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APPLE INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

ARAM HOVSEPIAN, individually and on behalf of all others similarly situated,

Plaintiff,

vs.

APPLE INC.,

Defendant.

CASE NO. C 08-05788 JF

DEFENDANT APPLE INC.'S REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS SECOND AMENDED COMPLAINT

Date: December 4, 2009
Time: 9:00 a.m.
Dept.: Courtroom 3, 5th Floor

Complaint Filed: December 31, 2008

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I. INTRODUCTION

In this Court's Order of August 21, 2009 granting Apple's Motion To Dismiss, the Court gave Plaintiff clear guidance to follow in preparing a further amendment to his complaint. The Court specifically found that Plaintiff's allegations contained "generalized allegations with respect to exclusive knowledge and active concealment" and that Plaintiff had "not stated a cognizable CLRA claim based upon statements made in contradiction to a fraudulent omission;" (Docket No. 49, Order at 5-6.) The Court also held that Plaintiff's UCL, fraudulent omission, unjust enrichment, and declaratory relief claims suffered similarly fatal defects. (*Id.* at 6-9.)

Plaintiff's Second Amended Complaint both ignores the Court's prior Order and continues its own march against the overwhelming weight of applicable authority. Notwithstanding this Court's prior guidance, Plaintiff has not added a single contrary, affirmative representation actually made by Apple to his already deficient complaint. Given Plaintiff's unsuccessful attempts to state a claim over three pleadings, Apple respectfully requests that Plaintiff's Second Amended Complaint be dismissed without leave to amend.

The arguments set forth in Plaintiff's Opposition to Apple's Motion To Dismiss the Second Amended Complaint do nothing to save this iteration of the complaint from its predecessor's fate.

- First, Plaintiff wrongly argues that the Court may "lower" Rule 9(b)'s heightened pleading standard because his averments of fraud are based on omissions. That, however, is not the law. Rule 9(b) is not relaxed where omissions form the basis of the fraud allegations. Consequently, because Plaintiff's averments of fraud based on omissions still suffer a lack of particularity, they should be dismissed.

- Second, numerous decisions of this and other courts have established that a manufacturer, such as Apple, is not the guarantor of its products beyond the warranty period. *See, e.g.*, *Daugherty v. Am. Honda Motor Co.*, 144 Cal. App. 4th 824 (2006); *Oestreicher v. Alienware Corp.*, 544 F. Supp. 2d 964, 970 (N.D. Cal. 2008). Rather, a manufacturer need only comply with the terms of its express warranty and any other applicable limited warranties.

In this action, Plaintiff does not dispute that his Apple computer functioned without issue during the full extent of all relevant warranty periods and until after all warranties expired, nor does Plaintiff dispute that Apple honored any obligations it had during the term of its one-year express warranty. Nor does he address the dispositive California state and federal case law cited by Apple

in its motion, unequivocally holding that unlawful or unfair business practices claims and non-statutory fraud claims can not be based on an alleged product defect when the product functions as represented during the express warranty period. Thus, Plaintiff's claims remain without merit and should be dismissed.

II. THE SECOND AMENDED COMPLAINT FAILS TO STATE A CLAIM FOR FRAUDULENT OMISSION-BASED VIOLATION OF THE UCL OR CLRA.

A. The Heightened Pleading Required by Rule 9(b) Applies to Plaintiff's Fraud-Based Omission Claims.

Plaintiff devotes nearly four pages of his Opposition to rearguing (and implicitly arguing against) an issue already decided by the Ninth Circuit, and reiterated by this Court in its Order granting Apple's last Motion To Dismiss (*see* Docket No. 56, Opp. at 1-4). Namely, the law holds Rule 9(b)'s heightened pleading requirements apply with equal force to nondisclosure claims under the UCL and CLRA that are "grounded in fraud." (*See* Order at 4:4-15 and 5:3-11 (citing *Kearns v. Ford Motor Co.*, 567 F.3d 1120 (9th Cir. 2009), and *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1102-06 (9th Cir. 2003).) Plaintiff would have the Court ignore the Ninth Circuit – as Plaintiff himself has done – and instead argues that the Court should read the California Supreme Court's decision in *In re Tobacco II*, 46 Cal. App. 4th 298 (2009), to overrule *Daugherty* and all related, subsequent product defect cases. In fact, Plaintiff challenges that "***the Court cannot point to any evidence*** suggesting that the California Supreme Court would limit the CLRA and UCL in the manner Apple urges." (Opp. at 4:28-5:2.) Despite Plaintiff's challenge to this Court, the Ninth Circuit has already ruled on the issue, and it ruled with the benefit of the California Supreme Court's *Tobacco II* decision.

