

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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4			
5	TYSON HOWARD, individually,)	2:16-CV-02292 LEK
6	and on behalf of all others)	
7	similarly situated,)	
8)	
9	Plaintiff,)	
10)	
11	vs.)	
12)	
13	DJI TECHNOLOGY, INC., aka SZ)	
14	DJI TECHNOLOGY CO., LTD.,)	
15)	
16	Defendant.)	
17	_____)	

**ORDER GRANTING IN PART AND DENYING IN PART
DEFENDANT’S MOTION TO DISMISS THE FIRST AMENDED COMPLAINT**

On January 24, 2017, Defendant DJI Technology, Inc. (“Defendant”) filed its Motion to Dismiss the First Amended Complaint (“Motion”).¹ [Dkt. no. 17.] Plaintiff Tyson Howard (“Plaintiff”) filed his memorandum in opposition on February 14, 2017, and Defendant filed its reply on February 20, 2017. [Dkt. nos. 19, 20.] The Court finds this matter suitable for disposition without a hearing pursuant to L.R. 230(g) of the Local Rules of the United States District Court for the Eastern District of California (“Local Rules”). Defendant’s Motion is

¹ Plaintiff identifies the defendant as “DJI Technology, Inc., aka SZ DJI Technology Co., Ltd.,” and describes it as “a California corporation.” [Amended Complaint at ¶¶ 1-2.] Defendant states that SZ DJI Technology Co., Ltd. “is a separate entity, and it is not a business name of DJI Technology, Inc.” [Mem. in Supp. of Motion at 2 n.2.] Because DJI Technology, Inc. “is the American branch of . . . SZ DJI Technology Co., Ltd.,” SZ DJI Technology Co., Ltd. has not appeared in this case. [Id. at 2 & n.2.]

1 hereby granted in part and denied in part for the reasons set
2 forth below.

3 **BACKGROUND**

4 Plaintiff filed his original Class Action Complaint
5 ("Complaint") on September 26, 2016. [Dkt. no. 1.] On
6 November 22, 2016, Defendant moved to dismiss the Complaint
7 ("First Motion to Dismiss"), and Plaintiff filed his First
8 Amended Class Action Complaint ("Amended Complaint") on
9 December 13, 2016. [Dkt. nos. 9, 11.] In light of the filing of
10 the Amended Complaint, this Court denied the First Motion to
11 Dismiss as moot. [Dkt. no. 13.]

12 Because the issue of class certification is not
13 currently before this Court, it will only consider Plaintiff's
14 individual allegations for purposes of the instant Motion.
15 According to the Amended Complaint, Defendant is a California
16 corporation that maintains, sells, and distributes drones and
17 video recording devices. [Amended Complaint at ¶ 2.] It
18 "conducts a large share of its business within California" and
19 "Plaintiff alleges, on information and belief, that Defendant's
20 marketing campaigns, as pertains to this matter, were created by
21 Defendant at its principle place of business in California, and
22 were disseminated from California." [Id. at ¶¶ 11-12.]

23 Around September 2015, Plaintiff purchased a DJI
24 Phantom III Standard drone from Defendant's website for

1 approximately \$800. Later that month, he purchased a DJI
2 Phantom III Pro drone from Defendant's website for approximately
3 \$1300.² [Id. at ¶¶ 16-19, 21-22.] According to Plaintiff,
4 "Defendant advertised through written representations that
5 Plaintiff would receive [the Drones] with high definition
6 [("HD")] recording capabilities." [Id. at ¶ 20.] According to
7 Plaintiff, Defendant's website for the DJI Phantom III Standard
8 drone "prominently advertises the ability of the camera on the
9 drone to capture '2.7K HD Video,'" and its website for the DJI
10 Phantom III Pro drone "prominently advertises the ability of the
11 camera on the drone to capture '4K HD Video.'" [Id. at ¶¶ 21-
12 22.] Based on Defendant's representations, Plaintiff believed
13 that the Drones "would meet his needs and expectations as to the
14 quality of the video recordings," and he purchased the Drones
15 based on Defendant's representations. [Id. at ¶¶ 23-24.]

