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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

MONTE MORGAN and F. JASON VASQUEZ, on behalf of themselves and all others similarly situated, Plaintiffs, vs. HARMONIX MUSIC SYSTEMS, INC., a corporation; MTV NETWORKS, a division of VIACOM INTERNATIONAL, INC., a corporation; ELECTRONIC ARTS, Inc., a corporation; and DOES 1 Through 10, Defendants.	Case No. CV 08 5211 BZ REPLY OF DEFENDANTS IN SUPPORT OF MOTION TO DISMISS FIRST AMENDED COMPLAINT AND MOTION TO STRIKE (Fed. R. Civ. P. 12(b)(6) and 12(f)) Date: July 1, 2009 Time: 10:00 a.m. Ctrm: G Judge: Hon. Bernard Zimmerman Complaint Filed: Nov. 18, 2008 First Amended Complaint Filed: Dec. 23, 2008 Oral Argument Requested

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INTRODUCTION

In response to Defendants' motion to dismiss Plaintiffs' First Amended Complaint ("FAC"), Plaintiffs have made two significant concessions. First, they have altogether dropped their second cause of action for breach of the implied warranty of fitness for a particular purpose. Second, they no longer contend that "Defendants' refusal to 'make exceptions to [their] warranty program' and replace defective *Rock Band* drum pedals more than 60 days after purchase," FAC ¶ 31, is the basis for their claims under the CLRA and UCL. *See, e.g.*, Plaintiffs' Opposition ("Opp.") at 11 ("Defendants' refusal to continue making exceptions to their warranty policy… is not even one underlying basis of the CLRA claim"). Instead, Plaintiffs have changed course and now contend that "at the heart of Plaintiffs' complaint is Defendants' marketing of *Rock Band* as a multi-player game including the drum, when in reality Defendants' drum controller was so defective that the game could not be played as marketed." *Id.* In other words, Plaintiffs have cast aside the lengthy and detailed allegations in their original complaint and FAC about the Defendants' allegedly unfair change of warranty policies, and now rely on the allegation (never actually made in the original complaint or FAC) that Defendants broke the law merely by describing *Rock Band* as a multiplayer game that can be played with a drum controller, because some of the drum pedals break after the 60-day express warranty has expired.

Plaintiffs' new theory is just as unavailing as their old theory. California and federal case law, including an ever-growing body of decisions in this District, make it abundantly clear that (i) a so-called "latent defect" in a component of a consumer product does not give rise to claims under the CLRA and the UCL unless the seller makes definitive affirmative representations to the purchaser about the defect-free status of the product, and (ii) in any event, a consumer's expectations of a defect-free product are bounded by the terms of the product's express warranty. *See, e.g., Daugherty v. American Honda Motor Co.*, 144 Cal.App.4th 824, 830 (2006); *Long v. Hewlett-Packard Co.*, 2007 WL 2994812 (N.D. Cal. July 27, 2007); *Oestreicher v. Alienware*, 544 F.Supp.2d 964 (N.D. Cal 2008), *affirmed at* 2009 WL 902341 (9th Cir. Apr. 2, 2009); *Hoey v. Sony Electronics Inc.*, 515 F.Supp.2d 1099 (N.D. Cal. 2007). Plaintiffs' case is exactly like these precedents: each case involved an attempt to leverage a product failure, attributed to a latent

defect, into a CLRA/UCL case, by attempting to transform a seller's representations about product features into an allegedly culpable misrepresentations or omission. In each of these cases, the claims were dismissed on the pleadings.

Plaintiffs' Opposition also fails to overcome a fatal defect of their remaining implied warranty claim, namely, that the duration of implied warranties is limited under California law to the duration of express warranties. Plaintiffs admit that this is the law, but they now argue that a 60-day express warranty is unreasonable and cannot set the limit for the implied warranties. Plaintiffs are wrong: first, section 1791.1(c) of the California Civil Code expressly recognizes that an implied warranty may have a duration of 60 days; and second, there are no allegations in the FAC that would support a conclusion that the 60-day express warranty as applied to the drum pedals at issue is unreasonable. Every unit of *Rock Band* hardware was sold with an express 60-day limited warranty, and Plaintiffs do not allege that its terms were hidden or deceptive. The express warranty stated that the product was guaranteed to be free of defects for sixty days, or it would be replaced or repaired. There is no allegation that Defendants failed to honor this promise. Moreover, the FAC fails to allege that either of the named plaintiffs experienced a product failure during the warranty period. Plaintiff Morgan admits that he did not, and Plaintiff Vasquez dodges the issue with vague pleading. Neither plaintiff ever submitted a warranty claim, timely or not.

