

United States District Court  
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MICHAEL ALLAGAS, ARTHUR RAY,  
AND BRETT MOHRMAN, et al.,  
  
Plaintiffs,  
  
v.  
  
BP SOLAR INTERNATIONAL INC., HOME  
DEPOT U.S.A., INC., AND DOES 1-10,  
inclusive,  
  
Defendants.

No. C 14-00560 SI  
  
**ORDER DENYING DEFENDANTS’  
MOTION TO DISMISS THE FIRST  
AMENDED COMPLAINT AND  
DENYING DEFENDANTS’ MOTION TO  
STRIKE**

Currently before the Court is defendants’ motion to dismiss plaintiffs’ first amended complaint and defendants’ motion to strike plaintiffs’ class allegations. Docket No. 36. Pursuant to Civil Local Rule 7-1(b), the Court determines that this matter is appropriate for resolution without oral argument. For the reasons set forth below, the Court DENIES the motion to dismiss and DENIES the motion to strike.

**BACKGROUND**

The following facts are drawn from the operative complaint. Plaintiffs Michael Allagas, Arthur Ray, and Brett Mohrman seek recovery on behalf of themselves and all California residents who purchased solar panels manufactured by defendant BP Solar International, Inc., or purchased properties on which the solar panels were installed. First Amended Complaint (FAC) ¶¶ 1,4. Plaintiffs allege

1 claims for breach of express and implied warranty under California law, the Song-Beverly Consumer  
2 Warranty Act, Cal. Civ. Code § 1790 *et seq.*, and the Magnuson-Moss Warranty Act, 15 U.S.C. § 2302;  
3 violation of the California Consumers Legal Remedies Act (CLRA), Cal. Civ. Code § 1750 *et seq.*; and  
4 violations of California’s Unfair Competition Law (UCL), Cal. Bus. & Prof. Code § 17200 *et seq.*

5 In December 2005, plaintiff Allagas purchased a BP Solar Home Solution – which included  
6 twenty-four BP 4175B solar panels – from defendant Home Depot. *Id.* ¶ 5. In August 2005, plaintiff  
7 Ray purchased a solar system from Diablo Solar Services that consisted of eighteen BP SX 170B solar  
8 panels.<sup>1</sup> *Id.* ¶ 6. And in June 2012, plaintiff Mohrman purchased a home on which a solar system  
9 consisting of twenty BP 2150S solar panels was previously installed. *Id.* ¶ 7.

10 Plaintiffs allege that there is a latent defect in the junction box of the BP solar panels that causes  
11 a junction box failure and results in a total loss of functionality of the solar panels. FAC at 3. The solar  
12 panels are installed on racks which are mounted on the roof of a house or the ground. *Id.* ¶ 15. The  
13 panels are connected together by connection cables. *Id.* ¶ 16. If one solar panel fails, the panels  
14 connected to it also stop functioning. *Id.* ¶ 17. The connection between the solar panels is made at a  
15 junction box attached to the back of each solar panel. *Id.* Plaintiffs allege that a defect in the junction  
16 box and the solder joints between the connecting cables causes the solder joint to overheat; the failed  
17 solder joints cause electrical arcing that generates temperatures of 2000-3000 degrees and results in the  
18 immediate total loss of the functionality of the solar panel and also creates a serious fire safety risk. *Id.*  
19 ¶ 18. The heat melts the junction box, burns the cables and solar panels, and shatters the glass cover  
20 of the panels. *Id.* ¶ 19. According to plaintiffs, because of the defect in the junction box, all solar panels  
21 relevant to this litigation have failed or will fail before the end of the expected useful life. *Id.* ¶ 20.

22 Also at issue in this case are the solar panel marketing and advertising materials BP produced;  
23 the warranties and representations BP made regarding the solar panels; the offers BP made to warranty  
24 claimants; and a product advisory issued by BP regarding risks when using certain solar panels. *Id.* at  
25 8-18.

26 Plaintiffs seek to represent in this action a class composed of six subclasses:

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28 <sup>1</sup> The Court notes that the dates cited in paragraphs 5 and 6 of the FAC differ from the dates  
cited in plaintiffs’ original complaint. *See* Docket No. 1-2, ¶¶ 5, 6.



