. (*Id.* Ex. B.) The service agreement stated that Defendant would make " 'every reasonable effort' to notify police and other persons designated by" Plaintiffs. (*Id.* ¶ 24; Ex. B ¶ 20(a)(ii).)

On February 7, 2012, "unidentified individuals" broke into Plaintiffs' home, which disrupted "the primary connection between the residential burglar alarm and Defendant's monitoring facility," which triggered an alert to Defendant—the subcontracting monitoring facility. (*Id.* ¶¶ 14–16.) Upon receiving this alert, Defendant called Plaintiffs' residence at or about 4:47 P.M. (*Id.* ¶ 17.) No one answered this call, however, because the intruders had "bound and assaulted" Mrs. Berman, who was then "slapped, terrorized, tied up and threatened over the course of several hours...." (*Id.* ¶ 20.) Mr. Berman was likewise "assaulted, terrorized, tied up, and threatened at knifepoint" after he returned home from work that evening. (*Id.* ¶ 21.) Despite Plaintiffs inability to answer Defendant's call, Defendant did not contact the local authorities. (*Id.* ¶ 19.) As a result of the burglary, Plaintiffs suffered loss of property "valued in excess of $500,000.00," sustained "temporary and permanent physical and emotional injury and disability," and incurred medical expenses. (*Id.* ¶¶ 22, 30.)

***2** On November 9, 2012, Plaintiffs filed a Complaint in the Superior Court of New Jersey, Camden County, against the following defendants: Holmes Protection Group, Inc.; ADT LLC; Tyco International, Inc.; Tyco International, Ltd.; John Does 1–10; John Does 11–20; ABC Corporation; and XYZ Partnership. Plaintiffs then dismissed the claims against Tyco International, Inc. and Tyco International, Ltd. (Doc. No. 1 ¶¶ 1, 3.) On December 18, 2012, Defendant removed this case pursuant to 28 U.S.C. § 1446, invoking this Court's jurisdiction under 28 U.S.C. § 1332 and § 1367. (*Id.* ¶ 4.) Defendant filed its first Motion to Dismiss on December 26, 2012. (Doc. No. 3.)

On January 17, 2013, Plaintiffs filed an Amended Complaint, which the Defendant moved to dismiss on February 11, 2013. (Doc. Nos.7, 11.) Plaintiffs then filed a Motion to Amend/Correct their Amended Complaint. (Doc. No. 14.) As this motion was unopposed, the Court granted Plaintiffs' motion, and Plaintiffs filed a Second Amended Complaint. (Doc. No. 23.) This complaint was then re-filed twice due to Plaintiffs' omission of certain exhibits. (*See* Doc. Nos. 26, 28.)

Plaintiffs' Second Amended Complaint sets forth four claims against ADT: Count I—Breach of Contract; Count II—Breach of Express and Implied Warranties; Count III—Willful and Wanton Misconduct and Negligence; and Count IV—Violation of the New Jersey Consumer Fraud Act. On May 24, 2013, Defendant filed a Motion to Dismiss Counts II, III, and IV of the Second Amended Complaint. (Doc. No. 29.) This matter has been fully briefed and is now ripe for disposition.

II. DISCUSSION & ANALYSIS

A. Legal Standard on a Motion to Dismiss

Rule 12(b)(6) allows a court to dismiss an action for failure to state a claim upon which relief can be

granted. Fed.R.Civ.P. 12(b)(6). When evaluating a motion to dismiss, "courts accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir.2009) (quoting *Phillips*, 515 F.3d at 233). In other words, a complaint is sufficient if it contains enough factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). It is not for courts to decide at this point whether the moving party will succeed on the merits, but "whether they should be afforded an opportunity to offer evidence in support of their claims." *In re Rockefeller Ctr. Prop., Inc.*, 311 F.3d 198, 215 (3d Cir.2002). Also, legal conclusions and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678.