For the foregoing reasons, even assuming for purposes of this motion that their *Rock Band* drum pedal broke due to a latent defect after Plaintiffs used the *Rock Band* game for several months, this simply does give rise to causes of action under the CLRA, the UCL, or the law of implied warranties. Plaintiffs have already amended their claim once, and further amendments would not cure the defects in Plaintiffs' case. Plaintiffs' First Amended Complaint should be therefore dismissed in its entirety without leave to amend.

ARGUMENT

A. Plaintiffs' First Cause Of Action For Breach Of Implied Warranty Must Be Dismissed Because The Implied Warranty Is Limited to Sixty Days

Assuming that Plaintiffs could establish the elements of the prima facie case for breach of the implied warranty of merchantability, their action is barred because the implied warranty

expired 60 days after the dates of their respective purchases. Section 1791.1(c) states as follows:

> The duration of the implied warranty of merchantability… shall be coextensive in duration with an express warranty which accompanies the consumer goods, provided the duration of the express warranty is reasonable; but in no event shall such implied warranty have a duration of less than 60 days nor more than one year following the sale of new consumer goods to a retail buyer.

Plaintiffs do not dispute that this law is applicable to their implied warranty claim.[1] *See* Opp. 3. Instead, they devote pages to arguing that Defendants cannot disclaim implied warranties without red-flag language such "as is" or "with all faults," pursuant to Civil Code sections 1791.3, even though Defendants' motion to dismiss does not rely on disclaimer. Disclaimer law is irrelevant to this motion. They further argue that Defendants cannot rely on this statute because it would "distort this remedial, consumer-protection Act to favor merchants," ignoring the dispositive point that the provision manifestly protects both consumers and sellers, as evidenced by the absolute one-year limitation on implied warranties. Finally, Plaintiffs argue that section 1791.1(c) does not apply in this case, because the 60-day express warranty is "unreasonable."

Plaintiffs' "unreasonableness" theory should not be credited. First, Cal. Civ. Code 1791.1(c) provides that implied warranties may be limited to 60 days, albeit at a minimum. The determination of the proper scope of the warranty period is an issue of law. *See Bush v. Am. Motor Sales Corp.*, 575 F. Supp. 1581, 1583 (D. Colo. 1984) (in granting a motion to dismiss a federal warranty claim, court held that "the question of whether the limitation of a warranty to a designated period is unreasonable or unconscionable may be decided as a matter of law.").[2] Any presumption that a 60-day warranty is ipso facto unreasonable defies the canon of interpretation that statutory language should not be relegated to surplusage. *People v. Steele*, Cal. App. 3d 788, 793 (1991).

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[1] Under the federal Magnuson-Moss Warranty Act, the same rule adheres: "implied warranties may be limited in duration to the duration of a written warranty of reasonable duration, if such limitation is conscionable and is set forth in clear and unmistakable language and prominently displayed on the face of the warranty." 15 U.S.C. § 2308(b). *See* Ex. A to the Simon Declaration in support of Motion (Warranty Card stating that "[i]f any such warranties are incapable of being disclaimed, then such warranties… are limited to the warranty period(s) described above.").

[2] Each authority cited by Plaintiffs for the proposition that "reasonableness" is a question of fact has nothing to do with warranty limitations. Plaintiffs' citation to California Commercial Code section 1205, for example, elides the crucial language that that definition applies to the "time for taking an action required by this code."

Second, the FAC does not allege, even in a conclusory fashion, that the express warranty is unreasonable, and there is no evidence, and there are no allegations, as to *why* the express warranty for *Rock Band* peripherals is unreasonable.[3] *See Western Mining Council v. Watt,* 643 F.2d 618, 624 (9th Cir. 1981) (the Court need not accept as true any unreasonable inferences or unwarranted deductions of fact). It is not alleged, for example, that the warranty was concealed, misleading, unconscionable, or atypical for electronic toys. Plaintiff's Opposition points to one hypothetical scenario in the FAC, "a mother [who] purchased *Rock Band* and *Rock Band* peripherals as a Christmas gift for her child prior to October 26, 2008 but the defective pedal does not happen to break until Christmas day." FAC ¶ 31. This unfortunate story is, of course, not the experience of the two named plaintiffs nor of anyone else identified in the FAC who suffered a broken drum pedal in the year between the product launch and the filing of Plaintiffs' initial complaint. Furthermore, it proves too much, because on this theory every 60-day warranty on any plastic electronic game would be unreasonable.

