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8 IN THE UNITED STATES DISTRICT COURT  
9 FOR THE EASTERN DISTRICT OF CALIFORNIA  
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11 RESHELLE CABLE, MATTHEW CADWELL, ) 2:09-cv-00579-GEB-DAD  
12 KATIE COELHO, WILLIAM DRAPEAU, )  
13 JOSHUA HARDT, CHRIS VILLANUEVA, )  
14 and JOHN CAMERON, on behalf of ) ORDER  
15 themselves and all others )  
16 similarly situated, )  
17 Plaintiffs, )  
18 v. )  
19 MICROSOFT CORPORATION and DOES 1- )  
20 500, )  
21 Defendants. )  
22

23 Defendant Microsoft moves for dismissal of Plaintiffs'  
24 claims alleged under California's Consumer Legal Remedies Act  
25 ("CLRA"), Cal. Civ. Code §§ 1750-1784, and California's Unfair  
26 Competition Law ("UCL"), Cal. Bus. & Prof. Code §§ 17200-17210.  
27 Defendant argues these claims fail to meet the pleading standard in  
28 Rule 9(b) of the Federal Rules of Civil Procedure ("Rule"), which  
requires fraud allegations be pleaded with particularity. Defendant  
also moves for dismissal of Plaintiffs' remaining averments in their  
CLRA and UCL claims under Rule 12(b)(6), and for dismissal of

1 Plaintiffs' strict liability and negligence claims for failure to  
2 state viable claims. Plaintiffs oppose the motions.

3 Defendant argues Plaintiffs' allegations in their CLRA and  
4 UCL claims that allege "fraud in terms of both the conduct alleged and  
5 its supposed effect on consumers," are not pleaded with the  
6 particularity required by Rule 9(b). (Def. [']s Mot. to Dismiss 11:7-  
7 8.) Defendant argues the following allegations in Plaintiffs' CLRA  
8 claim have not been pleaded with particularity: "(a) that  
9 [Defendant's] XBOX 360 consoles . . . have sponsorship, approval,  
10 characteristics, ingredients, uses, benefits or quantities which they  
11 do not have; (b) that [Defendant's] consoles are of a particular  
12 standard, quality or grade, or of a particular style or model, if they  
13 are of another; and (c) by advertising its goods with the intent not  
14 to sell them as advertised." (Second Amended Complaint ("SAC" or  
15 "Complaint" ¶¶ 57-58.) Further, Plaintiffs allege Defendant committed  
16 fraud by omission in "actively conceal[ing] and fail[ing] to disclose  
17 material facts, including [the XBOX 360 console's] defects . . . ."  
18 (SAC ¶ 59.)

19 Defendant also argues the following allegations in  
20 Plaintiffs' UCL claim have not been pleaded with the required Rule  
21 9(b) particularity: "that [Defendant] engaged in unfair and unlawful  
22 business acts . . . [by] fail[ing] to disclose material information it  
23 was obligated to disclose regarding the defective nature of the XBOX  
24 360 consoles . . . combined with its worldwide brand image and  
25 advertising campaign [, which] was deceptive . . . ."; by falsely  
26 "represent[ing], through its brand imaging, advertising, marketing,  
27 warranties, and other representations that XBOX 360 consoles were safe  
28 and free from defects." (SAC ¶¶ 49 and 50.)

1           The Ninth Circuit discussed application of Rule 9(b) to  
2 fraud averments in CLRA and UCL claims in Vess v. Ciba-Geigy Corp.  
3 USA, 317 F.3d 1097, 1105 (9th Cir. 2003), stating even though “[f]raud  
4 is not an essential element of a claim under these statutes[,]” . . .  
5 “allegations (averments) of fraudulent conduct must satisfy the  
6 heightened pleading requirements of Rule 9(b).” This standard also  
7 applies to fraud by omission averments. Kearns v. Ford Motor Co., 567  
8 F.3d 1120, 1127 (9th Cir. 2009) (stating “claims of nondisclosure  
9 . . . couched in general pleadings” have to meet the Rule 9(b)  
10 requirements).

11           Rule 9(b) requires that averments of fraud be accompanied by  
12 “the who, what, when, where or how” of the misconduct charged. Vess,  
13 317 F.3d at 1106 (quoting Cooper v. Pickett, 137 F.3d 616, 627 (9th  
14 Cir. 1997)). Plaintiffs fail to satisfy these pleading requirements  
15 in the fraud averments of their CLRA and UCL claims since they did not  
16 allege who made the representations, when or where the representations  
17 were made, and how the representations and omissions were false or  
18 misleading. Therefore, Plaintiffs’ fraud averments in their CLRA and  
19 UCL claims are dismissed for failure to satisfy Rule 9(b)’s heightened  
20 pleading requirements.