16 After he purchased the Drones, Plaintiff learned that
17 they were not capable of recording at the definition level
18 advertised, and they "recorded video at inferior qualities
19 significantly below 2.7K and 4K." [Id. at ¶¶ 25-26.] According
20 to Plaintiff, the prices of the Drones were higher than they
21 would have been without the advertised recording capabilities, as
22 evidenced by the fact that the DJI III Pro - which advertised "a

23 ² This Court will refer to the DJI Phantom III Standard
24 drone and the DJI Phantom III Pro drone that Plaintiff purchased
25 collectively as "the Drones."

1 'significantly improved' 4K camera" - was more expensive than the
2 DJI III Standard. [Id. at ¶¶ 33-34.] Plaintiff alleges that
3 Defendant's "sales tactics rely on falsities and have a tendency
4 to mislead and deceive a reasonable consumer." [Id. at ¶ 27.]
5 Plaintiff alleges that Defendant's false representations about
6 the Drones' HD recording features "were part of a common scheme
7 to mislead [Plaintiff] and incentivize [him] to purchase [the
8 Drones] in spite of the lack of the promised" HD recording
9 capabilities. [Id. at ¶¶ 29-30.] Plaintiff would not have
10 purchased the Drones if he knew that Defendant's representations
11 about the HD recording capabilities were false and if he had
12 known what the Drones' actual recording capabilities were. [Id.
13 at ¶¶ 31-32.]

14 The Amended Complaint alleges the following claims:
15 violation of the California False Advertising Law ("FAL"), Cal.
16 Bus. & Prof. Code § 17500, *et seq.* ("Count I"); [id. at ¶¶ 52-
17 62;] and violation of the Unfair Competition Law ("UCL"), Cal.
18 Bus. & Prof. Code § 17200, *et seq.* ("Count II"), [id. at ¶¶ 63-
19 81]. Plaintiff prays for: an order requiring Defendant "to
20 engage in corrective advertising"; [id. at ¶ 83.d;] actual,
21 punitive, and statutory enhanced damages; restitution of sale
22 prices paid; reasonable attorneys' fees and costs; pre- and post-
23 judgment interest; and any other appropriate relief.

24 //

1 In the instant Motion, Defendant seeks dismissal of the
2 Amended Complaint, with prejudice, pursuant to Fed. R. Civ. P.
3 9(b) and 12(b)(6).

4 DISCUSSION

5 This district court has recognized that the Fed. R.
6 Civ. P. 9(b) heightened pleading standard applies to claims
7 brought under Cal. Bus. & Prof. Code §§ 17200 and 17500. See,
8 e.g., Handy v. LogMeIn, Inc., No. 1:14-cv-01355-JLT, 2015 WL
9 4508669, at *5 (E.D. Cal. July 24, 2015) (some citations omitted)
10 (citing Kearns v. Ford Motor Co., 567 F.3d 1120, 1125 (9th Cir.
11 2009) (holding "Rule 9(b)'s particularity requirement applies" to
12 claims raised under Cal. Bus. & Prof. Code § 17200); VP Racing
13 Fuels, Inc. v. General Petroleum Corp., 673 F. Supp. 2d 1073,
14 1085-86 (E.D. Cal. 2009) (where the plaintiff alleged the
15 defendant knowingly made misrepresentations to the public and
16 "engaged in a fraudulent course of conduct," the plaintiff was
17 required to meet the heightened requirements of Rule 9(b) to
18 state a claim under Cal. Bus. & Prof Code § 17500)).³

19 Rule 9(b) requires that, "[i]n alleging fraud or
20 mistake, a party must state with particularity the
21 circumstances constituting fraud or mistake."
22 Fed. R. Civ. P. 9(b). "'Fraud can be averred by
23 specifically alleging fraud, or by alleging facts
24 that necessarily constitute fraud (even if the
25 word "fraud" is not used).'" Kearns v. Ford Motor
26 Co., 567 F.3d 1120, 1124 (9th Cir. 2009) (quoting

27 ³ This Court will refer to the July 24, 2015 order as
28 "Handy II."