Third, there is no merit to Plaintiffs' argument in their Opposition that because Morgan's "and possibly Vasquez's" pedals broke just outside of the 60-day window, it "demonstrates that Defendants drum pedals broke or tended to break just beyond the 60-day period – rendering Defendants express written warranty and limited implied warranty basically illusory." Opp. 4. This would require the Court to draw the specious inference that because Morgan's pedal broke between 85 and 115 days after purchase, all *Rock Band* drum pedals break in the same period.

Finally, the contention that the 60-day warranty is unreasonable because the pedals are allegedly defective is simply a bootstrapping argument that, if indulged, would allow any lawsuit alleging a breach of warranty to proceed.[4] The courts that have considered this argument have

[3] Plaintiffs' Opposition identifies only one line of the FAC, taken out of context and artfully elided, to suggest that the FAC alleges unreasonableness. Opp. 4. The unabridged allegation is that "Defendants' refusal to 'make exceptions to [their] warranty program' and replace defective Rock Band drum pedals more than 60 days after purchase is unfair, deceptive, and damaging to consumers throughout the United States," FAC ¶ 31, and it follows several paragraphs detailing Defendants discontinuation of the practice of accepting all exchanges even outside of the express warranty. See FAC ¶¶ 27-30. This allegation, read in context, applies only to the theory that the change-of-warranty policy was deceptive and unfair, a theory that Plaintiffs have now abandoned. Opp. at 11.

[4] Plaintiffs' "unreasonable" argument is fundamentally inconsistent with Plaintiffs' central premise that "in reality Defendants' drum kit was so defective that the game could not be played

rejected it. *See, e.g.*, *Daugherty*, 144 Cal.App.4th at 830 ("[V]irtually all product failures discovered in automobiles after expiration of the warranty can be attributed to a 'latent defect' that existed at the time of sale or during the term of the warranty. All parts will wear out sooner or later and thus have a limited effective life.") (citation omitted).

Plaintiffs do not dispute that *Rock Band* shipped with a 60-day express limited warranty, FAC ¶ 27, and they have not stated a colorable claim that the warranty is unreasonable, and accordingly the implied warranty of merchantability is limited to 60 days. Because Morgan alleges that his drum pedal broke at least 85 days after purchase, *id.* ¶¶ 37-38, he has no implied warranty claim. Vasquez does not state precisely on which side of 60 days his pedal broke. But even if his pedal broke within the 60-day implied warranty period, Vasquez was covered under the written warranty and was eligible to receive a free replacement pedal and was obligated to notify Defendants of a breach of warranty before resorting to a lawsuit. *See Andrade v. Pangborn Corp.*, 2004 WL 2480708 at *23 (N.D. Cal. Oct. 22, 2004). In either event, Plaintiffs' first cause of action for breach of the implied warranty of merchantability must be dismissed.

B. Plaintiffs' Third Cause Of Action Under The Consumer Legal Remedies Act Must Be Dismissed Because Plaintiffs Have Alleged No Misrepresentations And No Reliance

Plaintiffs' claims under the CLRA fail for a simple reason: Defendants' general descriptions of *Rock Band* as including a drum pedal do not violate the CLRA just because the pedal may cease to work after the 60-day warranty expires. In their Motion to Dismiss, in response to Plaintiffs' lengthy allegations set forth in paragraphs 27 through 31 of the FAC, Defendants demonstrated that their decision in June 2008 to enforce the limitations of the 60-day express warranty beginning October 1, 2008 did not constitute a deceptive practice giving rise to CLRA liability. In opposition, Plaintiffs have abandoned their change-of-warranty-policy theory

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as marketed" Opp. 11. If it were true that Rock Band could not be played as advertised because the drum feature does not work out of the box, like a car that will fall apart if it exceeds 45 miles an hour, then this deficiency in the product's features would be obvious immediately upon playing the game, and there would be no reason why a 60 day warranty would be unreasonably short.

entirely. Plaintiffs now say: "Defendants' refusal to continue making exceptions to their warranty policy… is not even one underlying basis of the CLRA claim alleged in the FAC." Opp. 11.