To determine whether a complaint is plausible on its face, courts conduct a three-part analysis. *Santiago v. Warminster Twp.*, 629 F.3d 121, 130 (3d Cir.2010). First, the court must "tak[e] note of the elements a plaintiff must plead to state a claim." *Id.* (quoting *Iqbal*, 556 U.S. at 675). Second, the court should identify allegations that, "because they are no more than conclusions, are not entitled to the assumption of truth." *Id.* at 131 (quoting *Iqbal*, 556 U.S. at 680). Finally, "where there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement for relief." *Id.* (quoting *Iqbal*, 556 U.S. at 680). This plausibility determination is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679. A complaint cannot survive where a court can only infer that a claim is merely possible rather than plausible. *Id.*

B. Count II—Breach of Express Warranties and Implied Warranties of Merchantability and Fitness for a Particular Purpose

***3** Defendant argues that Plaintiffs have failed to state a claim for breach of express or implied warranties because Defendant disclaimed all warranties in its contract with Plaintiffs. (Def's.Br.7–8.) Plaintiffs fail to oppose or otherwise respond to Defendant's argument.

Although Plaintiffs do not set forth any arguments in support of Count II, the Court will still address the merits of Plaintiffs claim. "To do otherwise would dismiss the plaintiff[s'] claims for failure to adhere to a local court rule rather than for failure to state a claim upon which relief could be granted." *Regal–Pinnacle Integrations Indus., Inc. v. Philadelphia Indem. Ins. Co.*, No. 12–5465, 2013 WL 1737236, at *4 (D.N.J. Apr.22, 2013) (citing *Stackhouse v. Mazurkiewiz*, 951 F.2d 29, 30 (3d Cir.1991)).

Under New Jersey law, "in order to state a claim for breach of express warranty, Plaintiffs must properly allege: (1) that Defendant made an affirmation, promise or description about the product; (2) that this affirmation, promise or description became part of the basis of the bargain for the product; and (3) that the product ultimately did not conform to the affirmation, promise or description." *Arlandson v. Hartz Mountain Corp.*, 792 F.Supp.2d 691, 706 (D.N.J.2011). Express warranties can be disclaimed, but the disclaimers must be "clear and conspicuous," i.e., it must be "so written that a reasonable person against whom it is to operate ought to have noticed it. *Gladden v. Cadillac Motor Car Div.*, 83 N.J. 320, 416 A.2d 394, 400 (N.J.1980); N.J. Stat. Ann. § 12A:1–201(10). A passage can be conspicuous if the type is larger "than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size," or if it is "set off from the surrounding text of the same size by symbols or other marks" that calls attention to the passage. *Id.* § 12A:1–201(10). Implied warranties of merchantability and fitness for a particular purpose may also be

disclaimed. The writing disclaiming those warranties must also be conspicuous and mention merchantability. *Id.* § 12A:2–316(2).

The Contract between Defendant and Plaintiffs provides:

> **THE AFORESAID WARRANTIES ARE EXPRESSLY MADE IN LIEU OF ANY OTHER WARRANTIES, EXPRESS OR IMPLIED. IT BEING UNDERSTOOD THAT ALL SUCH OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING THE WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE ARE HEREBY EXPRESSLY EXCLUDED.**

(Sec.Am.Compl.Ex. B, ¶ 14.)

Here the warranty disclaimer fulfills the statutory requirements for disclaiming the implied warranties of merchantability and fitness for a particular purpose in that it specifically mentions "merchantability," and is conspicuous in that it is easily discernible from its surrounding text. Further, by signing the contract, Plaintiffs acknowledged they read the terms and conditions of the contract, and specifically acknowledged that they read paragraph 14, which "LIMIT[s] THE WARRANTIED [sic], LIABILITIES AND OBLIGATIONS OF THE COMPANY." (Sec. Am. Compl. Ex. B at 1.) By specifically naming the warranty provision on the first page in a paragraph directly above the signature line, in addition to making the warranty disclaimer conspicuous, the Court is satisfied that this was a valid disclaimer. *See, e.g.*, *Viking Yacht Co. v. Composites One LLC,* 496 F.Supp.2d 462, 471 (D.N.J.2007) (granting summary judgment for defendant on plaintiffs' claims of breach of the implied warranties of merchantability and of fitness for a particular purpose where the disclaimers met "the statutory requirements and Plaintiff [did] not contend that they were unaware of them at the time of purchase").

***4** Turning to Plaintiffs' claim that Defendant's breached an express warranty, the Court is also satisfied that the disclaimer disclaimed any alleged express warranties made to Plaintiffs.

