ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address):
Christopher Chorba, SBN 216692
Gibson, Dunn & Crutcher LLP
333 South Grand Avenue
Los Angeles, CA 90071-3197
TELEPHONE NO.: 213-229-7000 FAX NO. (Optional): 213-229-7520
E-MAIL ADDRESS (Optional): CChorba@gibsondunn.com
ATTORNEY FOR (Name): Defendant Apple Inc.

FOR COURT USE ONLY

SUPERIOR COURT OF CALIFORNIA, COUNTY OF Santa Clara
STREET ADDRESS: 191 North First Street, Department 6
MAILING ADDRESS: 191 North First Street, Department 6
CITY AND ZIP CODE: San Jose, CA 95113
BRANCH NAME: Downtown Superior Court

PLAINTIFF/PETITIONER: Bethany Modisette et al.
DEFENDANT/RESPONDENT: Apple Inc.

# NOTICE OF ENTRY OF JUDGMENT OR ORDER

CASE NUMBER: 16CV304364

(Check one): ☑ UNLIMITED CASE (Amount demanded exceeded $25,000) ☐ LIMITED CASE (Amount demanded was $25,000 or less)

**TO ALL PARTIES :**

1. A judgment, decree, or order was entered in this action on (date): May 3, 2017

2. A copy of the judgment, decree, or order is attached to this notice.

Date: June 5, 2017

Christopher Chorba
(TYPE OR PRINT NAME OF ☑ ATTORNEY ☐ PARTY WITHOUT ATTORNEY)

▶ _____
(SIGNATURE)



Form Approved for Optional Use
Judicial Council of California
CIV-130 [New January 1, 2010]

NOTICE OF ENTRY OF JUDGMENT OR ORDER

www.courtinfo.ca.gov

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SANTA CLARA

BETHANY MODISETTE, et al.,

Plaintiffs,

v.

APPLE INC.,

Defendant.

CASE NO. 16cv304364

~~[PROPOSED]~~ **JUDGMENT OF DISMISSAL**

ASSIGNED FOR ALL PURPOSES TO:
THE HON. THEODORE C. ZAYNER
DEPARTMENT 6

Action Filed: December 23, 2016
Trial Date: None set.

On April 11, 2017, Defendant Apple Inc.'s Demurrer to Plaintiffs' First Amended Complaint came on for hearing before the Honorable Theodore C. Zayner in Department 6 of the Santa Clara County Superior Court, located at 191 North First Street, San Jose, California 95113. The Court, after considering Apple's Demurrer and supporting papers, the papers submitted by Plaintiffs in opposition, and the papers submitted by Apple in reply, sustained Apple's Demurrer in its entirety and without leave to amend, for all of the reasons set forth in the Court's separate order.

**IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED THAT:**

(1) Final judgment is entered in favor of Apple and against Plaintiffs;

(2) Plaintiffs' First Amended Complaint against Apple is dismissed in its entirety and without further leave to amend;

(3) Plaintiffs shall take nothing on their action against Defendant; and

(4) Defendant shall be entitled to recover costs as permitted by applicable law.

IT IS SO ORDERED.

DATED: 5/3, 2017

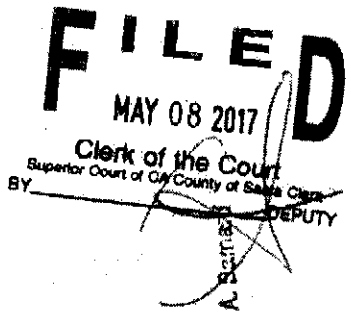
Theodore C. Zayner

HON. THEODORE C. ZAYNER
JUDGE OF THE SUPERIOR COURT

APPROVED AS TO FORM:

Brian Barrow
Attorney for Plaintiffs
Executed this 28th day of April, 2017.

Christopher Chorba
Attorney for Defendant
Executed this 28th day of April, 2017.




SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SANTA CLARA

BETHANY MODISETTE, et al.,

Plaintiffs,

v.

APPLE INC.,

Defendant.

CASE NO. 16cv304364

**~~[PROPOSED]~~ ORDER SUSTAINING DEFENDANT APPLE INC.'S DEMURRERS TO PLAINTIFFS' FIRST AMENDED COMPLAINT**

ASSIGNED FOR ALL PURPOSES TO:
THE HON. THEODORE C. ZAYNER
DEPARTMENT 6

Hearing Date: April 11, 2017
Hearing Time: 9:00 A.M.
Dept.: 6

Action Filed: December 23, 2016
Trial Date: None set.