In *Kearns*, decided ***after*** the *Tobacco II* decision, the Ninth Circuit held that nondisclosure claims under the UCL and the CLRA must be pleaded with particularity as required by Rule 9(b). *Kearns*, 567 F.3d at 1127.[1] *Kearns* involved a putative class action lawsuit brought under both the UCL and CLRA, asserting false and misleading advertising (and omissions) about Ford's pre-owned vehicles. *Id*. at 1120. The court held that a party alleging fraud must "set forth *more* than the

[1] Plaintiff's citation to jurisprudence supporting a lower particularity standard ignores the Ninth Circuit's clear guidance on omission-based fraud claims under Rule 9(b).

neutral facts necessary to identify the transaction." *Id.* at 1124 (emphasis in original) (citations omitted). "[Plaintiff's] claims of nondisclosure were couched in general pleadings alleging [an] intent to conceal [information] from customers…. Such general pleadings do not satisfy the heightened pleading requirements of Rule 9(b). Therefore, we hold that [Plaintiff's] nondisclosure claims are claims of fraud and were properly dismissed for not being sufficiently pleaded." *Id.* at 1127.

In an unsuccessful attempt to avoid this controlling authority, Plaintiff again contends that his allegations are sufficient under Rule 8, and that the requirements of Rule 9(b) are less onerous than Apple set forth in its motion. To argue his erroneous position, Plaintiff ignores *Kearns*. In fact, Plaintiff does not cite, or even attempt to distinguish, the Ninth Circuit's holding in *Kearns*.

B. Under Rule 9(b), Plaintiff's Fraud-Based Omission Claims Are Not Sufficiently Pleaded.

In his Opposition, Plaintiff makes no effort to point to a single advertisement containing a misrepresentation, or to specify where or what Apple could or should have clarified. Nowhere does Plaintiff specify the underlying misleading content from any sales materials. Nor does Plaintiff specify when he was exposed to Apple's advertising or which ones he found material. Plaintiff has also failed to identify what sales material, if any, he relied upon in making his decision to buy an iMac. Plaintiff does ***not*** even allege that Apple represented that its LCD screens were "sure to last 60,000 hours" or "no less than 5 years of normal usage." (*See* SAC, ¶ 23.) Such consumer expectations based on "industry-standards," especially when they cannot be imputed to anyone connected with Apple, are entirely inadequate to establish a UCL or CLRA claim based on fraud. *See Oestreicher,* 544 F. Supp. 2d at 972-73, *aff'd* by 322 Fed. Appx. 489 (9th Cir. 2009) (recognizing *Daugherty*, and affirming district court's dismissal of CLRA and fraudulent concealment claims, as well as the UCL claims that derive from them).

Plaintiff's citation to an Ohio district court opinion, *In re Whirlpool Corp. Front-Loading Washer Products Liability Litigation*, 2009 WL 3712649 (N.D. Ohio Nov. 3, 2009), for a lower particularity standard under Rule 9(b) is directly at odds with the Ninth Circuit's controlling *Kearns* decision. In *Whirlpool*, the district court noted that it was not necessary to "specify the time, place,

and specific content of an omission" as precisely. *Id.* at *16. The particularity missing from Plaintiff's allegations, however, is not "the specific time and place" of the omissions. Rather, Plaintiff's Second Amended Complaint fails to allege facts showing that Apple ***ever*** gave ***any*** information which could have the likely effect of misleading the public. Without reference to contrary representations actually made by Apple, Plaintiff has not adequately pleaded an omission-theory under the CLRA or the UCL.