1 In reviewing a Rule 12(b)(6) motion, a district court must accept as true all facts alleged in the  
2 complaint, and draw all reasonable inferences in favor of the plaintiff. *See al-Kidd v. Ashcroft*, 580 F.3d  
3 949, 956 (9th Cir. 2009). However, a district court is not required to accept as true “allegations that are  
4 merely conclusory, unwarranted deductions of fact, or unreasonable inferences.” *In re Gilead Scis. Sec.*  
5 *Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008). As a general rule, the Court may not consider any materials  
6 beyond the pleadings when ruling on a Rule 12(b)(6) motion. *Lee v. City of L.A.*, 250 F.3d 668, 689 (9th  
7 Cir. 2001). However, pursuant to Federal Rule of Evidence 201, the Court may take judicial notice of  
8 “matters of public record,” such as prior court proceedings, without thereby transforming the motion  
9 into a motion for summary judgment. *Id.* at 688-89. If the Court dismisses a complaint, it must decide  
10 whether to grant leave to amend. The Ninth Circuit has “repeatedly held that a district court should  
11 grant leave to amend even if no request to amend the pleading was made, unless it determines that the  
12 pleading could not possibly be cured by the allegation of other facts.” *Lopez v. Smith*, 203 F.3d 1122,  
13 1130 (9th Cir. 2000) (citations and internal quotation marks omitted).

## 14

### 15 **II. Motion to Strike Class Allegations**

16 Pursuant to Federal Rule of Civil Procedure 12(f), a party may move to strike from a pleading  
17 “any insufficient defense or any redundant, immaterial, or impertinent and scandalous matter.” Fed. R.  
18 Civ. P. 12(f). A defendant may move to strike class actions prior to discovery where the complaint  
19 demonstrates a class action cannot be maintained on the facts alleged therein. *Sanders v. Apple, Inc.*,  
20 672 F.Supp. 2d 978, 990 (N.D. Cal. 2009). To grant a motion to strike, “the court must be convinced  
21 that any questions of law are clear and not in dispute, and that under no set of circumstances could the  
22 claim or defense succeed.” *Id.*

## 23

## 24 **DISCUSSION**

### 25 **I. Motion to Dismiss**

26 Defendants have moved to dismiss plaintiffs’ claims for breach of express and implied warranty  
27 under California law, the Song-Beverly Act, and the Magnuson-Moss Act; violation of the CLRA; and  
28

1 violation of the UCL. The Court addresses defendants’ motion as to the claims of the three named  
2 plaintiffs – Allagas, Ray, and Mohrman.

3  
4 **A. Express Warranty Claims**

5 Plaintiffs’ second, third, and fourth causes of action are against BP for breach of the express  
6 defect and power warranties under California law, the Song-Beverly Act, and the Magnuson-Moss Act.  
7 Defendants move to dismiss the claims of Allagas and Ray. Motion at 2.

8 Plaintiffs have amended their complaint to allege that there is a latent defect in the junction box  
9 of the solar panels that causes a junction box failure and results in a total loss of functionality of the  
10 solar panels. FAC ¶¶ 17-18. Because of the defect in the junction box, all solar panels relevant to this  
11 litigation have failed or will fail before the end of their expected useful life. *Id.* ¶ 20. Plaintiffs allege  
12 that the latent defect in the panels is not discoverable until the customer experiences a junction box  
13 failure or fire. *Id.* ¶ 22. Allagas and Ray further allege that they relied upon the express defect and  
14 power warranties. *Id.* ¶¶ 91, 109.

15 The Court finds that plaintiffs have sufficiently pled their express defect warranty claim under  
16 California law and the Song-Beverly Act for latent defects that existed at the time the product was sold.  
17 *See Hicks v. Kaufman & Broad Home Corp.*, 89 Cal. App. 4th 908, 918, 923 (2001) (concluding that  
18 proof of an inherent defect which is substantially certain to result in malfunction during the useful life  
19 of the product establishes breach of express warranty); *see also Hewlett-Packard v. Superior Court*, 167  
20 Cal. App. 4th, 87, 96 (2008) (reasoning that an actual malfunction of the product would not be necessary  
21 to establish defect, if it could be established that the product was substantially certain to fail  
22 prematurely).<sup>2</sup> Accordingly, plaintiffs have stated express defect warranty claims under California law,  
23 the Song-Beverly Act, and the Magnuson-Moss Act.

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25 <sup>2</sup> The BP express warranty does not, “by its express terms cover[] only defects that result in  
26 product failure during the warranty period.” *Tietzworth v. Sears*, 720 F.Supp. 2d 1123, 1141 (N.D. Cal.  
27 2010). The BP warranty provides that for the term of the warranty:  
28 Your BP SOLAR Product sold hereunder shall be free from defects in materials and  
workmanship. If, during the term of your warranty, there is such a defect, then BP  
SOLAR will, at its sole option, repair or replace Your BP SOLAR Product with an  
equivalent product, or refund the purchase price to you.

1 As to plaintiffs’ express power warranty claims, the Court finds that Allagas and Ray have stated  
2 claims under California law and the Magnuson-Moss Act because the amended complaint alleges their  
3 reliance upon the power warranty. FAC ¶¶ 88, 90-91, 107, 109. Additionally, the amended complaint  
4 alleges Ray’s notice to BP and a power failure, so Ray has also stated a claim for breach of the express  
5 power warranty under the Song-Beverly Act. *Id.* ¶¶ 112-17.