Plaintiffs' new theory is that Defendants violated the CLRA because they "market[ed] *Rock Band* as a multi-player game including a drummer, when in reality Defendants' drum kit was so defective that the game could not be played as marketed, unless one invested in an after-market drum kit or foot pedal." *Id.* This theory – that general descriptions of the product constitute affirmative misrepresentations that the product will be defect-free even outside the warranty period – has been repeatedly rejected by numerous federal courts, including several in this District. Plaintiffs are far from the first to argue that when a product fails, it is due to a latent defect, and that the seller must therefore have misrepresented the product or concealed facts they were obligated to disclose at the time of sale. In recent years the California and district courts have rejected such an expansion of CLRA liability, many courts rightly observing that to hold otherwise would condone the infinite expansion of claims and render meaningless limited warranties. *Daugherty*, 144 Cal.App.4th at 829 ("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"). These courts, with only a few exceptions where safety defects were alleged, have dismissed CLRA claims based on alleged latent defects, and Plaintiffs' have articulated no reason why their analogous claim does not merit dismissal.

1. No Actionable Misrepresentations Have Been Alleged

In their Opposition, Plaintiffs contend that the FAC states a case for an affirmative misrepresentation, namely that Defendants "advertis[ed] that *Rock Band* video game could be played with a full band, including drums." Opp. 6. In support of this, Plaintiffs point to several allegations in the FAC to the effect that *after* their pedals allegedly broke, they could no longer play *Rock Band* fully as advertised. FAC ¶ 5, ¶ 9, ¶ 71. The FAC does not allege that *Rock Band*, prior to a pedal breakage, lacked any advertised feature or function. On the contrary, Plaintiffs admit that they played *Rock Band* with the advertised drum features: Morgan and Vasquez both allege that their drum pedals broke after they had played the game for quite some time. FAC ¶¶ 38, 41; Opp. 4 ("the drum pedals broke or tended to break just beyond the 60-day period.").

What Plaintiffs do not and cannot allege is a single instance in which any Defendant made any affirmative representation that the *Rock Band* drum pedal would be free from product defects, and accordingly their claim must fail. *See Daugherty*, 144 Cal. App. 4th at 833-34. As here, the Daugherty plaintiffs alleged that Honda engines had a known but concealed defect that broke after the expiration of the limited warranty. *Id.* at 828. They asserted that Honda had issued press releases leading them to believe the car was defect-free. *Id.* at 834. Affirming the trial court's dismissal of the claim, the Court of Appeal that there was no affirmative misrepresentation because "[a]ll of plaintiffs' automobiles functioned as represented throughout their warranty periods, and indeed many still have experienced no malfunction." *Id.*

Following *Daugherty*, a court in the Northern District reached the same conclusion on facts similar to this case in *Long v. Hewlett-Packard Co*. In *Long*, plaintiff had purchased an HP laptop that experienced a monitor malfunction within the warranty period, allegedly due to a defective inverter. HP replaced the part. 2007 WL 2994812 at *2. The replacement part then failed, outside of the warranty period, and HP refused to replace the part again, even though plaintiff alleged that HP had simply replaced the defective part with an equally defective part. *Id.* The *Long* plaintiff identified purported misrepresentations, *e.g.*, that the laptop was advertised as a "reliable mobile computing solution" and that the term "notebook computer" implied the computer would work. *Id.* at *7. The Court found that such statements were "non-actionable puffery," *see Williams v. Gerber Prods. Co.*, 253 F.3d 934, 938 (9th Cir. 2008), and in any event, they were not a "representation regarding the consistency or longevity of the computer's operation." *Id.* The only representation rising to this level was the product warranty itself:

> HP warranted that its hardware, accessories and supplies would be free from defects in materials and workmanship for up to one year. However, HP also clearly stated that it did not warrant uninterrupted or error free operation of its products – simply that it would repair or replace any product to its warranted condition within a reasonable time, or refund the purchase price.