Currently before the Court is the demurrer by defendant Apple, Inc. ("Apple") to the first amended complaint ("FAC") of plaintiffs Bethany Modisette, James Modisette, and Isabella Modisette (collectively, "Plaintiffs").[1]

**Factual and Procedural Background**

This action arises out of a tragic accident that occurred in Denton County, Texas on December 24, 2014. (FAC, ¶¶ 4, 13.) Bethany and James were travelling with their two minor daughters, Isabella and Moriah, in a Toyota Camry southbound on Interstate 35W when police activity caused traffic to slow or stop. (*Id.*, at ¶ 13.) At the same time, Garrett Wilhelm was also travelling southbound on Interstate 35W in a Toyota 4Runner. (*Id.*, at ¶ 14.) Wilhelm was utilizing Apple's FaceTime application on his iPhone 6 Plus while driving. (*Id.*, at ¶¶ 14-15.) As a result of the distraction caused by the use of the FaceTime application, Wilhelm's attention was diverted away from the traffic conditions on the road. (*Id.*, at ¶ 15.) Wilhelm's car struck the Modisette family car at 65 miles per hour, "causing it to be propelled forward, rotate, and come to a final rest at an angle facing the wrong direction in the right lane of traffic." (*Ibid.*) After the initial impact, Wilhelm's car rolled up and over the driver's side of the Modisette family car, causing extreme damage to the driver's side of the Toyota Camry. (*Ibid.*) James and Moriah were in critical condition and rescue workers labored to extract them from the car. (*Ibid.*) James, Bethany, and Isabella were eventually transported to the regional medical center for treatment of their injuries. (*Ibid.*) Moriah was air-lifted to the area children's hospital, where she later died from her injuries. (*Ibid.*)

Plaintiffs allege that Apple "negligently and carelessly researched, specified, designed, manufactured, fabricated, modified, tested or failed to test, warned or failed to warn, labeled, assembled, distributed, supplied, sold, inspected, serviced, failed to recall, failed to retrofit, repaired, marketed, warranted, packaged, and advertised the iPhone 6 Plus." (FAC, ¶ 38.) Apple "specifically designed and manufactured its iPhones to include factory-installed, non-optional applications such as 'Messages,' 'Phone,' and 'FaceTime' applications, and the camera/video feature, such that those applications could be accessed and used in any situation, including while operating a motor vehicle."

[1] At times, the parties are referred to by their first names for purposes of clarity; no disrespect is intended. (See *Rubenstein v. Rubenstein* (2000) 81 Cal.App.4th 1131, 1136, fn. 1.)

(*Ibid.*) Apple knew or reasonably should have known that users of the iPhone 6 Plus would use the factory-installed and non-optional features, including FaceTime, while operating a motor vehicle and "they would foreseeably be distracted from the task of safe driving as a result of using those freely available features while driving, thereby foreseeably increasing the risk of injury and death as a result of distracted driving." (*Ibid.*) Furthermore, Apple's "failure to design, manufacture, and sell the Apple iPhone 6 Plus with the patented, safer, alternative design technology already available to it that would automatically lock-out or block users from utilizing [its] 'FaceTime' application while driving a motor vehicle at highway speed, and failure to warn users that the product was likely to be dangerous when used or misused in a reasonably foreseeable manner and/or instruct on the safe usage of this and similar applications, rendered the Apple iPhone 6 defective when it left [Apple's] possession, and were a substantial factor in causing [Plaintiffs'] injuries and [Moriah's] death." (FAC, ¶¶ 4-5.)

Based on the foregoing, Plaintiffs filed the operative FAC against Apple, alleging causes of action for: (1) general negligence; (2) gross negligence; (3) negligent product liability; (4) strict product liability; (5) negligent infliction of emotional distress; (6) intentional infliction of emotional distress; (7) loss of consortium; and (8) public nuisance.

On March 9, 2017, Apple filed the instant demurrer to the FAC. Plaintiffs filed papers in opposition to the demurrer on March 29, 2017. Apple filed a reply on April 4, 2017.

**Discussion**

Apple demurs to each and every cause of action of the FAC on the ground of failure to allege facts sufficient to constitute a cause of action. (See Code Civ. Proc., § 430.10, subd. (e).)

As the court finds that each cause of action alleged in the FAC fails, as a matter of law, to establish either the element of duty or of causation, the demurrer is SUSTAINED, without leave to amend.

**I. Plaintiffs' Evidentiary Objection**

Plaintiffs submit an evidentiary objection to (1) portions of the declaration of Apple's counsel pertaining to court orders issued in the case of *Coalition Against Distracted Driving, et al. v. Apple,*

*Inc., et al.* (Los Angeles County Superior Court, Case No. BC578915) (the "CADD Case") and (2) the subject court orders, which are attached to the declaration as Exhibit 1.