6 The Court DENIES defendants’ motion to dismiss plaintiffs’ express warranty claims.  
7

8 **B. Implied Warranty Claims**

9 Plaintiffs’ fifth, sixth, and seventh causes of action are against all defendants for breach of  
10 implied warranty under California law, the Song-Beverly Act, and the Magnuson-Moss Act. Defendants  
11 move to dismiss all plaintiffs’ implied warranty claims. Motion at 9.

12 The amended complaint now clearly alleges a latent defect in the solar panels that renders them  
13 unmerchantable and unfit for their intended use. FAC ¶¶ 205. Additionally, Allagas has alleged privity,  
14 and Ray and Mohrman have alleged that they were the intended beneficiaries of the implied warranties.  
15 *Id.* ¶¶ 200-204. The Court finds that Allagas, Ray, and Mohrman have sufficiently alleged their implied  
16 warranty claims under California law, and thus have also stated claims under the Magnuson-Moss Act.  
17 *See Gilbert Financial Corp. v. Steelform Contracting Co.*, 82 Cal. App. 3d 65, 69-70 (1978); *see also*  
18 *Shell v. Schmidt*, 126 Cal. App. 2d 279, 290 (1954).

19 As to plaintiffs’ claims under the Song-Beverly Act, defendants maintain these claims fail as a  
20 matter of law because they are untimely. Motion at 9, Reply at 5. Plaintiffs contend that their claims  
21 under the Song-Beverly Act accrue at the time of discovery of the breach, because the BP warranty  
22 extends to future performance of the solar panels, and that their claims are timely under the relevant  
23 statute of limitations. Opp. at 20. “A motion to dismiss based on the running of the statute of  
24 limitations period may be granted only if the assertions of the complaint, read with the required  
25 liberality, would not permit the plaintiff to prove that the statute was tolled.” *Supermail Cargo, Inc. v.*  
26 *U.S.*, 68 F.3d 1204, 1206-07 (9th Cir. 1995) (citing *Jablon v. Dean Witter & Co.*, 614 F.2d 677, 682 (9th  
27 Cir. 1980) (internal quotation mark omitted). The Court cannot say that plaintiffs will be unable to  
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1 prove a set of facts establishing the timeliness of their claims. Accordingly, the Court DENIES  
2 defendants' motion to dismiss plaintiffs' implied warranty claims.

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4 **C. Claims Under the CLRA and the Fraud Prong of the UCL**

5 Plaintiffs allege that BP violated the CLRA by making false representations and warranties about  
6 the solar panels and failing to disclose facts it was required to disclose, and by including in the warranty  
7 unconscionable warranty exclusions. FAC ¶¶ 162, 237, 240. Defendants assert that claims made under  
8 the CLRA and fraud prong of the UCL must be dismissed because all of the allegedly misleading  
9 statements are non-actionable puffery and the claims are not pled with the requisite particularity under  
10 Federal Rule of Civil Procedure 9(b). Motion at 14-21, Reply at 8-14.

11 The Court disagrees. Plaintiffs cite various broad representations in the promotional materials,  
12 including promises the solar panels will “drastically reduce or eliminate your electric bills . . . forever,”  
13 will “increase the value of your home,” and “[n]o other system can operate at a higher level of safety  
14 than those offered by BP Solar.” FAC ¶ 51. In addition, however, plaintiffs also cite representations  
15 and warranties in the solar panel product data sheets warranting 80% power output for a 25 year period  
16 and a 90% power output for a 12 year period, together with a 5-year limited warranty of materials and  
17 workmanship. *Id.* Taken together, these statements are “factual representations” that could be “likely  
18 to deceive a reasonable consumer.” *Consumer Advocates v. Echostar Satellite Corp.*, 113 Cal. App. 4th  
19 1351, 1361-62 (2003). A reasonable consumer could have relied on these statements as descriptions  
20 of the quality and power capabilities of the solar panels.

21 Defendants further argue plaintiffs have failed to plead their claims with the requisite  
22 particularity. To satisfy the heightened Rule 9(b) pleading standard, plaintiffs “must set forth what is  
23 false and misleading about a statement, and why it is false.” *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d  
24 1097, 1106 (9th Cir. 2003). Allegations of fraud “must be accompanied by the who, what, when,  
25 where, and how of the misconduct charged.” *Id.* (citation and internal quotation mark omitted). The  
26 amended complaint details BP’s marketing plan and relationship with distributors and sellers of the solar  
27 panels, the warranty statements and why they are misleading and false, where and when the warranty  
28 statements were made to Allagas and Ray, and plaintiffs’ reliance upon them. FAC ¶¶ 20-23, 39, 51,

1 53-70, 85-91, 106-111. The amended complaint also alleges BP’s knowledge of the latent defect in the  
2 solar panels, BP’s concealment of the defect, particular instances when information regarding the defect  
3 and risk of fire could have been revealed, and the warranties all three plaintiffs relied upon that failed  
4 to include the concealed information. *Id.* ¶¶ 24- 28, 86-91, 106-111, 122-23. The Court therefore  
5 DENIES defendants’ motion as to plaintiffs’ claims under the CLRA and the fraud prong of the UCL.