1 Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1105
2 (9th Cir. 2003)). "When an entire complaint, or
3 an entire claim within a complaint, is grounded in
4 fraud and its allegations fail to satisfy the
5 heightened pleading requirements of Rule 9(b), a
6 district court may dismiss the complaint or
7 claim." Vess, 317 F.3d at 1107 (9th Cir. 2003)
8 (citing Bly-Magee v. California, 236 F.3d 1014,
9 1019 (9th Cir. 2001)). Under Rule 9(b), the
10 circumstances constituting the alleged fraud must
11 be specific enough to give each defendant notice
12 of its particular misconduct so that the defendant
13 can defend against the charge instead of merely
14 denying that it did anything wrong. Kearns, 567
15 F.3d at 1124 (citing Bly-Magee, 236 F.3d at 1019).
16 To satisfy the particularity standard of
17 Rule 9(b), the plaintiff must set forth more than
18 the neutral facts necessary to identify the
19 transaction at issue. Id. (citing In re GlenFed,
20 Inc. Sec. Litig., 42 F.3d 1541, 1548 (9th Cir.
21 1994), superseded by statute on other grounds).
22

23 Agha-Khan v. Bank of Am., No. 1:17-cv-00011-DAD, 2017 WL 2833399,
24 at *5 (E.D. Cal. June 30, 2017) (alteration in Agha-Khan).

25 Further,

26 The heightened pleading standard of Rule 9(b)
27 requires that "[a] complaint would need to state
28 the time, place, and specific content of the false
29 representations as well as the identities of the
30 parties to the misrepresentation." Edwards v.
31 Marin Park, Inc., 356 F.3d 1058, 1066 (9th Cir.
32 2004); see also Kearns, 567 F.3d at 1126 (the
33 plaintiff must articulate the "who, what, when,
34 where, and how" of the fraud alleged[]). Only
35 factual allegations, rather than mere conclusions
36 satisfy this pleading burden. Moore v. Kayport
37 Package Express, Inc., 885 F.2d 531, 540 (9th Cir.
38 1989). If the factual allegations do not meet the
39 heightened pleading standard, the "averments . . .
40 should be disregarded, or stripped from the claim
41 for failure to satisfy Rule 9(b)." Kearns, 567
42 F.3d at 1124 (quotations omitted).
43

44 Handy II, 2015 WL 4508669, at *5 (some alterations in Handy II).

1 Many courts in California have applied a
2 relatively straightforward test for the
3 application of Rule 9(b) to label-based fraud
4 claims. The "who" are the defendants; the "what"
5 are their allegedly misleading claims; the "when"
6 is the . . . period[] during which those claims
7 were made; the "where" is the offending label; and
8 the "how" is the plaintiff's explanation why the
9 defendant's claims are misleading.

10
11 Handy v. LogMeIn, Inc., No. 1:14-cv-01355-JLT, 2015 WL 1729681,
12 at *4 (E.D. Cal. Apr. 15, 2015) (citation and quotation marks
13 omitted).⁴

14 **I. Count I**

15 Count I alleges that Defendant made misrepresentations
16 about the Drones' recording capabilities. The claim is also
17 based on Defendant's omissions, but Plaintiff does not clearly
18 identify what information was omitted. [Amended Complaint at
19 ¶¶ 55-56.] Read as a whole, the Amended Complaint alleges that
20 Defendant omitted what the Drones' actual recording capabilities
21 were. See, e.g., id. at ¶ 32 ("Had Defendant properly marketed,
22 advertised, and represented the [Drones] as lacking high
23 definition recording, Plaintiff would not have purchased the
24 product.").