Plaintiffs' evidentiary objection is not well-taken because the court orders, and the portions of counsel's declaration referencing the same, are not offered as *evidence* in support of Apple's demurrer. Rather, Apple offers the court orders as relevant legal authority concerning the same and/or similar issues raised in the present demurrer. Thus, Plaintiffs' evidentiary objection is overruled.

In any event, the Court declines to consider the rulings made in the CADD Case. Even assuming for the sake of argument that the CADD Case involves the same issues as this case, written trial court rulings have no precedential value. (See *Santa Ana Hospital Medical Center v. Belshe* (1997) 56 Cal.App.4th 819, 830–31 [declining to consider a written trial court ruling]; see also *San Diego County Employees Retirement Ass'n v. County of San Diego* (2007) 151 Cal.App.4th 1163, 1184 ["Retirement Association's reliance on a 1998 superior court judgment is unhelpful. [Citation.] A trial court judgment cannot properly be cited in support of a legal argument, absent exceptions not applicable here."]; *Budrow v. Dave & Buster's of California, Inc.* (2009) 171 Cal.App.4th 875, 884–85 [declining to take judicial notice of a written trial court ruling]; *Crab Addison, Inc. v. Super. Ct.* (2008) 169 Cal.App.4th 958, 963 [same].)

**II. Choice of Law**

Although a choice of law issue is not expressly raised, given Apple's repeated citation to, and reliance on, Texas law in its moving papers, the Court finds it necessary for clarity to confirm the law to be applied in this action. Apple submits the court should reach the same conclusion, under the law of either State.

"California follows a three-step 'governmental interest analysis' to address conflict of laws claims and ascertain the most appropriate law applicable to the issues where there is no effective choice-of-law agreement." (*Washington Mutual Bank, FA v. Super. Ct. (Briseno)* (2001) 24 Cal.4th 906, 919 ("*Washington Mutual*"); *Kearney v. Salomon Smith Barney, Inc.* (2006) 39 Cal.4th 95, 107-108.) The analysis begins with the assumption that the court will apply "the law *of the forum state,* i.e., California, unless there is some reason not to." (*ABF Capital Corp. v. Grove Properties Co.* (2005) 126 Cal.App.4th 204, 222 ("*ABF Capital*"), italics original.) The first step in the analysis is

that the foreign law proponent must identify the applicable rule of law in the foreign state and show it materially differs from the law of California. (*Id.*, at p. 222.) The second step in the governmental interest analysis is for the court to "determine what interest, if any, each state has in having its own law applied to the case." (*Washington Mutual, supra,* 24 Cal.4th at p. 920.) The third step in the analysis is to determine which state's interests would be more impaired if its law were not applied, considering the states' relative commitment to the laws involved, the history and current status of the states' laws, and the function and purpose of those laws. (*ABF Capital., supra,* 126 Cal.App.4th at p. 221.)

Here, Apple does not attempt to demonstrate that (1) Texas law materially differs from California law, (2) Texas has any interest in having its own law applied to the case, or (3) Texas' interests would be more impaired if its law was not applied. Instead, Apple merely "reserves all rights to challenge Plaintiff's apparent choice of California law." (Mem Ps. & As., p. 3, fn. 1.) Because Apple does not demonstrate that Texas law should be applied to this action, the Court will apply California law. (See *Beech Aircraft Corp. v. Super. Ct.* (1976) 61 Cal.App.3d 501, 522 ["[G]enerally speaking the forum will apply its own rule of decision unless a party litigant timely invokes the law of a foreign state. In such event he must demonstrate that the latter rule of decision will further the interest of the foreign state and therefore that it is an appropriate one for the forum to apply to the case before it."].)

**III. Legal Standard**

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

omitted.) However, while "[a] demurrer admits all facts properly pleaded, [it does] not [admit] contentions, deductions or conclusions of law or fact." (*George v. Automobile Club of Southern California* (2011) 201 Cal.App.4th 1112, 1120.)