Recognizing the futility of disavowing the applicability of Rule 9(b) to Plaintiff's fraud and fraud-based claims, Plaintiff contends his Second Amended Complaint "passes Rule 12 muster when it puts the defendants on notice of the claims against it and includes some plausible factual averments beyond mere recitation of legal elements." (Opp. at 4:3-5.) Plaintiff cites two cases to suggest that Rule 8 – rather than Rule 9(b) – applies to his claims. *See Villegas v. J.P. Morgan Chase & Co.*, 2009 WL 605833 (N.D. Cal. Mar. 9, 2009); *Stoehr v. UBS Securities, LLC*, 2008 WL 2705575 (N.D. Cal. July 10, 2008). Neither case, however, involved an allegation of fraud. Consequently, neither case provides (or even suggests) support for Plaintiff's position that his fraud-based claims are not governed by Rule 9(b).

III. THE *DAUGHERTY* LINE OF CASES IS FATAL TO PLAINTIFF'S CLAIMS.

In the Second Amended Complaint, Plaintiff unsuccessfully recycles the same vague allegations of consumer fraud that this Court previously found inadequate. Plaintiff does not claim in his Opposition that his new allegations resolve the generalities and failure to allege the exact circumstances of any specific representation by Apple, nor does he resolve his failure to allege with particularity the materiality, duty to disclose, and "but for" reliance concerning specific omissions.

Plaintiff's fraud-by-omission allegations are not tied to any Apple advertising or marketing materials. The Second Amended Complaint lacks identification of the precise facts that were omitted (*i.e.*, what specific representation should have been made as a result of Apple's other statements), the basis for having to disclose such facts (*i.e.*, why was Apple obligated to make the specific representation), and allegations that "but for" the omission of these precise facts, Plaintiff would have acted differently (*i.e.*, why the specific representation would have caused Plaintiff to behave differently).

Because all the alleged omissions are pleaded with generality and without identifying a contrary representation actually made by Apple, this Court should find – as it did in August – that Apple was under no duty to disclose any of them. (*See* Order at 6:2-3 ("generalized allegations with respect to consumer expectations are insufficient to meet Rule 9(b)'s heightened pleading requirements, especially when the alleged defect manifested itself more than one year after the expiration of the express warranty.") *See Daugherty*, 114 Cal. App. 4th at 835 (affirming dismissal of UCL and CLRA claims where allegations failed to show that the omission was contrary to a representation actually made by the defendant or a fact the defendant was obliged to disclose); *Bardin v. DaimlerChrysler*, 136 Cal. App. 4th 1255 (2006) (same). Absent more particularized allegations concerning each purported omission, Plaintiff – just as before – has failed to state a claim.

The *Daugherty* line of cases is fatal to Plaintiff's claims as a matter of law. 144 Cal. App. 4th 824; *Oestreicher*, 544 F. Supp. 2d at 970; *Long v. Hewlett-Packard Co.*, 2007 U.S. Dist. LEXIS 79262, at *23-24 (N.D. Cal. July 27, 2007), *aff'd* by 322 Fed. Appx. 585, 586 (9th Cir. 2009) ("HP owed Plaintiffs no independent duty to disclose information about the elevated failure rate of the laptops, absent a special relationship or affirmative misrepresentation."); *Hoey v. Sony Elecs. Inc.*, 515 F. Supp. 2d 1099, 1105 (N.D. Cal. 2007). These cases hold that a manufacturer can not be liable under California's consumer protection laws for failure to disclose a defect that manifests itself after expiration of the warranty period unless (1) the manufacturer has made affirmative misrepresentations about the allegedly defective part to the contrary or (2) the defect poses substantial safety concerns. *Daugherty* at 835-36. As the *Daugherty* court recognized:

> Opening the door to plaintiffs' new theory of liability would change the landscape of warranty and product liability law in California. Failure of a product to last forever would become a 'defect,' a manufacturer would no longer be able to issue limited warranties, and product defect litigation would become as widespread as manufacturing itself.