Plaintiffs allege that "[i]n order to induce plaintiffs to purchase a residential system, Holmes represented to and promised plaintiffs in writing that the residential system would be the 'same system' as that installed in plaintiffs' business." (Sec.Am.Compl.¶ 12.) Plaintiffs allege further that "[i]n reliance upon defendant's representations, promise and inducements," they entered into a written agreement with Homes for the purchase of their residential burglary and fire alarm system. (*Id.* ¶ 13.) Finally, Plaintiffs allege that the residential system was not the "same system" as that installed in their business, and that the system installed at their business provided greater protection. (*Id.* ¶ 47.) It appears that Plaintiffs have sufficiently alleged a claim for breach of an express warranty, however, they have failed to allege that Defendant's disclaimer was invalid. As is clear from the provision excerpted above, the disclaimer in Plaintiffs' contract disclaims any express warranties not set forth in the contract. (Sec.Am.Compl.Ex. B, ¶ 14.)

Accordingly, Count II of Plaintiffs' Second Amended Complaint will be dismissed.

C. Count III—Willful, Wanton, Reckless, and Intentional Conduct and Negligence

Defendant next argues that Plaintiffs' tort claims fail because they are precluded by the parties' contractual relationship and Defendant has no independent duty at common law to contact the authorities or other designated persons after receiving an alert signal from Plaintiffs' home. (Def.'s Br. 5–7.) Plaintiffs disagree and argue that the Electrical Contractors Licensing Act, N.J. Stat. Ann. § 45:5A–23, provides the basis for a cause of action in tort. (Pl.'s Opp'n Br.

16–17). Plaintiffs argue further that Defendant cannot preclude every type of extra-contractual liability by virtue of the exculpatory provision in its contract with Plaintiffs, and this clause is invalid. (*Id.*) Defendant has the better of the argument.

Under New Jersey law, courts have found that "a tort remedy does not arise from a contractual relationship unless the breaching party owes an independent duty imposed by law." *Saltiel v. GSI Consultants, Inc.*, 170 N.J. 297, 788 A.2d 268, 280 (N.J.2002); *see also Pfenninger v. Hunterdon Cent. Reg'l High Sch.*, 167 N.J. 230, 770 A.2d 1126 (N.J.2001) (standing for the proposition that a plaintiff may assert tort claims against a defendant with whom he had a contract, but only if those claims arose out of some legal duty other than the one imposed by the contract); *S. Broward Hosp. Dist. v. MedQuist, Inc.*, 516 F.Supp.2d 370, 396 (D.N.J.2007) ("If there is no duty owed to a plaintiff independent of what the defendant owes plaintiff under contract, a plaintiff may not maintain a tort claim (as a necessary element of the tort claim is absent)"). Indeed, in *Lala v. ADT Security Services, Inc.*, a case somewhat analogous to the instant matter, the Court applied this well settled rule and held that plaintiffs could not hold ADT liable in tort for failing to perform the services outlined in the parties' contract. 2010 WL 4923452 (D.N.J. Nov.29, 2010). In that case, plaintiffs' home was struck by lightning, which caused a fire that resulted in substantial property damage. *Id.* at * 1. Because plaintiffs' alarm did not function properly, it did not alert ADT personnel to the ensuing fire, which would have triggered their obligation to call the fire department. *Id.* Plaintiffs sued ADT alleging that it was responsible for plaintiffs' property damage under theories of negligence, strict liability, and *res ipsa loquitur*. *Id.* In granting ADT's motion for summary judgment on plaintiffs' tort claims, the Court held that plaintiffs were unable to show that "ADT had a legal obligation to provide alarm services independent of the one imposed by the contract." *Id.* at *3–4. Thus, no independent tort duty existed and no tort claim was available against ADT for its failure to alert the local fire department. *Id.*

***5** Notwithstanding this unfavorable precedent, Plaintiffs contend that their tort claim should survive because the New Jersey Legislature's 1997 extension of the Electrical Contractors Licensing Act to alarm business and the enactment of comprehensive regulations provide the basis for a cause of action in tort. (Pl.'s Opp'n Br. 17.) Plaintiffs further contend that although Defendant relies on an exculpatory language in the contract in an effort to insulate itself from tort liability, "the circumstances of this case warrant recognition of an extra-contractual duty of care on the part of [Defendant]." (Pl.'s Opp'n Br. 17.) Plaintiffs rely on *Synnex Corp. v. ADT Security Services, Inc.*, 394 N.J.Super. 577, 928 A.2d 37 (N.J.Super.Ct.App.Div.2007), in support of these arguments.