Id. at * 8.[5] Accordingly, there was no misrepresentation and no CLRA claim. Similarly, the Defendants here warranted that *Rock Band* peripherals would be free of defects for sixty days, but

[5] The same result obtained in *Hoey v. Sony Electronics Inc.*, 515 F.Supp.2d 1099 (N.D.Cal. 2007). Plaintiff, prosecuting an allegedly defective computer monitor under the CLRA, alleged that the 90-day product warranty promised a defect-free laptop. The court disagreed: "Nothing in

if "the Peripheral is found to be defective within 60 days from the date of original purchase, Electronic Arts will replace the Peripheral free of charge by following the instructions below."

The only statement alleged in the FAC that makes any representation about product quality, the limited warranty, does not give rise to a CLRA claim. The remaining alleged "representation," that *Rock Band* includes drum play, is not actionable because it does not concern product quality or longevity. Furthermore, given the allegations of the FAC that Plaintiffs played the game without breakage for months, the challenged representation – that the game can be played with a drummer – was indisputably true.

2. No Actionable Omissions Have Been Alleged

Although they try to have it both ways, Plaintiffs' case is essentially premised on an omission, namely, that "[d]espite their awareness of the above-described defects, Defendants nevertheless continue to market and sell the *Rock Band* drum kit… without modification and without disclosing the existence of the defect to consumers." FAC ¶ 26. Even if this were true, it would not support a claim under the CLRA. For an omission to be actionable under the CLRA, "the omission must be contrary to a representation actually made by the defendants, or an omission of a fact the defendant was obliged to disclose." *Daugherty*, 144 Cal. App. 4th at 835; *accord Bardin v. Daimler-Chrysler Corp.*, 136 Cal. App. 4th 1255, 1276 (2006) (manufacturer's undisclosed use of weak materials in a car part not actionable where it was not alleged that manufacturer "ever gave any information of other facts which could have the likely effect of misleading the public 'for want of communication'" about the strength of the material used).

Several courts in this District have followed *Daugherty* on this point in past few years. In *Long v. Hewlett-Packard*, Judge Ware dismissed an omissions-based CLRA claim premised on an allegedly defective laptop monitor manifesting both inside and outside of the express warranty. 2007 WL 2994812 at *7 ("HP is not alleged to have made any representation as to the life of its inverter, or even as to the useful life of its Pavilions. As such, a consumer's only reasonable

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the warranty expressly or impliedly warrants that the computer will be defect-free either during the warranty period or thereafter. Therefore, here, as in *Daugherty*, the complaint fails to identify any representation by Sony that the subject computers had any characteristic they do not have or of a standard or quality they are not." *Id.* at 1104 (citation omitted).

expectation was that the Pavilions would function properly for the duration of HP's limited one-year warranty."). In *Hoey v. Sony*, Judge Whyte dismissed an omissions-based CLRA claim that soldering defects caused a computer malfunction outside of the warranty period. 515 F.Supp.2d at 1104 ("Plaintiffs seek 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 [fraudulent] concealment. … The court concludes that as pleaded, plaintiffs' complaint fails to identify a representation by Sony contrary to the alleged concealment."). In *Oestreicher v. Alienware Corp.*, Judge Patel dismissed an omissions-based CLRA claim based on an alleged latent defect in a computer system that malfunctioned outside of an express warranty but during the expected useful life of product. 544 F. Supp. 2d 964, 969-70 (N.D. Cal. 2008) ("focus[ing] on whether the omission pertains to a fact the defendant was obligated to disclose" and concluding that "since any defect in question manifested themselves after expiration of the warranty period, plaintiff's CLRA claim must be barred under *Daugherty*, *Bardin*, *Hoey*, and *Long*.").

In their Opposition, Plaintiffs rely on *Falk v. General Motors Corp.*, 496 F.Supp.2d 1088 (N.D.Cal. 2007), which sustained an omission-based CLRA claim in a case concerning defective speedometers. The *Falk* court concluded that a defendants' "obligation to disclose" could be measured by evaluating whether the plaintiffs' CLRA claims would constitute material omissions under the factors used to determine fraudulent concealment. The *Falk* court determined that *Daugherty* did not control because "*Daugherty* emphasized that an 'unreasonable' safety risk would lead to a duty to disclose," *id.* at 1094, and "plaintiffs successfully allege that the potential for failed speedometers constitutes a safety hazard." *Id.* at 1086 n*. Indeed, in *Oestreicher*, Judge Patel distinguished *Falk* on the basis that it concerned a safety allegation, and thus determined that *Bardin*, *Hoey*, and *Long* instead applied to claims regarding a broken computer:

> Falk dealt with a defective speedometer. There "[p]laintiffs claim[ed] that, had they known of the alleged defect in certain GM speedometers, they would have considered not purchasing the trucks or demanding a lower price." *Id.* The same is the case here because Oestreicher claims that had he known of the defect, he would not have purchased the computer or would have demanded a lower price. However, the Falk court stated:
>
> Common experience supports plaintiffs' claim that a potential car buyer would view as material a defective speedometer. That a speedometer is prone to fail and to read

> a different speed than the vehicle's actual speed, even a difference of ten miles per hour, would be material to the reasonable consumer, driver and passenger. Such a faulty speedometer easily would lead to traveling at unsafe speeds and moving-violation penalties.
>
> Thus safety consideration was integral to the court's finding that the non-disclosed information was material. There is no such showing here.

544 F. Supp. 2d at 977. Plaintiffs have not alleged that the purported *Rock Band* defect created a safety risk, nor any other basis why Defendants' purported omission was anyhow more "material" than the alleged omissions in the consumer electronics cases. Plaintiffs' main argument, that *Rock Band* buyers complained and that Defendants thus had knowledge of the purported defects, does not bring this case closer to *Falk*. *See Oestreicher*, 544 F.Supp.2d at 972 (citing and agreeing with the Second Circuit's analysis in *Abraham v. Volkswagen*, 795 F.2d 238, 250 (2d Cir. 1986)): "All parts will wear out sooner or later. … Manufacturers always have knowledge regarding the effective life of products. … A rule that would make failure of a part actionable based on such 'knowledge' would render meaningless time/mileage limitations in warranty coverage."). As the Court in *Daugherty* opined, "[w]e cannot agree that failure to disclose a fact one has no affirmative duty to disclose is 'likely to deceive' anyone." 144 Cal.App.4th at 838. Plaintiffs therefore cannot state an omission-based CLRA claim.

3. Monte Morgan And Non-Resident Plaintiffs Lack Standing

Morgan, a Kansas resident, lacks standing to bring a CLRA claim because a CLRA claim cannot be maintained by non-residents of California based on conduct occurring outside of California. *Norderg v. Trilegiant Corp.*, 445 F.Supp.2d 1082, 1096 (N.D. Cal. 2006).

Plaintiffs argue in their Opposition that the alleged misrepresentations "emanated" from California, and thus, that Morgan may pursue a CLRA claim. However, there are no "emanation" allegations in the FAC. Although one of the Defendants, Electronic Arts, is headquartered in California, Plaintiffs do not allege that any of the activities that could give rise to their cause of action (eg., development, packaging, marketing, promotion, or shipping) took place in or were directed from California. They have alleged at most that Defendants are subject to personal jurisdiction in California because "their acts or omissions giving rise to Plaintiffs' claims occurred

and/or caused injury in the State of California," FAC ¶ 2 (emphasis added). Even then it is not alleged that Morgan, a Kansas resident, was injured in California.

Plaintiffs point to *In re Mattel, Inc.*, in which a court sustained a CLRA claim on allegations "of misrepresentations made in reports, company statements, and advertising that are reasonably likely to have come from or been approved by Mattel corporate headquarters in California." 588 F.Supp.2d 1111, 1119 (C.D. Cal. 2008). In reaching this conclusion, the court cited fifteen paragraphs of the complaint, each of which contained extremely detailed allegations, including press releases and reports *authored by Mattel* concerning the quality of its products. Plaintiffs' FAC, by contrast, does not identify a single representation attributable to Electronic Arts.[6] In *In re Mattel*, the issue was whether the court could infer that Mattel's representations would likely have emanated from Mattel's California headquarters. Here, by contrast, there is no basis to make such inference in the absence of any allegations that any relevant representations came from California, as opposed, for example to the New York and Massachusetts headquarters of the game developers, simply because Electronic Arts was the game distributor.