25 California's False Advertising Law prohibits
26 any person or entity from making an untrue and
27 misleading statement in advertising. Cal. Bus. &
28 Prof. Code § 17500. It is unlawful for any
29 company to make any statement concerning products
30 offered, which is known or should be known, to be

31 ⁴ The Court will refer to the April 15, 2015 order as
32 "Handy I."

1 untrue or misleading. Cal. Bus. & Prof. Code
2 § 17500. A false advertising claim under this
3 section may be brought "where the advertising
4 complained of is not actually false, but thought
5 likely to mislead or deceive, or is in fact
6 false." Day v. AT&T Corp., 63 Cal. App. 4th 325,
7 332, 74 Cal. Rptr. 2d 55 (1998). Thus, the FAL
8 proscribes "not only those advertisements which
9 have deceived or misled because they are untrue,
10 but also those which may be accurate on some
11 level, but will nonetheless tend to mislead or
12 deceive." Id. (emphasis omitted). In addition, a
13 plaintiff may state a claim under the FAL for
14 fraudulent omissions by a defendant. See Ehrlich
15 v. BMW of North Am., 801 F. Supp. 2d 908, 916
16 (C.D. Cal. 2010).

17
18 To state a cognizable claim for a fraudulent
19 omission, a plaintiff must allege the defendant's
20 omission was "contrary to a representation
21 actually made by the defendant, or an omission of
22 a fact the defendant was obligated to disclose."
23 Ehrlich, 801 F. Supp. 2d at 916 (quoting Falk v.
24 Gen. Motors Corp., 496 F. Supp. 2d 1088, 1094-95
25 (N.D. Cal. 2007)); see also Daugherty v. Am. Honda
26 Motor Co., Inc., 144 Cal. App. 4th 824, 835, 51
27 Cal. Rptr. 3d 118 (2006). Under California law,
28

29 There are four circumstances in which
30 nondisclosure or concealment may constitute
31 actionable fraud: (1) when the defendant is
32 in a fiduciary relationship with the
33 plaintiff; (2) when the defendant had
34 exclusive knowledge of material facts not
35 known to the plaintiff; (3) when the
36 defendant actively conceals a material fact
37 from the plaintiff; and (4) when the
38 defendant makes partial representations but
39 also suppresses some material facts.
40

41 LiMandri v. Judkins, 52 Cal. App. 4th 326, 336, 60
42 Cal. Rptr. 2d 539 (1997) (quoting Heliotis v.
43 Schuman, 181 Cal. App. 3d 646, 651, 226 Cal. Rptr.
44 509 (1986)). . . .
45

46 Handy II, 2015 WL 4508669, at *5-6.

47 //

1 **A. Misrepresentation**

2 As to the alleged misrepresentation, the Amended
3 Complaint alleges: the who - Defendant DJI Technology, Inc.; the
4 what - the statements that the Drones were capable of HD
5 recording; the where - the claims were made on the pages of
6 Defendant's website for the Drones; and the how - Plaintiff's
7 explanation that the Defendant's claims were misleading because
8 the Drones were not in fact capable of HD recording. However,
9 the Amended Complaint's factual allegations about the when are
10 insufficient. Plaintiff does allege that he bought the Drones
11 around September 2015, [Amended Complaint at ¶¶ 16, 18,] and that
12 he was "drawn to" the Drones because of Defendant's
13 representations, which he relied upon when he decided to purchase
14 the Drones [id. at ¶¶ 23-24]. These allegations, taken to be
15 true for purposes of the Motion, are sufficient to support a
16 reasonable inference that Plaintiff viewed Defendant's
17 representations about the Drones' recording capabilities by
18 September 2015. See Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)
19 ("To survive a motion to dismiss, a complaint must contain
20 sufficient factual matter, accepted as true, to 'state a claim to
21 relief that is plausible on its face.'" (quoting Bell Atlantic
22 Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955 (2007)));
23 id. ("A claim has facial plausibility when the plaintiff pleads
24 factual content that allows the court to draw the reasonable

1 inference that the defendant is liable for the misconduct
2 alleged." (citing Twombly, 550 at 556, 127 S. Ct. 1955)). The
3 allegations, however, do not satisfy the heightened pleading
4 standard because they do not sufficiently allege when Plaintiff
5 was exposed to Defendant's alleged misrepresentations. The
6 portion of Count I based on the alleged misrepresentations about
7 the Drones' recording capabilities must be dismissed.