**IV. Failure to Allege Facts Sufficient to State a Claim**

Apple argues that the Court should sustain its demurrer as to each and every cause of action of the FAC because each claim "requires proof of duty and causation, and as a matter of law, Plaintiffs cannot establish either of these elements." (Ntc. of Mtn., p. 2:14-15; see Mem. Ps. & As., pp. 1:5-7, 4:15-17.) With respect to the issue of duty, Apple asserts that "Plaintiffs do not (and cannot) establish that a manufacturer has a duty to warn of, or prevent, any misuse of an inherently safe product (such as a smartphone)." (Mem. Ps. & As., p. 1:8-9.) Apple then cites cases in which courts purportedly "rejected similar efforts to hold smart phone manufacturers and cellular service providers liable for negligent use of cellphones while driving and to 'impose a duty to warn.' " (*Id.*, at pp. 1:9-20, 5:6-9:24.) Regarding the issue of causation, Apple contends that the accident was caused solely by Wilhelm's neglect of his duty to safely operate his vehicle and his misuse of the iPhone 6 Plus. (*Id.*, at pp. 11:25-13:28.) Apple further asserts that Wihelm's misuse of the iPhone 6 Plus is the subject of criminal prosecution and his criminal act constitutes an intervening cause that cuts off its liability. (*Id.*, at p. 14:16-24.)

In opposition, Plaintiffs argue that Apple owed them a duty to exercise reasonable care for their safety; Apple's duty argument does not apply to their strict liability cause of action; and whether Apple's alleged conduct was a proximate cause of their injuries is a question of fact for the jury.

**A. First and Second Causes of Action**

Plaintiffs' first and second causes of action are for general negligence and gross negligence, respectively. "To state a cause of action for negligence, a plaintiff must allege (1) the defendant owed the plaintiff a duty of care, (2) the defendant breached that duty, and (3) the breach proximately caused the plaintiff's damages or injuries." (*Lueras v. BAC Home Loans Servicing, LP* (2013) 221 Cal.App.4th 49, 62.)

With respect to the issue of duty, it is well-established that the existence of a legal duty to use reasonable care in a particular factual situation is a question of law for courts to decide. (*Vasquez v.*

*Residential Investments, Inc.* (2004) 118 Cal.App.4th 269, 278.) Thus, the Court may properly resolve the issue of duty on this demurrer.

"As a general rule, each person has a duty to use ordinary care and 'is liable for injuries caused by his failure to exercise reasonable care in the circumstances ....' [Citation.] ' 'Courts, however, have invoked the concept of duty to limit generally 'the otherwise potentially infinite liability which would follow from every negligent act ....' ' ' [Citation.] As noted, whether a legal duty of care exists ' 'is a question of law to be determined on a case-by-case basis.' ' [Citation.] This determination calls for a balancing of the so-called '*Rowland* factors,' which include the ' 'foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.' ' [Citations.] The court's task in determining whether a duty exists 'is not to decide whether a *particular* plaintiff's injury was reasonably foreseeable in light of a *particular* defendant's conduct, but rather to evaluate more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed on the negligent party.' [Citation.]" (*Elsheref v. Applied Materials, Inc.* (2014) 223 Cal.App.4th 451, 459–60 ("*Elsheref*"), italics in original.)

Here, some of those factors could weigh in favor of finding a duty on the part of Apple. Plaintiffs' allegations establish that the iPhone 6 Plus came installed with the FaceTime application; operation of the FaceTime application requires cognitive, manual, audio, and visual efforts on the part of the user; such efforts distract drivers from paying attention to the road; distracted driving is a well-documented cause of car accidents; distracted driving has led to a rise in traffic fatalities; Apple knew or should have known that use of the FaceTime application while operating a car posed risks to human life and safety; Apple submitted a patent application, that was approved in early 2014, for a lock-out mechanism configured to disable iPhone functions, such as the FaceTime application, while the user was driving at highway speeds; and, in its patent application, Apple acknowledged that

distracted driving due to the use of a cellphone was a widespread practice and a major public concern. (FAC, ¶¶ 14, 16-23, 26-27, 29-32, 38-40, 49, 52, 54.) Based on these allegations, the Court concludes that there was a low degree of foreseeability that Apple's alleged conduct would result in an accident. Next, the degree of certainty that Plaintiffs' suffered injury is indisputably high. Furthermore, the policy of preventing future harm and the "moral blame" factor favor the imposition of a legal duty, given Plaintiffs' allegations that Apple had actual or constructive knowledge of the harmful consequences of its conduct. (See *Rotolo v. San Jose Sports & Entertainment, LLC* (2007) 151 Cal.App.4th 307, 337–338 disapproved on other grounds in *Verdugo v. Target Corp.* (2014) 59 Cal.4th 312, 328.)