Id. at 829.

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A. There Is No Duty To Disclose Because Apple Has Made No Contrary Representations and No Product Safety Issue Exists.

This Court relied on *Daugherty* in granting Apple's previous motion to dismiss. Plaintiff does not dispute that he has failed to allege either exception identified in *Daugherty*. Rather, Plaintiff attempts to refute the central reasoning of the *Daugherty* line of cases, and directly challenges the unambiguous holding of the Ninth Circuit in *Kearns* that to plead fraud-based omission claims under the UCL or CLRA, a plaintiff must do so with particularity. *See Kearns*, 567 F.3d at 1126-27 (affirming district court's dismissal of plaintiff's third amended complaint). Plaintiff fails to support his CLRA or UCL claims with any allegation that Apple made any representation of any kind regarding its computer screens, nor can he allege a safety concern. According to the allegations of Plaintiff's Second Amended Complaint, Apple has said nothing that was likely to deceive the general public about the qualities and characteristics of its iMac screens. Moreover, Plaintiff does not allege any safety issue to him personally or to the putative class arising from the alleged screen defect. Absent any such allegations that Apple misled him or that safety is a grave concern, Plaintiff's claims should be dismissed with prejudice.

Plaintiff recognizes that the dispositive cases law on which Apple's Motion To Dismiss is based "reached the conclusion that [a duty to disclose does not exist] unless product safety is implicated." (Opp. at 5:21-25 (citing *Daugherty*, 144 Cal. App. 4th 824; *Oestreicher*, 544 F. Supp. 2d at 970; *Long*, 2007 U.S. Dist. LEXIS 79262, at *23-24; and *Hoey*, 515 F. Supp. 2d at 1105.) This same authority recognized by Plaintiff rejects the possibility that a duty to disclose exists based only upon a manufacturer's exclusive knowledge.

In *Hoey*, for example, plaintiffs filed a class action against Sony alleging it violated the CLRA by failing to disclose defects that manifested after the expiration of the plaintiffs' warranties in two series of notebook computers. Citing *Daugherty*, the district court dismissed plaintiffs' claims, refusing to allow the plaintiffs "to bootstrap Sony's express warranty into a representation that the VAIO notebooks are defect-free, such that a failure to disclose the alleged soldering defect would constitute concealment." 515 F. Supp. 2d at 1104. Similarly, in *Long*, plaintiffs sought to bring a CLRA claim against Hewlett-Packard on behalf of a putative class alleging that it failed to

disclose a defective inverter that caused the monitor in certain notebook computers to flicker and fail ***outside*** the warranty period, but within the computers' "useful life." 2007 U.S. Dist. LEXIS 79262, at *2. Also relying on *Daugherty*, the district court held that because Plaintiff failed to allege that Hewlett-Packard made any representation as to the life of the inverter, or even the useful life of the notebooks, Hewlett-Packard's alleged failure to disclose the defect was not actionable under the CLRA when the defect manifested itself ***after*** the warranty period. *Id.* at *23-24. Finally, in *Oestreicher*, the plaintiff brought statutory claims under the UCL and CLRA and an unjust enrichment "claim," alleging that Alienware concealed material information regarding an alleged latent design defect that manifested ***outside*** the three-month warranty period and was exclusively known to Alienware. 544 F. Supp. 2d at 966-67. Citing *Daugherty*, the district court found no allegations of fraud. *Id.* at 969. Accordingly, the district court rejected plaintiff's argument that a duty to disclose is imposed on a manufacturer for a non-safety related defect in its product.

Plaintiff again relies extensively on *Falk v. General Motors Corp.*, 496 F. Supp. 2d 1088 (N.D. Cal. 2007), to argue against the weight of authority. As this Court has recognized, "*Falk* involved the failure of vehicle speedometers, an essential safety feature that a manufacture may have a duty to disclose." (Order at 6 n.4.) Here, Plaintiff does not allege a product safety concern, and the screen defect alleged does not obligate Apple to disclose anything because it does not raise safety concerns. *See Oestreicher*, 544 F. Supp. 2d at 971-73 (finding "the safety consideration [] integral to the [*Falk*] court's finding that the non-disclosed information was material"). The *Daugherty* court recognized this distinction: while a manufacturer would have a duty to disclose defects that raise unreasonable safety risks, the risk of having to pay for "cost of repairs" in the event that a defect manifests itself is not enough to give rise to a disclosure obligation. 144 Cal. App. 4th at 836.

