

1 **BACKGROUND²**

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3 Plaintiff alleges that on February 15, 2011, Defendant
4 unveiled the 2011 MacBook Pro ("MacBook"), a computer Defendant
5 purportedly touted as generating "huge leaps in performance."
6 According to Plaintiff, Defendant promised, among other things,
7 that:

8 [The MacBook Pros] run applications up to twice as fast
9 as their top-of-the-line predecessors.

10 They perform up to twice as fast as the previous
11 generation, breezing through demanding tasks like
12 editing HD video.

13 Say you're using a processor-intensive application like
14 Aperture 3 or Final Cut Pro that benefits from extra
15 power...By shifting core frequency in smaller
16 increments than before, it allows the processor to
17 manage performance without sacrificing efficiency. All
18 this takes place behind the scenes, so your work just
19 goes smoother and faster.

20 Even with faster processors and graphics, the new
21 MacBook Pro lasts an amazing 7 hours on a single
22 charge.

23 [Y]ou can expect to surf the web wirelessly for up to 7
24 hours on a single charge. Or take your entire creative
25 studio on the road for live performances or a location
26 shoot.

27 FAC, ¶¶ 6, 7, 9. The above statements are accompanied by the
28 caveat, however, that "[b]attery life and charge cycles vary by
use and settings." Declaration of Alexei Klestoff, ¶¶ 2-3,
Exhs. A, B.³

25 ² The following facts are derived, at times verbatim, from
26 Plaintiff's Complaint.

27 ³ These additional statements, though not quoted in the FAC,
28 are the proper subjects of judicial notice. See Branch v.
Tunnell, 14 F.3d 449, 454 (9th Cir. 1994) ("[D]ocuments whose
contents are alleged in a complaint and whose authenticity no

1 Plaintiff purchased a MacBook on February 28, 2011, just
2 shortly after its release. After purchasing his new computer,
3 Plaintiff found that the product's battery was not charging under
4 certain conditions, such as when the computer was fully utilizing
5 processors meant for streaming movies, playing video games or
6 editing video. More specifically, Plaintiff discovered, and
7 reported to Defendant in July of 2011, that his battery was
8 draining power even when the machine was plugged into an external
9 power source via the AC adapter. Plaintiff further contends
10 that, in approximately August of 2011, his power adapter failed
11 to supply sufficient power to the MacBook so much so that the
12 computer's battery drained to zero, causing the machine to shut
13 down. Plaintiff then had to spend twenty minutes recharging his
14 battery and had to re-copy media on a video editing job he was
15 performing. Plaintiff believes other consumers may have
16 experienced a similar situation where their MacBooks stopped
17 functioning properly, or at all for that matter, and that the
18 machines' battery cycle counts may be caused to increase under
19 the above conditions.

20 According to Plaintiff, when Defendant has been notified
21 that the MacBook battery may drain even when the system is
22 plugged in, Defendant's customer service representatives have
23 advised customers that this is how the MacBook is designed and
24 that there is no resolution for the issue.

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26 party questions, but which are not physically attached to the
27 pleading, may be considered in ruling on a Rule 12(b)(6) motion
28 to dismiss."); see also Berenblat v. Apple Inc., 2009 WL 2591366,
*2 n.3 (N.D. Cal.); Hoey v. Sony Elecs., Inc., 515 F. Supp. 2d
1099, 1103 (N.D. Cal.).

1 Indeed, when Plaintiff himself contacted Defendant, as mentioned
2 above, Plaintiff was transferred to a Senior Engineer Support
3 Representative, who advised Plaintiff, via what Plaintiff
4 believes was a scripted response, that "[t]his battery issue was
5 expected behavior" and Defendant "[did] not have a fix."

6 Consequently, on September 9, 2011, Plaintiff initiated this
7 action against Defendant in state court. Defendant subsequently
8 removed the case to this Court, after which Plaintiff filed his
9 FAC, alleging causes of action for: 1) Products Liability -
10 Negligence; 2) Products Liability - Defect in Design,
11 Manufacture, and Assembly; 3) Products Liability - Breach of
12 Express and Implied Warranty; 4) Intentional Misrepresentation;
13 5) Negligent Misrepresentation; 6) Fraud and Concealment;
14 7) Violation of California's Unfair Competition Law, California
15 Business & Professions Code § 17200 ("UCL"); 8) Violation of
16 California's Consumers Legal Remedies Act, California Civil Code
17 §§ 1750, et seq. ("CLRA"); and 9) Money Had and Received. On
18 March 26, 2012, Defendant moved to dismiss Plaintiff's FAC. For
19 the following reasons, Defendant's Motion is GRANTED with leave
20 to amend.