But the remaining factors weigh more strongly against a finding of duty here. First, the Court concludes there is not a sufficiently "close" connection between Apple's conduct and Plaintiffs' injuries to warrant the imposition of a legal duty. As Apple persuasively argues, Plaintiffs' injuries are more closely connected to Wilhelm's failure to exercise due care while driving and his inattention to the road. The Court finds it particularly persuasive that in negligence cases based on premises liability there is "no legal duty to provide a distraction barrier to prevent passing motorists from seeing or hearing what is occurring upon the land." (*Lompoc Unified School Dist. v. Superior Court* (1993) 20 Cal.App.4th 1688, 1694.) The defendant in such a case "has no liability for injuries caused by the motorist who is not paying attention to where he or she is going" because "it is the motorist who has the duty to exercise reasonable care at all times, to be alert to potential dangers, and to not permit his or her attention to be so distracted by an interesting sight that such would interfere with the safe operation of a motor vehicle." (*Ibid.*) The Court sees no reason why a legal duty should be imposed on Apple to erect a "distraction barrier" simply because the alleged distraction occurs inside the motor vehicle as opposed to outside of it.

Second, the burden on Apple and the consequences to the community would be substantial if the Court were to impose a legal duty here. Moreover, the imposition of such a duty would be contrary to public policy. As other courts have found, "many items may be used by a person while driving, thus making the person less attentive to driving. It is foreseeable to some extent that there will be drivers who eat, apply makeup, or look at a map while driving and that some of those drivers

will be involved in car accidents because of the resulting distraction. However, it would be unreasonable to find it sound public policy to impose a duty on the restaurant or cosmetic manufacturer or map designer to prevent such accidents." (*Williams v. Cingular Wireless* (Ind. Ct. App. 2004) 809 N.E.2d 473, 478 ("*Williams*").) This is because, as previously stated, it is the driver's responsibility to drive with due care. (*Ibid.*) Apple cannot control what people do with the phones after they purchase them. (*Ibid.*) To place a duty on Apple to develop and install additional software, or issue warnings to users, because the phone might be involved in a car accident would be akin to making a car manufacturer install software that caps a vehicle's speed, or warn car buyers against driving above the speed limit, because the car might be negligently used in such a way that it causes an accident. (*Ibid.*; see *Durkee v. C.H. Robinson Worldwide, Inc.* (W.D.N.C. 2011) 765 F.Supp.2d 742, 749 ["If manufacturers or designers of products had a legal duty to third parties to anticipate improper use of their products then no product that would potentially distract a driver could be marketed. Cellular telephones, GPS devices and even car radios would be the subject of suits such as this one"].)

"Cellular phones are safely used in many different contexts every day. Indeed, many drivers use cellular phones safely for personal and business calls, as well as to report traffic emergencies. Encouraging drivers to report accidents, dangerous road conditions, or other similar threats to authorities on their cellular phones is in the public's interest." (*Williams, supra,* 809 N.E.2d at p. 478.) Imposing a duty on Apple and similar companies to prevent car accidents caused by distracted driving would place a higher burden on those companies than on other types of manufacturers or sellers of products that might be distracting to drivers. (*Ibid.*) "Ultimately, sound public policy dictates that the responsibility for negligent driving should fall on the driver." (*Ibid.*)

In view of all of the *Rowland* factors discussed above and the overwhelming need to keep liability within reasonable bounds, the Court concludes a common law duty of care should not be imposed on Apple in the circumstances of this case. (See *Hegyes v. Unjian Enterprises, Inc.* (1991) 234 Cal.App.3d 1103, 1114 ["in any negligence case, there is an overwhelming need to keep liability within reasonable bounds and to limit the areas of actionable causation by applying the concept of duty"].)

For these reasons, the demurrer to the first and second cause of action is SUSTAINED, without leave to amend.[2] (See *Melton v. Boustred* (2010) 183 Cal.App.4th 521, 544 ("*Melton*") ["the plaintiff must demonstrate a reasonable possibility that the complaint's defects can be cured by amendment"]; see also *City of Stockton v. Super. Ct.* (2007) 42 Cal.4th 730, 747 ("*Stockton*") ["If the plaintiff has not had an opportunity to amend the complaint in response to the demurrer, leave to amend is liberally allowed as a matter of fairness, *unless the complaint shows on its face that it is incapable of amendment*."], italics added.)

