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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

CHAD HERRON, individually, on behalf of himself and all others similarly situated,

Plaintiff,

v.

BEST BUY STORES, L.P., a Virginia limited partnership; TOSHIBA AMERICA INFORMATION SYSTEMS, INC., a California corporation, inclusive,

Defendants.

No. 12-cv-02103-GEB-JFM

**ORDER GRANTING IN PART AND DENYING IN PART DEFEDANT BEST BUY STORES, L.P.'S MOTION TO DISMISS CLAIMS IN PLAINTIFF'S THIRD AMENDED COMPLAINT<sup>1</sup>**

Defendant Best Buy Stores, L.P. ("Best Buy") moves in this putative class action for dismissal under Federal Rule of Civil Procedure 12(b)(6) of the California Consumer Legal Remedy Act ("CLRA") claim alleged against it in Plaintiff's Third Amended Complaint ("TAC").<sup>2</sup> Further, Best Buy moves in the alternative for dismissal of the damages component of Plaintiff's

<sup>1</sup> This matter is deemed suitable for decision without oral argument. E.D. Cal. R. 230(g), and therefore the hearing scheduled on June 2, 2014 for this motion is vacated.

<sup>2</sup> Best Buy also seeks dismissal of Plaintiff's "UCL unlawfulness claim," arguing it is "derivative" of Plaintiff's CLRA claim. (Def.'s Mot. 5:10, ECF No. 12.) However, this referenced UCL claim is not in the TAC.

1 CLRA claim that concerns laptops Plaintiff did not purchase.  
2 Plaintiff opposes the motion.

### 3 I. FACTUAL ALLEGATIONS

4 The following allegations in Plaintiff's TAC concern  
5 the motion. "In or about January 2010," after looking at the  
6 product tags for various laptops, Plaintiff purchased a Toshiba  
7 Satellite L505 laptop from a Best Buy retail store in Folsom,  
8 California. (TAC ¶¶ 10-12, ECF No. 68.) "In Best Buy's retail  
9 stores, each [l]aptop computer . . . has a Best Buy 'product  
10 tag'" that "lists the [l]aptop's battery life as being 'up to' a  
11 specified number of hours." (Id. ¶¶ 41-42.) "Best Buy represented  
12 Plaintiff's [l]aptop battery life to be 'up to 3.32 hours.'" (Id. ¶ 42.) "There is not an explanation as to how the 'up to'  
13 hours was derived on the product tag or elsewhere." (Id. ¶ 43.)

14 Plaintiff "decided to purchase the Toshiba Satellite  
15 L505 [laptop] based substantially on his reliance on the  
16 representation that the battery life for the model was 'up to  
17 3.32 hours.'" (Id. ¶ 12.) "In the years since Plaintiff purchased  
18 his laptop, he has never once achieved even close to the  
19 represented 3.32 hours of battery life." (Id. ¶ 15.)

20 "The 'up to' battery life representations on Best Buy's  
21 product tags are not limited to [laptops] manufactured by  
22 Toshiba; rather such representations are common and identical  
23 regardless of the manufacturer of the [laptop]." (Id. ¶ 44.) Best  
24 Buy's "up to" battery life claims are the result of tests  
25 conducted under the MobileMark 2007 ("MM07") benchmark. (Id.)  
26 During an MM07 test, the laptop monitor's brightness is set to  
27 "20% to 30% of its normal level," "Wi-Fi, Bluetooth, and other  
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1 wireless functions are disabled,” and “the main processor chip is  
2 set to 5% to 7.5% of its normal capacity.” (Id. ¶¶ 26-28.) “Best  
3 Buy’s use of the results from MM07 . . . grossly overstate[s] the  
4 battery life a consumer can expect to experience.” (Id. ¶ 45.)

## 5 **II. DISCUSSION**

### 6 **1. CLRA Statute of Limitations**

7 Best Buy argues Plaintiff’s CLRA claim is barred by the  
8 applicable statute of limitations. Specifically, Best Buy  
9 challenges the credibility of Plaintiff’s Doe allegations  
10 pertinent to California’s relation back doctrine for fictitiously  
11 named Defendants in Plaintiff’s First Amended Complaint. Best Buy  
12 Stores made the same argument in its prior Motion to Dismiss  
13 Plaintiff’s Second Amended Complaint, which was rejected in an  
14 order filed on February 4, 2013. (See Order Granting in Part and  
15 Denying in Part Defs.’ Mot. to Dismiss 5:5-8:3, ECF No. 60.) That  
16 portion of the February 4, 2013 order is adopted herein, and  
17 therefore this portion of Best Buy’s motion is denied.