6  
7 **D. Claims Under the Unfair Prong of the UCL**

8 Defendants assert that plaintiffs have failed to allege injury, and their claims under the unfair  
9 prong of the UCL must therefore be dismissed. Motion at 22, Reply at 15. California’s UCL prohibits  
10 unfair competition by means of any unlawful, unfair or fraudulent business practice. Cal. Bus. & Prof.  
11 Code §§ 17200-17210. To have standing under the UCL, as amended by California’s Proposition 64,  
12 “plaintiffs must establish that they (1) suffered an injury in fact and (2) lost money or property as a result  
13 of the unfair competition.” *Birdsong v. Apple, Inc.*, 590 F.3d 955, 959-960 (9th Cir. 2009).<sup>3</sup> “Thus, to  
14 plead a UCL claim, the plaintiffs must show, consistent with Article III, that they suffered a distinct and  
15 palpable injury as a result of the alleged unlawful or unfair conduct.” *Id.*

16 Plaintiffs claim they have suffered injury as a result of BP’s unfair methods of competition and  
17 unfair practices. FAC ¶ 243. Plaintiffs allege they have been injured by the enforcement of the  
18 warranty exclusions, claim suppression strategy, and BP’s concealment of the risk of fire from the solar  
19 panels. *Id.* ¶¶ 91, 102, 109, 117, 123, 128, 149, 245. Plaintiffs also allege that but for BP’s unfair  
20 business practices, they would not have purchased the solar systems. *Id.* ¶¶ 91, 109, 123. Additionally,  
21 the amended complaint details plaintiffs’ injuries from lost property, out-of-pocket inspection costs, and  
22 electricity bills associated with the defective solar systems. *Id.* ¶¶ 94-105, 112-121, 149. Plaintiffs  
23 have incurred concrete financial losses in the form of ascertainable out-of-pocket damages due to BP’s  
24 allegedly unfair business practices and thus have demonstrated injury under the UCL. *See Kwikset*  
25 *Corp. v. Superior Court*, 51 Cal. 4th 310, 323 (2011) (explaining that economic injury from unfair

26  
27 <sup>3</sup> Proposition 64 prohibits “private attorneys from filing lawsuits for unfair competition where  
28 they have no client who has been injured in fact *under the standing requirements of the United States*  
*Constitution.*” *Buckland Threshold Enters., Ltd.*, 155 Cal. App. 4th 798, 814 (Cal. Ct. App. 2007)  
(quoting Prop. 64, § 1, (e)) (emphasis in original).



1 competition may be shown by plaintiff's surrender in a transaction more than he or she otherwise would  
2 have; loss of a present or future property interest; or where plaintiff is required to enter into a transaction  
3 costing money that would have otherwise been unnecessary).

4 The Court finds that plaintiffs have sufficiently plead their claim under the unfair prong of the  
5 UCL and DENIES defendants' motion as to this claim.

6  
7 **II. Motion to Strike Class Allegations**


8 Defendants again move to strike plaintiffs' class allegation. Docket No. 37. Motions to strike  
9 class allegations are rarely granted at the pleading stage. *See In re Wal-Mart, Inc. Wage & Hour Litig.*,  
10 505 F. Supp. 2d 609, 614-15 (N.D. Cal. 2007). The better practice is to assess class allegations through  
11 a motion for class certification. *Cruz v. Sky Chefs, Inc.*, No. C-12-02705 DMR, 2013 WL 1892337,  
12 at \* 6 (N.D. Cal. May 6, 2013) (citing cases from both before and after *Twombly* for the proposition that  
13 class allegations should rarely be stricken at the pleading stage). Therefore, the Court DENIES  
14 defendants' motion to strike the class allegations.

15  
16 **CONCLUSION**

17 The Court DENIES defendants' motion to dismiss plaintiffs' claims for breach of express and  
18 implied warranties, and claims made under the CLRA and UCL. The Court also DENIES defendants'  
19 motion to strike the class allegations. This disposes of Docket No. 36.

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21 **IT IS SO ORDERED.**

22  
23 Dated: September 8, 2014

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25 \_\_\_\_\_  
26 SUSAN ILLSTON  
27 UNITED STATES DISTRICT JUDGE  
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