C. Plaintiffs' Fourth Cause Of Action For Unfair Competition Must Be Dismissed Because No Fraudulent, Unfair, or Unlawful Business Practices Have Been Alleged

1. The "Fraudulent" Prong

The "fraudulent" prong of the UCL requires a plaintiff to allege a false statement or advertising that is likely to deceive a reasonable consumer. *Freeman v. Time, Inc.*, 68 F.3d 285, 289 (9th Cir. 1995). As discussed above in the context of the CLRA, the Complaint fails to identify a single false or deceptive, let alone fraudulent, statement made by Defendants. The only representation that is alleged that concerns the quality and/or longevity of the drum kit controller was the *Rock Band* is the 60-day express warranty. Plaintiffs have not alleged any facts, *e.g.*, product depictions or advertising copy, that would give rise to an implication that the drum kit

[6] In their Opposition, Plaintiffs argue that the *Rock Band* warranty card proves that Electronic Arts handles merchandise returns. Opp. 13, n. 6. This is of no moment because (1) this not alleged in the pleadings; and (2) Plaintiffs maintain that allegedly deceptive warranty practices are "not even an underlying basis for the CLRA claim alleged in the FAC." Opp. 11.

controllers were guaranteed to be free of defects for more than sixty days. Nor have they alleged facts from which to infer that a reasonable consumer would have been misled – particularly since under the UCL each representation must be evaluated in the context of *all* representations made to the consumer, and, accordingly, the 60-day express limited warranty cannot be ignored in this calculus. *Haskell v. Time Inc.*, 857 F. Supp. 1392, 1399 (E.D. Cal. 1994).

Each of the cases discussed above, *Daugherty, Oestreicher, Long*, and *Hoey*, included UCL claims as well as CLRA claims, and in each case the court dismissed the claim, having found no actionable misrepresentation or omission. *See Long v. Hewlett-Packard*, 2007 WL 2994812 at *8 (dismissing UCL and CLRA claims without leave to amend: "HP is not alleged to have made any representation as to the life of its inverter, or even as to the useful life of its [computers]. As such, a consumer's only reasonable expectation was that the Pavilions would function properly for the duration of HP's limited on-year warranty"); *also Daugherty*, 133 Cal.App.4th at 838 ("We cannot agree that a failure to disclose a fact one has no affirmative duty to disclose is likely to deceive anyone within the meaning of the UCL.").

Plaintiffs argue that *Rock Band* was marketed as a multiplayer game including a drummer, "when in reality, the *Rock Band* drum kit would break when used for such purpose." Opp. 15. Here, Plaintiffs play loose with the phrase "would break": they claim that this case is akin to a car that breaks when it reaches 45 mph. *Id.* But that is a false analogy – the proper analogy is to a car has all the features and functions it is advertised to have but includes a component that eventually breaks down after the warranty has expired due to a hidden defect, *e.g.*, the car parts in *Bardin* or *Daugherty*, or the electronics in *Oestreicher, Long,* and *Hoey*. In this case, it is undisputed that *Rock Band* could be played with a drummer, as both Morgan and Vasquez played it until their pedals broke. FAC ¶¶ 39, 41; *see also* Opp. 4 (contending that "Plaintiff's Morgan's, and possibly Vasquez's, individual claims demonstrate that Defendants' drum pedals broke or tended to break just beyond the 60-day period."). As the courts have noted, if this scenario gave rise to statutory violations, limited warranties would be meaningless and sellers' liability would be infinite, as every product will wear out eventually. *See, e.g.*, *Daugherty*, 144 Cal.App.4th at 829.

2. The "Unlawful" Prong

Because Plaintiffs' CLRA claim cannot be sustained, Plaintiff cannot maintain an action under the "unlawful" prong of the UCL. *Whiteside v. Tenet Healthcare Corp.*, 101 Cal. App. 4th 693, 706 (2002) (if a plaintiff fails adequately to plead a violation of a borrowed law, the unlawful" prong of the UCL is inapplicable). Plaintiffs cannot premise an "unlawful" claim on an action for breach of warranty. *See Klein v. Earth Elements, Inc.*, 59 Cal. App. 4th 965 (1997).

3. The "Unfair" Prong

California courts employ two different standards for determining what constitutes an "unfair" business practice, the *Casa Blanca* line, in which a business practice is unfair if it "'offends an established public policy or … is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.'" *People v. Casa Blanca Convalescent Homes, Inc.*, 159 Cal. App. 3d 509, 530 (1984); and the *Scripps* line, in which a claim of an unfair practice "must be 'tethered' to specific constitutional, statutory or regulatory provisions." *Scripps Clinic v. Superior Court*, 108 Cal. App. 4th 917, 940 (2003).