21           Defendant also seeks dismissal of Plaintiffs’ remaining  
22 averments in their UCL claim under Rule 12(b)(6), arguing the  
23 averments are insufficient to state a viable claim because they are  
24 based solely on Plaintiffs’ nonviable CLRA claim. (Def. [’s] Mot. to  
25 Dismiss 19:10-11.) Defendant argues that any duty it has to  
26 Plaintiffs is limited to its warranty obligations in two warranties of  
27 which it requests to have judicial notice taken. Plaintiffs have not  
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1 opposed the request and argued at the hearing held July 13, 2009 as  
2 though the request had been granted. The request is granted.

3 Plaintiffs allege that when Defendant violated the CLRA,  
4 "Microsoft engaged in unfair and unlawful business practices in  
5 violation of the UCL . . . ." (SAC ¶ 46.) However, "[a]  
6 manufacturer's duty to consumers is limited [under the CLRA] to its  
7 warranty obligations absent either an affirmative misrepresentation or  
8 a safety issue." Ostreicher v. Alienware Corp., 2009 WL 902341, \*3  
9 (9th Cir. 2009) (unpublished decision) (citing Daugherty v. Am. Honda  
10 Motor Co., 144 Cal. App. 4th 824, 836 (2006)). Plaintiffs do not  
11 allege in their Complaint affirmative misrepresentations or safety  
12 issues. Therefore, Defendant's motion to dismiss the remaining  
13 averments in Plaintiff's UCL claim is granted.

14 Defendant also seeks dismissal of Plaintiffs' averment in  
15 UCL in which they challenge Defendant's Disc Replacement Program,  
16 arguing Plaintiffs lack standing to challenge this Program. There are  
17 no factual allegations in the Complaint indicating that Plaintiffs  
18 have standing to challenge the Program and Plaintiffs conceded at the  
19 hearing held on July 13, 2009 that they did not allege facts  
20 sufficient to show they have standing. Therefore, Defendant's motion  
21 to dismiss Plaintiffs' remaining averments in their UCL claim is  
22 granted.

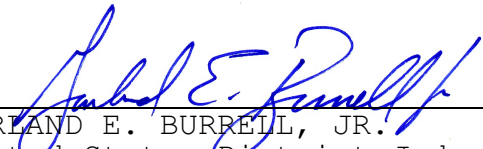
23 Defendant also argues Plaintiffs' strict liability and  
24 negligence claims are barred by the economic loss rule, and should be  
25 dismissed under Rule 12(b)(6) for failure to state viable claims,  
26 because Plaintiffs do not allege defects in the XBOX 360 console  
27 caused personal injury or damage to property other than damage to the  
28 console itself. The economic loss rule bars tort recovery for

1 economic loss caused by a defective product, but "allows a plaintiff  
2 to recover in strict products liability [and negligence] in tort when  
3 a product defect causes [personal injury] or damage to 'other  
4 property,' that is, property other than the product itself." Jimenez  
5 v. Superior Court, 29 Cal. 4th 473, 483 (2002); See Aas v. Superior  
6 Court, 24 Cal. 4th 627, 632 (2000) (applying economic loss rule in  
7 negligence action). However, Defendant concedes in its motion that  
8 Plaintiffs may be able to recover damages for the scratched game discs  
9 caused by the alleged defective Optical Disc Drive design because the  
10 discs may constitute property separate from the XBOX 360 console  
11 itself. (Def. ['s] Mot. to Dismiss 21:25-26.)

12 Plaintiffs allege that due to the defects in the XBOX 360  
13 console and Defendant's misconduct, they "purchased an XBOX 360  
14 console or game discs without knowing the truth about the consoles;  
15 paid more to purchase the console than they would have had the truth  
16 been known; unnecessarily purchased extended warranties from third-  
17 party vendors; were prevented from using the XBOX Live Service after  
18 paying for it; and have suffered either a diminished or complete loss  
19 of value of their consoles, game discs, warranties and XBOX Live  
20 Service." (SAC ¶ 39.) Other than damages alleged recoverable because  
21 of the scratched game discs, Plaintiff's allegations consist of  
22 economic damages barred by the economic loss rule. For the stated  
23 reasons, Plaintiffs' allegations are insufficient to show that the  
24 remaining damages they seek are not limited by Defendant's warranties.  
25 Therefore, Defendant's motion to dismiss Plaintiffs' strict liability  
26 and negligence claims is granted, except for Plaintiffs' damage claim  
27 for scratched discs.

1           Lastly, Plaintiffs seek an opportunity to file an amended  
2 complaint in which they could address deficiencies in their pleading.  
3 This request is granted provided that the amended complaint is filed  
4 ten days from the date on which this Order is filed.

5 Dated: August 6, 2009

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8 GARLAND E. BURRELL, JR.  
United States District Judge