8 Defendant also argues that Plaintiff's allegations are
9 implausible because, after he allegedly learned that the DJI III
10 Standard did not have the advertised HD recording capability, he
11 purchased the DJI III Pro. However, this argument raises
12 credibility issues, which are beyond the scope of the instant
13 motion to dismiss. See Ransom v. McCabe, No. 1:13cv01779 AWI DLB
14 PC, 2015 WL 5159412, at *3 (E.D. Cal. Sept. 2, 2015) (citing
15 Albino v. Baca, 747 F.3d 1162, 1169 (9th Cir. 2014)), *report and*
16 *recommendation adopted*, 2015 WL 6438150 (Oct. 22, 2015).

17 Further, Defendant contends that Plaintiff has failed
18 to plead sufficient allegations regarding Defendant's knowledge
19 that its representations about the Drones' recording capabilities
20 were false/misleading. Plaintiff alleges "Defendant knew that
21 their representations and omissions were untrue and misleading,
22 and deliberately made the aforementioned representations and
23 omissions in order to deceive reasonable Purchasers like
24 Plaintiff." [Amended Complaint at ¶ 56.] Plaintiff's general

1 allegation of Defendant's knowledge and intent are sufficient.
2 See Comm. to Protect Our Agric. Water v. Occidental Oil & Gas
3 Corp., 235 F. Supp. 3d 1132, 1177 (E.D. Cal. 2017) ("While
4 plaintiffs must plead the factual circumstances of fraud itself
5 with particularity, they may allege specific intent to defraud
6 through general allegations." (citing In re GlenFed, Inc. Sec.
7 Litig., 42 F.3d 1541, 1547 (9th Cir. 1994) (en banc))).

8 Defendant argues that the dismissal should be with
9 prejudice because it is not possible for Plaintiff to cure the
10 defect in this portion of Count I by further amendment. See
11 Rodriguez v. Brown, 1:15-cv-01754-LJO-EPG-PC, 2016 WL 6494705, at
12 *3 (E.D. Cal. Nov. 1, 2016) ("Whether dismissal is with or
13 without prejudice will depend upon whether it is possible for
14 Plaintiff to cure any defects." (citing Vess v. Ciba-Geigy Corp.
15 USA, 317 F.3d 1097, 1107-08 (9th Cir. 2003) (collecting cases))),
16 *report and recommendation adopted*, 2016 WL 7104173 (E.D. Cal.
17 Dec. 6, 2016). Defendant argues that the First Motion to Dismiss
18 raised the same issues raised in the instant Motion, and
19 Plaintiff failed to cure the defects when he filed the Amended
20 Complaint. Defendant contends that this shows that it would not
21 be possible for Plaintiff to cure any defects in a second amended
22 complaint. This Court disagrees. The only identified defect in
23 this portion of Count I is the failure to allege when Plaintiff
24 viewed Defendant's alleged misrepresentations, and it is possible

1 for Plaintiff to cure this defect by amendment. The dismissal of
2 the portion of Count I based on Defendant's alleged
3 misrepresentations about the Drones' recording capabilities is
4 without prejudice.