B. Plaintiff's Attempt To Re-Interpret *Daugherty* Through *Tobacco II* Must Fail.

Without citation to any authority other than the California Supreme Court's decision in *Tobacco II* (a case having nothing to do with a manufacturer's duty to disclose an alleged defect), Plaintiff suggests that under the UCL, manufacturers, like Apple, owe a fiduciary-like obligation to disclose all material facts of which they have exclusive knowledge. Plaintiff somehow views the

California Supreme Court's decision regarding the UCL's standing requirements to mean that the cases discussed above no longer mean what they say.

Plaintiff emphasizes paragraphs in the Second Amended Complaint (*see*, *e.g.*, SAC, ¶¶ 3, 11, 21, 26, 34-35) that purportedly create a duty to disclose based solely on the existence of the alleged defect and the manufacturer's exclusive knowledge of that defect. Even assuming the truth of each and every paragraph, Plaintiff has failed to allege nondisclosure claims under the CLRA or the UCL. *See Daugherty*, 144 Cal. App. 4th at 829, 835-36.

In both *Daugherty* and *Bardin*, the plaintiffs expressly alleged that the defendants knew of and failed to disclose defects, and the courts concluded that such knowledge coupled with nondisclosure was insufficient to state a claim. *Daugherty*, 144 Cal. App. 4th at 829; *Bardin*, 136 Cal. App. 4th at 1262-63. The federal cases interpreting *Daugherty* and *Bardin* in consumer electronics cases have come to the same conclusion. *See Oestreicher*, 544 F. Supp. 2d at 970; *Hoey*, 515 F. Supp. 2d at 1105; *Long*, 2007 U.S. Dist. LEXIS 79262, at *23-24. Plaintiff's allegations regarding Apple's exclusive knowledge and/or active concealment of the alleged defect (SAC, ¶¶23, 27, 86) do not state a claim under established California law. Plaintiff has not identified a single allegation in the 109 paragraphs of the Second Amended Complaint that demonstrates an omission contrary to any representation of Apple. Nor does Plaintiff identify a product safety issue that would create an obligation to disclose.

In spite of this authority and this Court's prior Order, Plaintiff's argument is that – even absent fraud – a manufacturer *always* has a duty to disclose all facts of which it has superior knowledge (which would presumably always be the case) and to pay for repairs outside the warranty period based on a consumer's subjective view of the product's useful life. In support of his position, Plaintiff again cites *Tobacco II* for the proposition that "the California Supreme Court 'always have (sic) [erred on the side of expansiveness] with regard to the UCL.'" (Opp. at 5:3-4.)

The problem is that *Tobacco II* simply does not stand for the propositions Plaintiff attempts to foist upon it. First, in *Tobacco II*, the California Supreme Court did ***not*** hold that a duty to disclose exists even where a manufacturer has not represented anything to the contrary of the alleged omission. It simply does not address the issue, and Plaintiff cannot point to any portion of

the opinion that supports its argument. Second, as Plaintiff acknowledges the *Tobacco II* court reached its conclusions in the context of class certification and standing requirements. (Opp. at 6:8-9.) *See Cohen v. DIRECTV, Inc.*, 178 Cal. App. 4th 966, 2009 WL 3069116, at *10 (Sept. 28, 2009) ("*Tobacco II* held that, *for purposes of standing* in context of the class certification issue in a 'false advertising' case involving the UCL, the class members need not be assessed for the element of reliance") (emphasis in original). The California Supreme Court's holding in *Tobacco II* does not speak to the issue before this Court, and does not alter the central substantive holding of *Daugherty* and related cases. Indeed, California law, federal law, and common sense all contradict Plaintiff's argument. As this Court already recognized, absent either a statement to the contrary or a safety issue (neither of which has been alleged by Plaintiff), Plaintiff's CLRA and UCL claims fail as a matter of law and should be dismissed with prejudice.