In *Synnex*, the New Jersey Appellate Division considered "whether an exculpatory clause in a contract for the sale of a burglar alarm system, which requires the buyer to rely solely on its own insurance for any loss from theft, is contrary to public policy and therefore unenforceable in light of a statute that subjects sellers of alarm systems to licensing and regulatory controls." *Id.* at 38–39.

Synnex Corporation had installed an ADT security system in its warehouse, but was the victim of a burglary six months later, which resulted in property loss. *Id.* at 39–40. In support of its claims against ADT, Synnex argued that when the New Jersey Legislature extended the Electrical Contractors Licensing Act ("the Act") to alarm companies, it represented a "legislative expression of public policy," requiring the invalidation of exculpatory provisions in alarm business contracts. *Id.* at 45. The court disagreed and held that although the 1997 amendments to the Act required alarm businesses to obtain licenses and implement regulations imposed by the Board of Electrical Contractors, it did not "create a private cause of

action for a violation of its provisions or prescribe rules of civil liability for licensees." *Id.* In reversing the jury verdict finding ADT negligent, the court stated "liability for licensees for negligence or other tortious conduct" continued to be governed by common law. *Id.* In dicta, the court went on to emphasize that its decision was informed by the fact that the case "involved[d] the validity of an exculpatory clause as applied to *property loss* for which the buyer of an alarm system may obtain its own insurance coverage," and that it did "not involve the validity of such a clause as applied to *a personal injury claim,* with respect to which different policy considerations would have to be evaluated." *Id.* at 47 (emphasis added).

Plaintiffs rely on this dicta in arguing that because *Synnex* left unanswered the question of whether a private cause of action for personal injury could be maintained under the Act, this Court should answer that question and create a new basis for liability under New Jersey law. The Court declines to do so. *See Travelers Indem. Co. v. Dammann & Co., Inc.*, 594 F.3d 238, 253 (3d Cir.2010) ("where a federal court sits in diversity and is charged with predicting how another court might rule on the record presented before it, the court should opt for an interpretation of the law that restricts liability rather than expand it until the Supreme Court of New Jersey decides differently"); *see also Coyle v. Englander's*, 199 N.J.Super. 212, 488 A.2d 1083, 1090 (N.J.Super.Ct.App.Div.1985) ("In the absence of precedent, or at least clear direction by dictum from our Supreme Court, we conclude that failure to perform a contractual term alone does not create liability for damages for personal injuries, where no breach of any common-law duty is implicated in the slightest, and we affirm. Development of policy is for the Supreme Court in this instance, as in most instances.").

***6** The law is clear that a plaintiff cannot maintain a tort claim against a defendant where the conduct complained of arises out of a contractual obligation, and does not implicate an extracontractual duty of care. Here, Plaintiffs have failed to allege—and cannot allege—that Defendant owed Plaintiff an extra-contractual duty to contact the authorities or other designated persons after receiving an alert signal from Plaintiffs' home. Indeed, Plaintiffs' own allegations support the point that Defendant's obligations arose solely out of the parties' contract. (*See* Sec. Am. Compl. ¶ 24 ("Pursuant to the terms and provisions of the Alarm Services Agreement, defendants were obligated to use "every reasonable effort" to notify police and other persons designated by plaintiffs."); ¶ 33 ("Defendant ADT and/or John Doe 21, an as yet unidentified monitoring facility that contracted with ADT and undertook to perform services defined in the Alarm Services Agreement, received an alert signal from plaintiffs' residence on February 7, 2012.").) By the same token, Plaintiffs' argument that the Court should invalidate the exculpatory clause in their contract in order to hold Defendant liable in tort also fails. *See Stelluti v. Casapenn Enters., LLC*, 408 N.J.Super. 435, 975 A.2d 494, 500–502 (N.J.Super.Ct.App.Div.2009) *aff'd*, 203 N.J. 286, 1 A.3d 678 (N.J.2010) (collecting cases and remarking that exculpatory clauses will be found to be invalid where defendant owes a legal duty to the plaintiff extraneous to the contract, or there is a specific public policy concern implicated by the parties private agreement, or the agreement attempts to relieve defendant of a statutorily-based duty).