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1 "Factual allegations must be enough to raise a right to relief
2 above the speculative level." Twombly, 550 U.S. at 555.

3 Furthermore, "Rule 8(a)(2)...requires a 'showing,' rather
4 than a blanket assertion, of entitlement to relief." Twombly,
5 550 U.S. at 556 n.3 (internal citations and quotations omitted).

6 "Without some factual allegation in the complaint, it is hard to
7 see how a claimant could satisfy the requirements of providing
8 not only 'fair notice' of the nature of the claim, but also

9 'grounds' on which the claim rests." Id. (citation omitted). A

10 pleading must contain "only enough facts to state a claim to

11 relief that is plausible on its face." Id. at 570. If the

12 "plaintiffs...have not nudged their claims across the line from

13 conceivable to plausible, their complaint must be dismissed."

14 Id. However, "a well-pleaded complaint may proceed even if it

15 strikes a savvy judge that actual proof of those facts is

16 improbable, and 'that a recovery is very remote and unlikely.'"

17 Id. at 556 (quoting Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)).

18 Under Rule 9(b), however, a party alleging fraud or

19 intentional misrepresentation must satisfy a heightened pleading

20 standard by stating with particularity the circumstances

21 constituting fraud. Fed. R. Civ. P. 9(b). Specifically,

22 "[a]verments of fraud must be accompanied by 'the who, what,

23 when, where, and how' of the misconduct charged." Vess v. Ciba-

24 Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir. 2003) (quoting

25 Cooper v. Pickett, 137 F.3d 616, 627 (9th Cir. 1997)). Further,

26 "a plaintiff must set forth more than the neutral facts necessary

27 to identify the transaction. The plaintiff must set forth what

28 is false or misleading about a statement, and why it is false."

1 Id. (quoting Decker v. GlenFed, Inc., 42 F.3d 1541, 1548
2 (9th Cir. 1994).

3 A court granting a motion to dismiss a complaint must then
4 decide whether to grant a leave to amend. Leave to amend should
5 be "freely given" where there is no "undue delay, bad faith or
6 dilatory motive on the part of the movant,...undue prejudice to
7 the opposing party by virtue of allowance of the amendment, [or]
8 futility of the amendment...." Foman v. Davis, 371 U.S. 178, 182
9 (1962); Eminence Capital, LLC v. Aspeon, Inc., 316 F.3d 1048,
10 1052 (9th Cir. 2003) (listing the Foman factors as those to be
11 considered when deciding whether to grant leave to amend).
12 Dismissal without leave to amend is proper only if it is clear
13 that "the complaint could not be saved by any amendment." Intri-
14 Plex Techs., Inc. v. Crest Group, Inc., 499 F.3d 1048, 1056
15 (9th Cir. 2007) (internal citations and quotations omitted).
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17 ANALYSIS

18 A. Defendant's Motion to Dismiss Plaintiff's 19 Misrepresentation, Fraudulent Concealment, UCL and CLRA 20 claims.

21 Defendant moves to dismiss Plaintiff's fourth through eighth
22 causes of action on the basis that Plaintiff has failed to
23 adequately plead actionable misrepresentations or omissions.
24 These fraud-based causes of action are subject to review pursuant
25 to Rule 9(b)'s heightened pleading standard.

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1 See Fed. R. Civ. P. 9(b) (“In alleging fraud or mistake, a party
2 must state with particularity the circumstances constituting
3 fraud or mistake.”); Kearns v. Ford Motor Co., 567 F.3d 1120,
4 1124-25 (9th Cir. 2009) (applying Rule 9(b) to CLRA and UCL
5 claims predicated on alleged misrepresentations). Especially
6 given this heightened standard of review, Plaintiff’s instant
7 claims fail.