IV. PLAINTIFF'S THIRD CAUSE OF ACTION FOR FRAUDULENT OMISSION SHOULD BE DISMISSED FOR FAILURE TO ALLEGE A DUTY TO DISCLOSE.

Plaintiff's non-statutory fraudulent concealment claim (Count III) suffers the same pleading failures and must be dismissed because Plaintiff's allegations of fraud are inadequate.[2] As with his omission-based CLRA and UCL claims, Plaintiff alleges Apple had full knowledge, or was reckless in not knowing, of the defect. As the court in *Oestreicher* observed, "allegations of this nature [] could be made about any alleged design defect in any manufactured product." *See Oestreicher*, 544 F. Supp. 2d at 974. The heightened pleading requirements of Rule 9(b) were designed to avoid such threadbare claims. For virtually identical reasons as those present here, the court in *Oestreicher* found a lack of facts substantiating the plaintiff's "common law" fraudulent concealment claim based on an alleged latent defect. *Id.* (dismissing ***with prejudice*** plaintiff's non-

[2] Under California law:

> [T]he elements of an action for fraud and deceit based on concealment are: (1) the defendant must have concealed or suppressed a material fact, (2) the defendant must have been under a duty to disclose the fact to the plaintiff, (3) the defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff must have been unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff must have sustained damage.

Hahn v. Mirda, 147 Cal. App. 4th 740, 748 (2007) (internal quotation omitted).

statutory fraudulent omission claim based on concealment).

Here, Plaintiff fails to describe with specificity representations made by Apple with respect to the LCD that would give rise to a duty to disclose – essentially failing to identify the materiality required pursuant to the authority cited by Plaintiff, *Am-Mark Label, Inc. v. Chiang*, 2007 WL 4424952, at *9 (Cal. App. Dec. 19, 2007) (unpublished and noncitable under California Rules of Court). *See Hoey*, 515 F. Supp. 2d at 1104-05 (dismissing non-statutory claim for fraudulent concealment because plaintiffs' complaint failed to identify a representation contrary to the alleged omission). Plaintiff has not identified anything in Apple's advertising and marketing materials which would give rise to a duty to disclose the defect alleged. Indeed, even in his Opposition, Plaintiff does not claim that Apple has represented anything to the contrary of any alleged omission. For each of these reasons, Plaintiff fails to state a claim for fraudulent concealment, and his fraudulent omission claim should be dismissed with prejudice.

V. PLAINTIFF CANNOT STATE A CLAIM FOR UNJUST ENRICHMENT OR DECLARATORY RELIEF.

Plaintiff's claim for restitution is premised solely on the underlying allegations of his other claims. Because – as discussed above – dismissal of Plaintiff's CLRA, UCL, and fraudulent concealment claims is appropriate, dismissal of his "claim" of unjust enrichment is also proper. *See McBride v. Boughton*, 123 Cal. App. 4th 379, 387 (2004) ("Unjust enrichment is not a cause of action, however, or even a remedy"). Similarly, his claim for declaratory relief must fail where, as here, he has stated no other claim. *See Bardin*, 136 Cal. App. 4th at 1277 (dismissing declaratory relief claim where "no other facts [] reveal an actual controversy exists between the parties").

VI. CONCLUSION: DISMISSAL WITH PREJUDICE IS APPROPRIATE.

Plaintiff's fraud-based allegations are not sufficient to state a UCL, CLRA or non-statutory fraud claim. Plaintiff's other claims for relief should also be dismissed. Thus, for the reasons set forth above and more fully in Apple's Motion To Dismiss, Plaintiff's Second Amended Complaint should be dismissed, this time ***without leave to amend***. It is now clear that Plaintiff cannot state a valid claim, despite making three attempts and despite this Court's clear prior guidance. Further leave to amend would be futile.

DATED: November 20, 2009

PAUL, HASTINGS, JANOFSKY & WALKER LLP

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