Accordingly, Plaintiffs' claim is dismissed.[FN2]

FN2. "New Jersey has long recognized the distinction between willful or wanton conduct on the one hand and mere negligence on the other." *Foldi v. Jeffries*, 93 N.J. 533, 461 A.2d 1145, 1153–54 (N.J.1983) (citations omitted). The New Jersey Supreme Court has "generally expressed the concept as follows: it must appear that the defendant with knowledge of existing conditions, and conscious from such knowledge that injury will likely or probably result from his conduct,

> and with reckless indifference to the consequences, consciously and intentionally does some wrongful act or omits to discharge *some duty* which produces the injurious result." *Id.* Defendants argue that Plaintiffs' willful and wanton misconduct claim fails, but do not acknowledge the difference between this claim and Plaintiffs' negligence claim. Plaintiffs fail to make any arguments in support of their claim that Defendant engaged in willful, wanton, reckless and intentional conduct, and only allege that "Defendants willfully, wantonly, recklessly and intentionally failed to contact local authorities or other persons designated by plaintiffs." (Sec.Am.Compl.¶ 35.) This "formulaic recitation of the elements" of a claim for willful or wanton conduct is insufficient to state a claim. *See Ashcroft v. Iqbal,* 556 U.S. 662, 681, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). Additionally, for the reasons stated in connection with Plaintiffs' negligence claim, they have failed to allege—and cannot allege—that Defendant owed Plaintiff a duty and omitted to discharge that duty such that their conduct was willful or wanton. Thus, this aspect of Plaintiffs' tort claim will also be dismissed.

D. Count IV—Consumer Fraud

The New Jersey Consumer Fraud Act ("NJCFA" or the "Act") is "designed to promote the disclosure of relevant information to enable [ ] consumer[s] to make intelligent decisions in the selection of products and services." *Belmont Condo. Ass'n v. Geibel,* 432 N.J.Super. 52, 74 A.3d 10, 27 (N.J.Super.Ct.App.Div.2013) (quoting *Div. of Consumer Affairs v. Gen. Elec. Co.,* 244 N.J.Super. 349, 582 A.2d 831, 833 (N.J.Super.Ct.App.Div.1999)). Accordingly, the Act imposes liability on any person who uses "any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission." N.J. Stat. Ann. § 56:8–2. Violations of the Act include "affirmative acts, knowing omissions, and regulatory violations." *Cox v. Sears Roebuck & Co.,* 138 N.J. 2, 647 A.2d 454, 462 (N.J.1994). Thus, to state a claim under the NJCFA, a plaintiff must allege (1) unlawful conduct, *i.e.*, affirmative acts, omissions, or regulatory violations, (2) an ascertainable loss, and (3) a causal relationship between the defendant [']s unlawful conduct and the plaintiffs['] ascertainable loss. *See Int'l Union of Operating Eng'gs Local No. 68 Welfare Fund v. Merck & Co., Inc.,* 192 N.J. 372, 929 A.2d 1076, 1086 (N.J.2007) (citations omitted).

***7** As with common law and equitable fraud, a NJCFA violation must be plead with particularity pursuant to Rule 9(b). *See Frederico v. Home Depot,* 507 F.3d 188, 200 (3d Cir.2007) (in discussing plaintiff's NJCFA claim, stating that "[p]ursuant to Rule 9(b), a plaintiff alleging fraud must state the circumstances of the alleged fraud with sufficient particularity to place the defendant on notice of the 'precise misconduct with which [it is] charged'.... To satisfy this standard, the plaintiff must plead or allege the date, time and place of the alleged fraud or otherwise inject precision or some measure of substantiation into a fraud allegation").