**B. Third and Fourth Causes of Action**

Plaintiffs' third and fourth causes of action are for negligent and strict product liability, respectively. (See *Jiminez v. Sears, Roebuck & Co.* (1971) 4 Cal.3d 379, 387 [in a products liability action, the plaintiff may assert liability under a theory of strict liability in tort or on the theory of negligence].) Negligent product liability may be premised upon a theory of design defect, manufacturing defect, or failure to warn. (See CACI 1221-1222.) To recover on a theory of negligent product liability, a plaintiff must show that the defendant failed to use the amount of care in designing, manufacturing, inspecting, installing, repairing the product, or warning about the product's dangerous condition, that a reasonably careful designer or manufacturer would use in similar circumstances to avoid exposing others to a foreseeable risk of harm. (See *ibid.*)

Strict product liability may also be premised upon a theory of design defect, manufacturing defect, or failure to warn. (*Chavez v. Glock, Inc.* (2012) 207 Cal.App.4th 1283, 1302.) " 'The elements of a strict products liability cause of action are a defect in the manufacture or design of the product or a failure to warn, causation, and injury.' [Citations.] More specifically, plaintiff must ordinarily show: ' '(1) the product is placed on the market; (2) there is knowledge that it will be used without inspection for defect; (3) the product proves to be defective; and (4) the defect causes injury....' ' [Citation.]" (*Nelson v. Super. Ct.* (2006) 144 Cal.App.4th 689, 695, emphasis omitted; see

---

[2] Given that Plaintiff does not establish the element of duty, the Court need not address Apple's arguments regarding causation with respect to the first and second causes of action. However, the court's conclusion on this issue applies to each cause of action alleged in the First Amended Complaint.

also *Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57, 62.) Duty is not an element of a claim for strict product liability. (*Elsheref, supra,* 223 Cal.App.4th at pp. 463-64.)

Since the claim for negligent product liability requires the existence of a legal duty, the third cause of action fails for the same reasons explained with respect to the first and second causes of action.

Because the fourth cause of action is one for strict product liability, the lack of any duty is not fatal to the claim. (See *Elsheref, supra,* 223 Cal.App.4th at p. 464 ["strict products liability causes of action need not be pled in terms of classic negligence elements (duty, breach, causation and damages) ..."].)

With respect to Apple's remaining argument, causation is a usually a question of fact for the jury, and it ordinarily may not be resolved on demurrer unless there is no room for a reasonable difference of opinion. (*Weissich v. County of Marin* (1990) 224 Cal.App.3d 1069, 1084 ("*Weissich*") ["Ordinarily proximate cause is a question of fact which cannot be decided as a matter of law from the allegations of a complaint. ... Nevertheless, where the facts are such that the only reasonable conclusion is an absence of causation, the question is one of law, not of fact."]; *Rosh v. Cave Imaging Systems, Inc.* (1994) 26 Cal.App.4th 1225, 1235 ("*Rosh*") ["The question of causation is one of fact; it becomes a question of law only where reasonable people do not dispute the absence of causation."].) Although it is not binding authority here, the Court finds persuasive the reasoning and finding of the United States District Court in *Meador v. Apple, Inc.* (E.D. Tex., Aug. 16, 2016, No. 6:15-CV-715) 2016 WL 7665863. There, the District Court rejected at the pleading stage similar theories of liability alleged against Apple, finding "because the circumstances here are not 'such that reasonable jurors would identify [the iPhone or Apple's conduct] as being actually responsible for the ultimate harm' to Plaintiffs, the iPhone and Apple's conduct are too remotely connected with Plaintiffs' injuries to constitute their legal cause." (*Id.,* at p. *4.) In dismissing the plaintiff's claims against Apple, the District Court concluded that the plaintiffs "failed to state a plausible products liability claim under either a strict liability or negligence theory." (*Ibid.*) This Court agrees. The chain of causation alleged by Plaintiffs in this case is far too attenuated for a reasonable person to conclude that Apple's conduct is or was a substantial factor in causing Plaintiffs' harm. (See CACI 430.)

Accordingly, the demurrer to the third and fourth causes of action is SUSTAINED, without leave to amend. (See *Melton, supra,* 183 Cal.App.4th at p. 544 ["the plaintiff must demonstrate a reasonable possibility that the complaint's defects can be cured by amendment"]; see also *Stockton, supra,* 42 Cal.4th at p. 747 ["If the plaintiff has not had an opportunity to amend the complaint in response to the demurrer, leave to amend is liberally allowed as a matter of fairness, *unless the complaint shows on its face that it is incapable of amendment.*"], italics added.)

**C. Fifth and Sixth Causes of Action**

Plaintiffs' fifth and sixth causes of action are for negligent and intentional infliction of emotional distress, respectively. Negligent infliction of emotional distress claims are a simply a species of negligence; thus, the elements necessary to plead a claim for NIED are (1) the existence of a duty of care owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages. (See *Behr v. Redmond* (2011) 193 Cal.App.4th 517, 532; see also *Lawson v. Management Activities, Inc.* (1999) 69 Cal.App.4th 652, 656; *Burgess v. Super. Ct.* (1992) 2 Cal.4th 1064, 1072.)