5 **B. Omission**

6 Plaintiff also pleads a related allegation that
7 Defendant omitted information about what the Drones' actual
8 recording capabilities were. Plaintiff's allegations, if proven,
9 could support a claim based on fraudulent nondisclosure. See
10 LiMandri, 52 Cal. App. 4th at 336. Defendant arguably had
11 exclusive knowledge of the Drones' recording capabilities that
12 was not known to Plaintiff when he purchased them. Plaintiff
13 also alleges that: Defendant deliberately concealed the Drones'
14 actual recording capabilities, which were material features of
15 the products. [Amended Complaint at ¶¶ 23, 56.] Similarly,
16 Defendant arguably made a partial representation, *i.e.* that the
17 Drones were capable of video recording, but suppressed the
18 material fact that the Drones were not capable of HD recording.

19 The portion of Count I based on Defendant's alleged
20 omission, however, fails to state a plausible claim for the same
21 reason as the portion based on Defendant's alleged
22 misrepresentation. Plaintiff has not alleged when he viewed
23 Defendant's materials which he alleges omitted information about
24 the Drones' actual recording capabilities. For the same reasons

1 set forth as to the portion of Count I based on Defendant's
2 alleged misrepresentation, the portion of Count I based on
3 Defendant's alleged omission is also dismissed without prejudice.

4 **II. Count II**

5 Count II alleges that Defendant's actions, omissions,
6 misrepresentations, and practices violate § 17200.

7 Under § 17200, unfair competition includes
8 any "unlawful, unfair, or fraudulent business act
9 or practice." Cal. Bus. & Prof. Code § 17200.
10 Therefore, there are three prongs under which a
11 claim may be established under § 17200. Daro v.
12 Superior Court, 151 Cal. App. 4th 1079, 1093, 61
13 Cal. Rptr. 3d 716 (2007) ("Because section 17200
14 is written in the disjunctive, a business act or
15 practice need only meet one of the three
16 criteria-unlawful, unfair, or fraudulent-to be
17 considered unfair competition"); Lozano v. AT&T
18 Wireless Servs., 504 F.3d 718, 731 (9th Cir. 2007)
19 ("[e]ach prong . . . is a separate and distinct
20 theory of liability").

21
22 Actions prohibited by § 17200 include "any
23 practices forbidden by law, be it civil or
24 criminal, federal, state, or municipal, statutory,
25 regulatory, or court-made." Saunders v. Superior
26 Court, 27 Cal. App. 4th 832, 838-39, 33 Cal. Rptr.
27 2d 438 (1994). Thus, the "unlawful" prong
28 requires an underlying violation of law. Krantz
29 v. BT Visual Images, 89 Cal. App. 4th 164, 178,
30 107 Cal. Rptr. 2d 209 (2001). An "unfair"
31 practice under section 17200 is one "whose harm to
32 the victim outweighs its benefits." Saunders v.
33 Superior Court, 27 Cal. App. 4th 832, 839, 33 Cal.
34 Rptr. 2d 438 (1994). Finally, a "fraudulent" act
35 or practice under § 17200 is "one which is likely
36 to deceive the public," and "may be based on
37 misrepresentations . . . which are untrue, and
38 also those which may be accurate on some level,
39 but will nonetheless tend to mislead or deceive."
40 McKell v. Washington Mutual, Inc., 142 Cal. App.
41 4th 1457, 1474, 49 Cal. Rptr. 3d 227 (2006).
42

1 Significantly, as with a False Advertising
2 Law claim, a plaintiff may demonstrate a violation
3 of the "fraudulent" prong of the UCL by showing
4 that reasonable "members of the public are likely
5 to be deceived." Sybersound Records, Inc. v. UAV
6 Corp., 517 F.3d 1137, 1151-52 (9th Cir. 2008); see
7 also Bardin v. DaimlerChrysler Corp., 136 Cal.
8 App. 4th 1255, 1261, 39 Cal. Rptr. 3d 634
9 (2006). . . .

10
11 Handy I, 2015 WL 1729681, at *8 (some alterations in Handy I).