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9 **1. Plaintiff’s Common Law Claims.**

10
11 Defendant first moves to dismiss Plaintiff’s common law
12 claims for intentional and negligent misrepresentation and for
13 fraud and concealment. “To state a claim for fraud or
14 intentional misrepresentation under California law, a Plaintiff
15 must allege: (1) misrepresentation (false representation,
16 concealment, or nondisclosure); (2) knowledge of falsity (or
17 scienter); (3) intent to defraud, i.e., to induce reliance;
18 (4) justifiable reliance; and (5) resulting damage.” Baltazar v.
19 Apple, Inc., 2011 WL 588209, *3 (N.D. Cal.) (“Baltazar I”). “The
20 same elements comprise a cause of action for negligent
21 misrepresentation, except there is no requirement of intent to
22 induce reliance.” Cadlo v. Owens-Illinois, Inc.,
23 125 Cal. App. 4th 513, 519 (2004). In stating a negligent
24 misrepresentation claim, Plaintiff must nonetheless allege he
25 actually relied upon Defendant’s purported misrepresentations.
26 Id. “Thus, the mere assertion of ‘reliance’ is insufficient.

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1 The plaintiff must allege the specifics of his or her reliance on
2 the misrepresentation to show a bona fide claim of actual
3 reliance." Id. Similarly, to state an actionable omission or
4 concealment claim, Plaintiff "must allege specifically a
5 representation actually made by the defendant that is contrary to
6 the omission, or an omission of a fact that the defendant was
7 obliged to disclose." Baltazar v. Apple, Inc., 2011 WL 3795013,
8 *5 (N.D. Cal.) ("Baltazar II") (citing Daughtery v. American
9 Honda Motor Co., 144 Cal. App. 4th 824, 835 (2006)).

10 The crux of each of Plaintiff's fraud-based claims is that
11 Defendant misrepresented or concealed the fact that, under
12 certain conditions, even if the MacBook is plugged in, the AC
13 adapter does not charge the battery, and the computer thus
14 simultaneously uses power from both the adapter and its internal
15 power source. Nowhere in the FAC, however, is it alleged that
16 Defendant made any affirmative representation to the contrary.
17 Moreover, the FAC also lacks any other affirmative allegations
18 Plaintiff plausibly claims were false.

19 For example as to the latter point, all of Plaintiff's
20 complaints regarding Defendant's battery-related promises fail
21 because Defendant expressly disclosed that "[b]attery life and
22 charge cycles vary by use and settings." Klestoff Decl., Exhs.
23 A, B; Maloney v. Verizon Internet Servs., Inc., 413 F. App'x 997,
24 999-1000 (9th Cir. 2011) (finding that a "reasonable consumer
25 would not have been deceived by statements, which included the
26 qualifier 'up to' (meaning the same or less than) and an
27 explanation that each consumer's maximum speed would vary
28 depending on several...factors.").

1 Given Defendant's disclaimer regarding battery life, Plaintiff
2 has also failed to allege he relied on any alleged battery-
3 related misrepresentation or omission.

4 Perhaps realizing the weakness inherent in his FAC,
5 Plaintiff argues in Opposition primarily that a number of
6 Defendant's marketing statements going to the MacBook's
7 performance speed and capabilities are rendered false because the
8 MacBook does not perform at all if it shuts down when its battery
9 is drained. The problem with this argument is that the
10 statements Plaintiff relies upon in support of his claims are
11 either not alleged to be false themselves or are comprised merely
12 of puffery. For example, Plaintiff alleges that Defendant
13 advertised the MacBook performance was "up to twice as fast as
14 the previous generation, breezing through demanding tasks like
15 editing HD video" and that "with up to 1 GB of dedicated CDDR5
16 video memory, these processors provide up to 3x faster
17 performance than the previous generation." FAC, ¶¶, 6, 25.
18 Nowhere in the FAC, however, does Plaintiff allege that the
19 MacBook is not in fact "up to twice as fast as the previous
20 generation" or that the processors do not "provide up to 3x
21 faster performance," even assuming the computer shuts down under
22 the unique circumstances Plaintiff alleges. Plaintiff's
23 remaining allegations, which go to such statements by Defendant
24 that the MacBook is a "breakthrough, through and through" and
25 that it provides for "huge leaps in performance" are puffery and
26 cannot provide a basis for Plaintiff's instant claims.