To state a claim for intentional infliction of emotional distress, a plaintiff must allege: (1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct. (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1050.) Duty is not an element of a claim for intentional infliction of emotional distress. (See *Plotnik v. Meihaus* (2012) 208 Cal.App.4th 1590, 1608-09 ("*Plotnik*") [indicating that duty is an element of a claim for negligent infliction of emotional distress, not intentional infliction of emotional distress].)

Since the claim for negligent infliction of emotional distress requires the existence of a legal duty, the fifth cause of action fails for the same reasons explained with respect to the first and second causes of action.

Next, because the sixth cause of action is one for intentional infliction of emotional distress, the lack of any duty is not fatal to the claim. (See *Plotnik, supra,* 208 Cal.App.4th at pp. 1608-09.) However, Plaintiffs' claims also fail on the element of causation for the reasons stated above.

Accordingly, the demurrer to the fifth and sixth causes of action is SUSTAINED, without leave to amend. (See *Melton, supra,* 183 Cal.App.4th at p. 544 ["the plaintiff must demonstrate a reasonable possibility that the complaint's defects can be cured by amendment"]; see also *Stockton, supra,* 42 Cal.4th at p. 747 ["If the plaintiff has not had an opportunity to amend the complaint in response to the demurrer, leave to amend is liberally allowed as a matter of fairness, *unless the complaint shows on its face that it is incapable of amendment.*"], italics added.)

**D. Seventh Cause of Action**

Plaintiffs' seventh cause of action is for loss of consortium. "A cause of action for loss of consortium is, by its nature, dependent on the existence of a cause of action for tortious injury to a spouse." (*LeFiell Mfg. Co. v. Super. Ct.* (2012) 55 Cal.4th 275, 285.) Because the Court concludes that the first through sixth causes of action fail on the elements of duty and/or causation, the seventh cause of action fails as well.

Accordingly, the demurrer to the seventh cause of action is SUSTAINED, without leave to amend. (See *Melton, supra,* 183 Cal.App.4th at p. 544 ["the plaintiff must demonstrate a reasonable possibility that the complaint's defects can be cured by amendment"]; see also *Stockton, supra,* 42 Cal.4th at p. 747 ["If the plaintiff has not had an opportunity to amend the complaint in response to the demurrer, leave to amend is liberally allowed as a matter of fairness, *unless the complaint shows on its face that it is incapable of amendment.*"], italics added.)

**E. Eighth Cause of Action**

Plaintiffs' eighth cause of action is for public nuisance. A nuisance is statutorily defined as anything "injurious to health" or "indecent, or offensive to the senses, or an obstruction to the free use of property" that interferes "with the comfortable enjoyment of life or property ...." (Civ. Code, § 3479.) "A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal." (Civ. Code, § 3480.)

> As the California Supreme Court has explained, "public nuisances are offenses against, or interferences with, the exercise of *rights common to the public.*" (*People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1103 ....) The interference must be both substantial and

unreasonable. (*Id.* at p. 1105, 60 Cal.Rptr.2d 277, 929 P.2d 596; *Birke v. Oakwood Worldwide* (2009) 169 Cal.App.4th 1540, 1547 ....)

> The elements "of a cause of action for public nuisance include the existence of a duty and causation." (*In re Firearm Cases* (2005) 126 Cal.App.4th 959, 988 ...; see generally, *Birke v. Oakwood Worldwide, supra,* 169 Cal.App.4th at p. 1548 ....) Public nuisance liability "does not hinge on whether the defendant owns, possesses or controls the property, nor on whether he is in a position to abate the nuisance; the critical question is whether the defendant created or assisted in the creation of the nuisance." (*City of Modesto Redevelopment Agency v. Superior Court* (2004) 119 Cal.App.4th 28, 38 ...; accord, *County of Santa Clara v. Atlantic Richfield Co.* (2006) 137 Cal.App.4th 292, 306 ....)
>
> Given "the broad definition of nuisance," the independent viability of a nuisance cause of action "depends on the facts of each case." (*El Escorial Owners' Assn. v. DLC Plastering, Inc.* (2007) 154 Cal.App.4th 1337, 1348 ....) "Where negligence and nuisance causes of action rely on the same facts about lack of due care, the nuisance claim is a negligence claim." (*Id.* at p. 1349 ....) The nuisance claim "stands or falls with the determination of the negligence cause of action" in such cases. (*Pamela W. v. Millsom, supra,* 25 Cal.App.4th at p. 954, fn. 1 ....)

(*Melton, supra,* 183 Cal.App.4th at p. 542.)