The FAC meets neither standard. Focusing on the *Casa Blanca* standard, which Plaintiffs naturally favor, Plaintiffs must allege that Defendants have made misrepresentations that "offend established public policy," or are otherwise "immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." There is nothing "immoral, unethical, oppressive, [or] unscrupulous" about a selling a toy that has a limited rather than a lifetime warranty. *See, e.g.*, Cal. Civ. Code § 1791.1 (stating that an implied warranty of merchantability "in no event" shall exceed a year following purchase). As stated several times above, this case is not about a videogame that does not work as advertised; it is at most a case about a videogame controller that did not last as long as the Plaintiffs expected, notwithstanding that the express warranty is the only representation of longevity that has been alleged. Courts, following *Daugherty*, have typically dismissed an "unfair" UCL claim based on a latent defect. 144 Cal.App.4th at 829 ("the failure to disclose a defect that might, or might not, shorten the effective life span of an automobile part that functions precisely as a warranted throughout the term of its express warranty cannot be

characterized as causing a substantial injury to consumers, and accordingly does not constitute an unfair practice under the UCL." *Accord*, *Oestreicher*, 544 F. Supp. 2d at 973.

4. Plaintiffs Cannot Show Injury Sufficient to Pursue A Representative UCL Claim

Representative standing under the UCL has been tightly circumscribed: "a person seeking to represent claims on behalf of others must show that (1) [he] has suffered actual injury in fact, and (2) such injury occurred as a result of the defendant's alleged unfair competition or false advertising." *Laster v. T-Mobile USA, Inc.*, 407 F. Supp. 2d 1181, 1194 (S.D. Cal. 2005).

Defendants' Motion to Dismiss responded to Plaintiffs' allegations of deceptive warranty practices, setting forth how under the chronology alleged in the FAC, neither named plaintiff could have relied to his detriment on Defendants' warranty practices: in the case of Vasquez, Defendants accepted claims without proof of purchase at the time he broke his pedal; and in the case of Morgan, Defendants had already announced their intention to enforce the 60-day warranty before Morgan even purchased the game. Motion at 23.

Plaintiffs do not rebut this; instead they now predicate their UCL action on the marketing of *Rock Band* as a multiplayer game featuring drums. *See* Opp. 15. Even on this theory of the operative misrepresentation – not a misrepresentation at all, as shown above – Vasquez still cannot allege injury-in-fact, because he could have obtained a free replacement by submitting a warranty claim. Plaintiffs counter that Vasquez could not have avoided a loss by submitting a warranty claim because the new controller would have been "just as the defective as the one he already broke." Opp. at 18. This argument fails because it would require the *Rock Band* pedal to last forever or be replaced forever if he broke it again, and is tantamount to requiring Defendants to provide a lifelong warranty or face UCL violations. *See Long v. Hewlett-Packard*, 2007 WL 2994812 at *5 & *8 (Even if defendant "merely substituted one defective inverter for another," this is consistent with HP's warranty obligations and not a UCL violation: "HP tendered an 'adequate repair' – specifically, it repaired Long's Pavilion such that it functioned without the need for further repairs to the end of the warranty period and beyond.").

5. California's UCL Does Not Apply To Actions Occurring Outside Of California That Injures Non-Residents

The UCL regulates unlawful, unfair and fraudulent conduct only if it occurs in California, *Norwest Mortgage, Inc. v. Superior Court*, 72 Cal. App. 4th 214, 222, 228 (1999) ("the Legislature did not intend the statues of this state to have force or operation beyond the boundaries of the state."). As discussed more fully above in the context of the CLRA, Morgan (and any non-resident members of the proposed class) cannot pursue a claim under the UCL because the FAC does not allege any misconduct taking place in or "emanating" from California, nor any conduct by Electronic Arts in particular from which the Court might reasonably infer a California source. As pleaded, the FAC does not state a claim by non-California plaintiffs under the UCL.

D. Plaintiffs' Proposed Class Definition Is Invalid And Should Be Stricken

Plaintiff's purported nationwide class definition must be stricken: non-California residents may not assert claims under the UCL and CLRA where the alleged misconduct did not occur in California, and the FAC does not allege any relevant California conduct. [7]

II. CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court dismiss the Complaint in its entirety, or, in the alternative, strike the purported class definition.

Dated: June 17, 2009

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[7] The class also must not include "entities," as they are not "consumers" as defined in the CLRA. Cal. Civ. Code § 1761(d). Plaintiffs have agreed to exclude "entities" from their motion for class certification, Opp. 22, and it should be stricken from the FAC.