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1 See Anunziato v. eMachines, Inc., 402 F. Supp. 2d 1133, (C.D.
2 Cal. 2005) ("Generalized, vague, and unspecified assertions
3 constitute 'mere puffery' upon which a reasonable consumer could
4 not rely.") (citing Glen Holly Entertainment, Inc. v. Tektronix
5 Inc., 343 F.3d 1000, 1015 (9th Cir. 2003)).

6 Ultimately, Plaintiff's claims fail as pled because he never
7 alleges that Defendant promised the MacBook would operate other
8 than as it did, nor does Plaintiff allege with sufficient
9 particularity that Defendant had a duty to disclose any
10 purportedly concealed fact (e.g., that, under certain conditions,
11 if the battery power is low enough, the MacBook may shut down
12 even if plugged in via an AC Adapter). See Baltazar II, 2011 WL
13 3795013, *5 (no claim for fraudulent omission when Defendant's
14 advertisements depicted iPad being used outdoors but the product
15 allegedly would not function without interruption under all
16 external conditions). Plaintiff likewise fails to adequately
17 plead Defendant actually concealed any purported defect from
18 Plaintiff at the time he purchased his MacBook or that Plaintiff
19 would not have purchased the product absent any misrepresentation
20 or omission. See Hovespian v. Apple, Inc., 2009 WL 259*1445, *3
21 (N.D. Cal.) (general allegations regarding concealment
22 insufficient). Accordingly, Defendant's Motion to Dismiss
23 Plaintiff's fraud and concealment claim is GRANTED with leave to
24 amend.

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1 **2. Plaintiff's Statutory Claims.**

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3 Plaintiff's statutory claims, each of which, as pled, is

4 wholly dependent on the viability of Plaintiff's

5 misrepresentation and concealment claims, fail for the same

6 reason as did their common law claims. California's UCL makes

7 actionable "any unlawful, unfair or fraudulent business act."

8 Cal. Bus & Prof. Code § 17200. "An act can be alleged to violate

9 any or all of the three prongs of the UCL-unlawful, unfair, or

10 fraudulent." Berryman v. Merit Prop. Mgmt., Inc.,

11 152 Cal. App. 4th 1544, 1554 (2007). Causes of action arising

12 out of the "unlawful" prong "borrow[] violations of other laws

13 and treat[] them as unlawful practices that the unfair

14 competition law makes independently actionable." Cal-Tech

15 Communications, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal.

16 4th 163, 180 (1999). "A UCL claim predicated on unfair business

17 practices may be grounded upon a violation of a statute or be a

18 standalone claim based on an alleged act that violates

19 established public policy or if it is immoral, unethical,

20 oppressive, or unscrupulous and causes injury to consumers which

21 outweighs its benefits." Hovsepian, 2009 WL 5069144, *4

22 (internal citations and quotations omitted). "A claim based upon

23 the fraud prong may be brought based upon conduct akin to common-

24 law fraud or an alleged course of conduct that is likely to

25 deceive the public." Id.

26 For its part, the CLRA prohibits "unfair methods of

27 competition and unfair or deceptive acts or practices." Cal.

28 Civ. Code § 1770.

1 "The CLRA proscribes both active misrepresentations about the
2 standard, quality, or grade of goods, as well as active
3 concealment related to the characteristics or quality of goods
4 that are contrary to what has been represented about the goods."
5 Morgan v. Harmonix Music Sys., Inc., 2009 WL 2031765, *3 (N.D.
6 Cal.).

7 As already discussed above, Plaintiff has failed to plead
8 the existence of any actionable misrepresentation or omission,
9 let alone a violation of a law or other unfair or fraudulent
10 practice, capable of supporting a cause of action for violation
11 of either the UCL or the CLRA. See, e.g., Baltazar I, 2011 WL
12 588209, *4-5 (failure to adequately allege misrepresentation,
13 omission or other wrongdoing fatal to UCL and CLRA claims);
14 Berenblat v. Apple, 2009 WL 2591366, *5 (N.D. Cal.) (failure to
15 disclose defect in product that nonetheless performs as warranted
16 during the warranty period does not provide basis for UCL
17 violation). Accordingly, Defendant's Motion to Dismiss
18 Plaintiff's statutory claims is GRANTED with leave to amend.