18 Best Buy also states in its reply brief: “To the extent  
19 the Court deems any of the grounds of the present motion to be  
20 duplicative of those asserted before, Best Buy [Stores] requests  
21 that the Court treat the motion as one for clarification or  
22 reconsideration.” (Def.’s Reply 3:17-19, ECF No. 79.) However,  
23 “[t]he district court need not consider arguments raised for the  
24 first time in a reply brief.” Zamani v. Carnes, 491 F.3d 990, 997  
25 (9th Cir. 2007). Therefore, this request is not considered.

### 26 **2. CLRA Notice Requirement**

27 Best Buy argues the damages portion of Plaintiff’s CLRA  
28 claim concerning laptops he did not purchase should be dismissed

1 since "the only make and model of laptop identified in the [CLRA]  
2 notice is the Toshiba Satellite laptop that Plaintiff actually  
3 purchased." (Def.'s Mot. 9:27-28.) Plaintiff counters:  
4 "Defendant's argument is clearly one of form over  
5 substance" since "[o]n numerous occasions throughout this case,  
6 Defendant has been fully able to fully articulate its  
7 understanding as to the scope of the putative Class." (Pl.'s  
8 Opp'n 14:13-16, ECF No. 77.)

9 Concerning the referenced notice, the CLRA prescribes:

10 Thirty days or more prior to the commencement  
11 of an action for damages pursuant to this  
title, the consumer shall do the following:

12 (1) Notify the person alleged to have  
13 employed or committed methods, acts, or  
14 practices declared unlawful by [the CLRA] of  
the particular alleged violations of [the  
CLRA].

15 (2) Demand that the person correct, repair,  
16 replace, or otherwise rectify the goods or  
services alleged to be in violation of [the  
17 CLRA].

18 Cal. Civ. Code § 1782(a) (emphasis added).

19 "The CLRA's notice requirement is not jurisdictional,  
20 but compliance with the requirement is necessary to state a  
21 claim" for damages. Keilholtz v. Superior Fireplace Co., No. 08-  
22 cv-836 CW, 2009 WL 839076, at \*2 (N.D. Cal. Mar. 30, 2009)  
23 (citing Outboard Marine Corp. v. Sup. Ct., 52 Cal. App. 3d 30,  
24 40-41 (1975)). "The purpose of the notice requirement . . . is to  
25 give the manufacturer or vendor sufficient notice of alleged  
26 defects to permit appropriate corrections or replacements," and  
27 this "purpose may only be accomplished by a literal application  
28 of the notice provisions." Outboard Marine, 52 Cal. App. 3d at

1 40-41 (emphasis added).

2 Plaintiff's CLRA notice only describes an alleged  
3 misstatement of the expected battery life of the Toshiba  
4 Satellite L505 laptop he purchased. (See TAC, Ex. C, ECF No. 68-  
5 3.) Since "literal application of the [CLRA] notice provisions"  
6 is required, Outboard Marine, 52 Cal. App. 3d at 41, Plaintiff's  
7 CLRA notice failed to "[n]otify" Best Buy "of the particular  
8 alleged violations" of the CLRA concerning laptops other than the  
9 Toshiba Satellite L505 Plaintiff purchased. Cal. Civ. Proc. Code  
10 § 1782(a)(1). Therefore, the damages component of Plaintiff's  
11 CLRA claim concerning the unnoticed referenced laptops is  
12 dismissed. Cf. Ang. V. Bimbo Bakeries USA, Inc., No. 13-cv-1196-  
13 WHO, 2013 WL 5407039, at \*12 (N.D. Cal. Sept. 25, 2013)  
14 (dismissing "the CLRA damage claim based on the Substantially  
15 Similar Products identified in the Amended Complaint[, which  
16 plaintiffs did not purchase], as plaintiffs failed to provide  
17 adequate [CLRA] notice" concerning these products).

### 18 **III. CONCLUSION**

19 For the stated reasons, the motion is GRANTED IN PART  
20 AND DENIED IN PART. The damages component of Plaintiff's CLRA  
21 claim is DISMISSED for laptops Plaintiff did not purchase. The  
22 remainder of the motion is DENIED.

23 Plaintiff is granted thirty-five (35) days from the  
24 date on which this order is filed to file an amended complaint  
25 addressing the deficiencies in the dismissed damages component of  
26 the CLRA claim for laptops Plaintiff did not purchase. Plaintiff  
27 is notified that failure to file an amended complaint within the  
28 prescribed time period could result in dismissal of the described

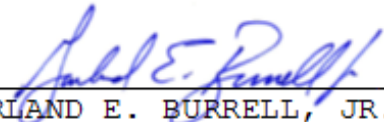
1 component of the CLRA claim with prejudice under Rule 41(b).

2 Dated: May 28, 2014

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GARIAND E. BURRELL, JR.  
Senior United States District Judge

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