In this case, Plaintiffs' eighth cause of action for public nuisance does not allege any facts in addition to those alleged in support of the first and second causes of action. (See FAC, ¶¶ 98-104.) Thus, the claim for public nuisance relies entirely on the facts asserted in Plaintiffs' negligence causes of action and, as framed, is merely a clone of the first and second causes of action using a different label. (See *Melton, supra,* 183 Cal.App.4th at p. 543.)

Accordingly, the demurrer to the eighth cause of action is SUSTAINED, without leave to amend. (See *Melton, supra,* 183 Cal.App.4th at p. 544 ["the plaintiff must demonstrate a reasonable possibility that the complaint's defects can be cured by amendment"]; see also *Stockton, supra,* 42 Cal.4th at p. 747 ["If the plaintiff has not had an opportunity to amend the complaint in response to the demurrer, leave to amend is liberally allowed as a matter of fairness, *unless the complaint shows on its face that it is incapable of amendment.*"], italics added.)

The Court hereby SUSTAINS Defendant Apple Inc.'s demurrers to the entire First Amended Complaint, and to each cause of action, without leave to amend. This action is hereby DISMISSED.

**IT IS SO ORDERED.**

DATED: 5/3, 2017

HON. THEODORE C. ZAYNER
JUDGE OF THE SUPERIOR COURT
Theodore C. Zayner

APPROVED AS TO FORM:

Brian Barrow
Attorney for Plaintiffs
Executed this 27th day of April, 2017.

Christopher Chorba
Attorney for Defendant
Executed this 27th day of April, 2017.

**PROOF OF SERVICE**

I, Candie Trainor, declare as follows:

I am employed in the County of Los Angeles, California; I am over the age of eighteen years and am not a party to this action; my business address is Gibson, Dunn & Crutcher LLP, 333 South Grand Avenue, Los Angeles, California 90071-3197, in said County and State. On June 5, 2017, I served the following document(s):

**NOTICE OF ENTRY OF JUDGMENT OR ORDER**

on the parties stated below, by the following means of service:

| | |
|---|---|
| Gregory P. Love (PHY pending)<br>LOVE LAW FIRM<br>107 E. Main Street<br>Henderson, Texas 75652<br>Telephone: (903) 212-4444<br>Facsimile: (903) 392-2267<br>Email: greg@lovetrialfirm.com | *Attorneys for Plaintiffs*<br>Bethany Modisette, et al., |
| John F. (Jack) Walker, III (PHY pending)<br>Marisa M. Schouten (PHY pending)<br>MARTIN WALKER PC<br>121 N. Spring Avenue<br>Tyler, Texas 75702<br>Telephone: (903) 526-1600<br>Facsimile: (903) 595-0796<br>Email: jwalker@martinwalkerlaw.com<br>mschouten@martinwalkerlaw.com | *Attorneys for Plaintiffs*<br>Bethany Modisette, et al., |
| Jeffrey B. Simon<br>Christopher J. Panatier<br>Jennifer L. Bartlett<br>Brian P .. Barrow<br>SIMON GREENSTONE<br>PANATIER BARTLETT PC<br>3780 Kilroy Airport Way, Suite 540<br>Long Beach, California 90806<br>Telephone: (562) 590-3400<br>Facsimile: (562) 590-3412<br>Email: jsimon@sgpblaw.com<br>cpanatier@sgpblaw.com<br>jbartlett@sgpblaw.com<br>bbarrow@sgpblaw.com<br>jsanchez@sgpblaw.com | *Attorneys for Plaintiffs*<br>Bethany Modisette, et al., |

| | |
|---|---|
| Eric H. Findlay<br>Debby Gunter<br>FINDLAY CRAFT, P.C.<br>102 N. College Ave, Ste. 900<br>Tyler, TX 75702<br>Telephone: 903 -53 4-1100<br>Facsimile: 903-534-1137<br>Email: efindlay@findlaycraft.com<br>dgunter@findlaycraft.com | *Attorneys for Defendant*<br>APPLE INC. |

☑ **BY ELECTRONIC SERVICE:** Per the consent of the parties, I caused the above-entitled documents to be electronically served on the interested parties to the action at their email address listed above.

☑ I am employed in the firm of Christopher Chorba, a member of the bar of this court, and the foregoing document(s) was(were) printed on recycled paper.

☑ **(STATE)** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

I certify under penalty of perjury that the foregoing is true and correct, that the foregoing document(s), and all copies made from same, were printed on recycled paper, and that this Proof of Service was executed by me on June 5, 2017, at Los Angeles, California.

Candie Trainor