19
20 **B. Defendant's Motion to Dismiss Plaintiff's Breach of**
21 **Warranty claims.**

22 Defendant also moves to dismiss both Plaintiff's Breach of
23 Express Warranty and his Breach of Implied Warranty of
24 Merchantability causes of action.⁵

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⁵ By way of his Opposition, Plaintiff appears to abandon any
27 argument he might have had that he has stated a claim for the
28 Breach of the Implied Warranty of Fitness for a Particular
Purpose. See Cal. Civ. Code § 1792.1. Given Plaintiff's
apparent admission that he does not state such a claim, the Court

1 Defendant's Motion is well-taken, and each of Plaintiff's breach
2 of warranty causes of action is dismissed with leave to amend.

3 First, "[t]o plead an action for breach of express warranty
4 under California law, a plaintiff must allege: (1) the exact
5 terms of the warranty; (2) reasonable reliance thereon; and (3) a
6 breach of warranty which proximately caused plaintiff's injury."
7 Baltazar I, 2011 WL 588209, *2 (citing Williams v. Beechnut
8 Nutrition Corp., 185 Cal. App. 3d 135, 142 (1986)). "A plaintiff
9 also must plead that he or she provided the defendant with
10 pre-suit notice of the breach." Id. (citing Cal. Commercial Code
11 § 2607).

12 The FAC contains no detail regarding the exact terms of any
13 express warranty breached under the facts of this case.
14 According to Plaintiff in his Opposition, the express warranties
15 provided to him by Defendant were violated when his MacBook
16 battery was completely drained, even while connected to an
17 external power source, such that the machine shut down
18 completely. Plaintiff thus claims that the machine is defective,
19 and that express warranties have been breached, because his
20 MacBook ceased to operate at all. Plaintiff's claim fails,
21 however, because he does not allege he provided Defendant with
22 the requisite pre-suit notice of the purported shutdown issue.
23 To the contrary, while Plaintiff contacted Defendant regarding
24 the MacBook's simultaneous use of power from both the battery and
25 the AC adapter in July of 2011, he does not allege his computer
26 shut down until the following month.

27
28 now construes the FAC as not bringing such a cause of action and
denies Defendant's Motion as to this claim as moot.

1 Accordingly, Plaintiff's Breach of Express Warranty cause of
2 action fails and Defendant's Motion is GRANTED with leave to
3 amend as to this cause of action.

4 Plaintiff's Breach of Implied Warranty of Merchantability
5 claim fares no better. Pursuant to California law, "every sale
6 of consumer goods that are sold at retail in [California] shall
7 be accompanied by the manufacturer's and the retail seller's
8 implied warranty that the goods be merchantable." Cal. Civ. Code
9 § 1792. "Goods in conformity with the implied warranty of
10 merchantability: (1) Pass without objection in the trade under
11 the contract description; (2) Are fit for the ordinary purposes
12 for which such goods are used; (3) Are adequately contained,
13 packaged, and labeled; and (4) Conform to the promises or
14 affirmations of fact made on the container or label."

15 Baltazar I, 2011 WL 588209 *2 (quoting Cal. Civ. Code
16 § 1791.1(a)) (internal quotations and alternations omitted).
17 "The implied warranty of merchantability does not 'impose a
18 general requirement that goods precisely fulfill the expectation
19 of the buyer. Instead, it provides for a minimum level of
20 quality.'" Berenblat, 2009 WL 2591366, *3 (quoting Am. Suzuki
21 Motor Corp. v. Super. Ct., 37 Cal. App. 4th 1291, 1295 (1995)).

22 Defendant correctly argues in its Motion that Plaintiff
23 fails to allege the MacBook is not fit for ordinary use. First
24 and foremost, Plaintiff has failed to sufficiently identify what
25 functions comprise the "ordinary purpose" of the MacBook.

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1 In response, Plaintiff argues that Defendant breached the implied
2 warranty because, if the battery drains to the point where the
3 system shuts down, the computer cannot be used at all, rendering
4 it unfit for any use, let alone ordinary use. However,
5 Plaintiff's allegations that, under unique circumstances, namely
6 "heavy loads" undertaken when the battery is already low, the
7 MacBook may shut down, and that his computer shut down once over
8 the course of a six month period, are insufficient as a matter of
9 law to state a claim that the MacBook is not fit for ordinary
10 use. See Baltazar II, 2011 WL 3795013, *3-4 (N.D. Cal.).
11 Defendant's Motion to Dismiss Plaintiff's Breach of the Implied
12 Warranty of Merchantability is thus GRANTED with leave to amend.