In their Second Amended Complaint, Plaintiffs allege that Defendant is liable under the NJCFA because "[i]n order to induce plaintiffs to purchase a residential security system, Holmes represented and promised" that the "residential system would be the 'same system' as that installed in plaintiffs' business," (*id.* at ¶ 12), and the monitoring services in the two systems were not in fact the same because the jewelry store system provided greater protection. (Sec.Am.Compl.¶¶ 46–48.)

Defendant argues that Plaintiffs have failed to state a claim under the NJCFA because: (1) Plaintiffs could not have reasonably believed the alarm systems

in the jewelry store and their residence were identical; (2) Plaintiffs signed separate contracts with different companies for their residential and business monitoring services; and (3) Plaintiffs failed to adequately plead their claim. (Def.'s Br. 8–12.)

At this stage of the proceedings, the Court is only concerned with whether Plaintiffs' factual allegations are enough "to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Twombly*, 550 U.S. at 555 (internal citation and quotation omitted). The Court is satisfied that Plaintiffs' Second Amended Complaint includes sufficient "grounds" to establish that they may be entitled to relief under the NJCFA.

Plaintiffs plainly allege unlawful conduct in Holmes' affirmative representation that the residential and commercial security systems were the "same," when the systems were not the same. Plaintiffs also allege an ascertainable loss in that they have alleged that they received "less than what was promised," *Ramirez v. STi Prepaid LLC*, 644 F.Supp.2d 496, 501 (D.N.J.2009) (citing *Union Ink Co., Inc. v. AT & T Corp.*, 352 N.J.Super. 617, 801 A.2d 361, 379 (N.J.Super.Ct.App.Div.2002)), and "different from what they reasonably expected in view of [Holmes'] [re]presentations." *Id.* (citing *Miller v. Am. Family Publishers*, 284 N.J.Super. 67, 663 A.2d 643, 655 (N.J.Super.Ct. Ch. Div.1995)). Finally, Plaintiffs allege a causal relationship between Holmes' unlawful conduct and their ascertainable loss in that they allege that they were "induced" to purchase the residential security system because of Holmes' representation. It is not unreasonable to think that Plaintiffs would assume that their residential system would provide the same level of security as their commercial system in light of Holmes' statement.

***8** Accordingly, because Plaintiffs have sufficiently plead their claim under the NJCFA, Defendant's motion as to Count IV will be denied.

E. Limitation of Liability

Finally, Defendant asks the Court to limit any awarded damages to the amount agreed upon in its contract with Plaintiffs. (Def.'s Br. at 15.) Plaintiffs contend that the liability limitation is unenforceable and unconscionable because this case involves personal injury, as opposed to property damage, and the parties have unequal bargaining powers. (Pl.'s Opp'n Br. 1.)

It is inappropriate for the Court to wade into factual issues, such as the measure of Plaintiffs' damages, on a motion to dismiss. *See NJSR Surgical Ctr., L.L.C. v. Horizon Blue Cross Blue Shield of New Jersey, Inc.*, No. 12–753, 2013 WL 5781496, at *9 (D.N.J. Oct.24, 2013). Accordingly, the Court will not address this issue further and Defendant's motion on this point will be denied.

F. Leave to Amend

"When a plaintiff does not seek leave to amend a deficient complaint after a defendant moves to dismiss it, the court must inform the plaintiff that he has leave to amend within a set period of time, unless amendment would be inequitable or futile." *Grayson v. Mayview State Hosp.*, 293 F.3d 103, 108 (3d Cir.2002).

Here, Plaintiffs have amended their original Complaint twice. To permit Plaintiffs to amend Counts II and III a third time would be futile. Plaintiffs cannot salvage their tort claims because their remedy exists solely in contract, nor can they salvage their breach of express and implied warranties claims because Defendant's disclaimer is valid. Accordingly, Counts II and III will be dismissed with prejudice. *See Hartman v. Twp. of Readington*, No. 02–2017, 2006 WL 3485995, at *3 (D.N.J. Nov.30, 2006) ("Dismissal of a count in a complaint with prejudice is appropriate if amendment would be inequitable or futile").

III. CONCLUSION

For the reasons stated above, Defendant's motion to dismiss is **GRANTED IN PART** and **DENIED IN PART.** An appropriate order will issue today.

D.N.J.,2013.
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