12 Count II relies all three prongs.

13 **A. Unfair**

14 [T]his court has previously summarized the various
15 definitions of "unfair" under the UCL as provided
16 by the California courts:

17
18 1. "An act or practice is unfair if the
19 consumer injury is substantial, is not
20 outweighed by any countervailing benefits to
21 consumers or to competition, and is not an
22 injury the consumers themselves could
23 reasonably have avoided." Daugherty v. Am.
24 Honda Motor Co., Inc., 144 Cal. App. 4th 824,
25 839 (2006).

26
27 2. " '[U]nfair' business practice occurs
28 when that practice offends an established
29 public policy or when the practice is
30 immoral, unethical, oppressive, unscrupulous
31 or substantially injurious to consumers."
32 Smith v. State Farm Mut. Auto. Ins. Co., 93
33 Cal. App. 4th 700, 719 (2001) (internal
34 citation and quotation marks omitted).

35
36 3. An unfair business practice means "the
37 public policy which is a predicate to the
38 action must be 'tethered' to specific
39 constitutional, statutory or regulatory
40 provisions." Scripps Clinic v. Superior
41 Court, 108 Cal. App. 4th 917, 940 (2003).

42
43 Vincent v. PNC Mortgage, Inc., No. 14-00833, 2014
44 WL 2766116, at *8 (E.D. Cal. June 18, 2014).

1 Wilkins v. Bank of Am., N.A., No. 2:15-cv-02341-KJM-EFB, 2016 WL
2 5940082, at *8 (E.D. Cal. Aug. 19, 2016) (some alterations in
3 Wilkins).

4 Count II alleges unfair business practices based the
5 first two definitions. As to the second definition, Plaintiff
6 merely alleges, in conclusory fashion, that "Defendant's acts,
7 omissions, misrepresentations, and practices" are "substantially
8 injurious . . . offend[] public policy, and [are] immoral,
9 unethical, oppressive, and unscrupulous as the gravity of the
10 conduct outweighs any alleged benefits attributable to such
11 conduct." [Amended Complaint at ¶ 65.] However, Plaintiff has
12 sufficiently alleged unfair business practices based on the first
13 definition.

14 The Amended Complaint alleges that Plaintiff has
15 suffered a substantial injury because he paid valuable
16 consideration for the Drones, which had higher prices because of
17 the advertised HD recording features, but which did not have
18 advertised features. [Amended Complaint at ¶¶ 16-25, 33-35, 67.]
19 Plaintiff also alleges that Defendant's practice of falsely
20 advertising and representing that the Drones were capable of HD
21 recording in order to induce consumers to purchase them did not
22 provide any benefit to Plaintiff or any other consumer. Thus,
23 the injury that Plaintiff suffered is not outweighed by any
24 countervailing benefits to consumers. [Id. at ¶¶ 35, 68.]

1 Finally, Plaintiff alleges that the injury he suffered is not one
2 that consumers could have avoided because, based on the
3 information Defendant made available about the Drones, consumers
4 would not have realized that Defendant's representations about
5 the Drones' ability to record HD video were false. [Id. at
6 ¶ 69.] With respect to the unfair prong, Plaintiff has pled
7 sufficient facts to state a § 17200 claim against Defendant.

8 **B. Fraudulent**

9 [T]he fraudulent prong of the UCL is "governed by
10 the reasonable consumer test: a plaintiff may
11 demonstrate a violation by show[ing] that
12 [reasonable] members of the public are likely to
13 be deceived." Rubio v. Capital One Bank, 613 F.3d
14 1195, 1204 (9th Cir. 2010) (citation omitted). A
15 UCL "plaintiff need not show that he or she or
16 others were actually deceived or confused by the
17 conduct or business practice in question."
18 Schnall v. Hertz Corp., 78 Cal. App. 4th 1144,
19 1167 (2000). Whether a business practice is
20 deceptive will usually be a question of fact not
21 appropriate for decision on a motion to dismiss.
22 Williams v. Gerber Products Co., 552 F.3d 934, 938
23 (9th Cir. 2008). At the same time, an unfair
24 practice claim grounded in fraud must be pled with
25 the particularity required by Federal Rule of
26 Civil Procedure 9(b). Vess, 317 F.3d at 1103.
27
28 Wilkins, 2016 WL 5940082, at *8 (some alterations in Wilkins).