13
14 **C. Defendant's Motion to Dismiss Plaintiff's Negligence
15 and Defective Design, Manufacture and Assembly claims.**

16 Defendant next moves to dismiss Plaintiff's negligence-based
17 causes of action as barred by the economic loss rule. See
18 Sacramento Regional Transit Dist. v. Grumman Flexible, 158 Cal.
19 App. 3d 289, *293 (1984) ("[W]here damage consists solely of
20 'economic losses,' recovery on a theory of products liability is
21 precluded."). "Economic loss or harm has been defined as
22 'damages for inadequate value, costs or repair and replacement of
23 the defective product or consequent loss of profits - without any
24 claim of personal injury or damages to other property." Id. at
25 294 (internal citations and quotations omitted).

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1 Accordingly, because Plaintiff fails to allege any physical
2 injury to property or person apart from the "manifestation of the
3 defect itself," Defendant argues Plaintiff's first two causes of
4 action must be dismissed. Id.

5 Plaintiff attempts to salvage these causes of action by
6 arguing that the MacBook's defect causes damage to its battery,
7 which it views as "other property." Assuming the truth of
8 Plaintiff's allegation for purposes of this Motion, his argument
9 nevertheless must be rejected because, as alleged in the FAC, the
10 battery is an integrated component of the MacBook and is not
11 alleged to be a separate component of property damaged by the
12 "defective" computer itself. See Jimenez v. Superior Court,
13 29 Cal. 4th 473, 487 (2002) (Kennard, J., concurring);
14 McKinney v. Google, Inc., 2011 WL 3862120, *8 (N.D. Cal.).
15 Defendant's Motion is thus GRANTED with leave to amend.

16
17 **D. Defendant's Motion to Dismiss Plaintiff's Money Had and**
18 **Received claim.**

19 Finally, Defendant argues Plaintiff's Money Had and Received
20 cause of action fails because Plaintiff failed to plead that
21 Defendant is indebted to him for a sum certain. "In the common
22 law action of general assumpsit, plaintiffs customarily plead an
23 indebtedness using 'common counts.'" Johnson v. GMRI, Inc., 2007
24 WL 1490819, *5 (E.D. Cal.). "The essential allegations of a
25 common count are (1) a statement of indebtedness in a 'certain
26 sum'; (2) the consideration, i.e., goods sold, work done, etc.'
27 and (3) nonpayment."

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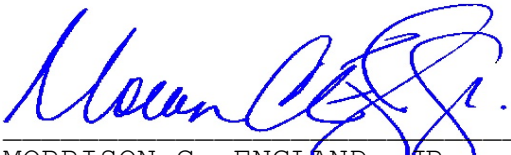
1 Id. Indeed, "[a] cause of action for money had and received is
2 stated if it is alleged the defendant 'is indebted to the
3 plaintiff in a certain sum for money had and received by the
4 defendant for the use of the plaintiff." Id. (internal citations
5 and quotations omitted). Because Plaintiff has failed to allege
6 anywhere in the FAC that Defendant owes him any concrete amount,
7 Defendant's argument is well-taken. Defendant's Motion to
8 Dismiss this cause of action is thus GRANTED with leave to amend.

9
10 **CONCLUSION**

11
12 For the reasons stated above, Defendants' Motion to Dismiss
13 (ECF No. 29) is GRANTED with leave to amend. Not later than
14 twenty (20) days following the date this Memorandum and Order is
15 electronically filed, Plaintiff may (but is not required to) file
16 an amended complaint. If no amended complaint is filed within
17 said twenty (20)-day period, without further notice to the
18 parties, the causes of action dismissed by virtue of this
19 Memorandum and Order will be dismissed with prejudice.

20 IT IS SO ORDERED.

21 Dated: July 10, 2012

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23 
24 MORRISON C. ENGLAND, JR.
25 UNITED STATES DISTRICT JUDGE
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