29 Reading the Amended Complaint as a whole, Plaintiff
30 alleges that Defendant falsely represented that the Drones had HD
31 recording capabilities and failed to disclose what the Drones'
32 actual recording capabilities were. Plaintiff also alleges that
33 the public is likely to be deceived by Defendant's practices
34 because, as evidenced by Plaintiff's reasonable reliance on

1 Defendant's statements, Defendant had unequal bargaining power
2 over the public, [Amended Complaint at ¶ 73,] and the information
3 Defendant made available about the Drones prevented Plaintiff and
4 other consumers from learning until after purchase that the
5 representations about the HD recording capabilities were false.
6 Although Plaintiff alleges that he was actually deceived, see,
7 e.g., id. at ¶ 73, because actual deception is not required, he
8 is not required to allege when he was exposed to Defendant's
9 representations, as he is in his § 17500 claim. Thus, his
10 failure to plead the "when" with particularity that was fatal to
11 Count I is not fatal to this portion of Count II. With respect
12 to the fraudulent prong, Plaintiff has pled sufficient facts to
13 state a § 17200 claim against Defendant.

14 **C. Unlawful**

15 As to the unlawful practices prong,

16 a plaintiff must show a violation of some
17 independent law. See Farmers Ins. Exch. v.
18 Superior Court, 2 Cal. 4th 377, 383 (1992). The
19 predicate violation may be federal, state, local,
20 or common law. Id. (section 17200 "borrows"
21 violations of other laws and treats them as
22 unlawful practices actionable separately under
23 section 17200). Because the statute borrows
24 violations of other laws, a failure to state a
25 claim under the underlying law translates to a
26 failure to state a claim under the unlawful prong.
27 See Saunders v. Superior Court, 27 Cal. App. 4th
28 832, 838 (Cal. Ct. App. 1994).

29
30 Wilkins, 2016 WL 5940082, at *8. Plaintiff bases his claim under
31 the unlawful prong on the alleged violation of § 17500. [Amended

1 Complaint at ¶ 78.] However, because Count I fails to state a
2 claim, Plaintiff has also failed to state a claim as to the
3 portion of his § 17200 claim based on the unlawful prong, and
4 must be dismissed. The dismissal of this portion of Count II is
5 without prejudice because it is possible for Plaintiff to cure
6 the defects in Count I by amendment.

7 **CONCLUSION**

8 On the basis of the foregoing, Defendant's Motion to
9 Dismiss the First Amended Complaint, filed January 24, 2017, is
10 HEREBY GRANTED IN PART AND DENIED IN PART. The Motion is GRANTED
11 insofar as Count I and the portion of Count II based on the
12 "unlawful" prong of Cal. Bus. & Prof. Code § 17200 are HEREBY
13 DISMISSED. The Motion is DENIED as to the portion of Count II
14 based on the "unfair" and "fraudulent" prongs of § 17200 and
15 insofar as the dismissal of Count I and the portion of Count II
16 based on the "unlawful" prong is WITHOUT PREJUDICE.

17 The Court GRANTS Plaintiff leave to file a second
18 amended complaint by **October 30, 2017**. If Plaintiff fails to
19 file his second amended complaint by **October 30, 2017**, this case
20 will proceed on the remaining portions of the First Amended Class
21 Action Complaint - the portions of Count II based on the unfair
22 and fraudulent prongs of § 17200.

23 IT IS SO ORDERED.
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1 DATED AT HONOLULU, HAWAII, September 20, 2017.

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/s/ Leslie E. Kobayashi
Leslie E. Kobayashi
United States District Judge

TYSON HOWARD VS. DJI TECHNOLOGY, INC.; 2:16-CV-02292 LEK