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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

REUBEN BERENBLAT, ANDREW PERSONETTE, EARL C. SIMPSON, LAURA MILLER, On behalf of themselves and all others similarly situated,

Plaintiffs,

v.

APPLE INC.,

Defendant.

Case No. C-08-04969 JF

APPLE INC.'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS

Date: August 14, 2009
Time: 9:00 am
Courtroom: 3

Judge: Honorable Jeremy Fogel

Complaint filed: October 30, 2008

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INTRODUCTION

Daugherty v. Am. Honda Motor Co., 144 Cal. App. 4th 824 (2006), and numerous decisions of this and other courts applying *Daugherty*, have established the principle that a manufacturer is not the guarantor of its products in perpetuity. Rather, a manufacturer need only comply with the terms of its express warranty and of any applicable limited warranties. Here, there is no dispute that Apple fully honored its obligations during the term of its one-year express warranty. Nor is there any dispute that Apple's express warranty limited the term of any applicable implied warranties to one year, or that Apple fulfilled its warranty obligations during that period. Accordingly, plaintiffs' claims are without merit and should be dismissed.

Plaintiffs attempt to avoid this inevitable result by relying on *Mexia v. Rinker Boat Co.*, 2009 Cal. App. LEXIS 942 (June 15, 2009). But this attempt fails for two reasons. First, *Mexia* construes California's Song-Beverly Consumer Warranty Act ("Song-Beverly") — *but none of the plaintiffs here alleges a claim under Song-Beverly*. Moreover, *Mexia*, which purports to interpret Song-Beverly to extend the term of implied warranties far beyond the term of the express warranty (and far beyond the one-year maximum warranty period set forth in Song-Beverly itself), cannot be reconciled with the holding and fundamental policy of *Daugherty* and its progeny. *Mexia* would do precisely what *Daugherty* says the courts may not do: make the manufacturer an insurer for the useful life of its products. That is not, and cannot be, the law.

Plaintiffs' effort to avoid the provision of Apple's express warranty limiting implied warranties to one year is equally unavailing. Plaintiffs argue that "there is no information in the pleadings" regarding whether consumers receive pre-sale notice of the warranty.[1] Notably, however, plaintiffs fail to allege that they did not receive pre-sale notice of the warranty, and two of the four plaintiffs in fact exercised their rights under the express warranty. Plaintiffs' allegations do not establish lack of pre-sale notice. Plaintiffs' argument that the limitation of express warranties to one year is unconscionable is equally meritless. Apple's one-year limit on implied warranties is coextensive with the maximum duration the California Legislature has

[1] Memorandum of Points and Authorities in Opposition to Apple Inc.'s Motion to Dismiss ("Opp.") at 15:6-7.

permitted for implied warranties, and as such cannot be unconscionable. Accordingly, plaintiffs' implied warranty claim, and their UCL claim predicated on the implied warranty claim, are barred by the *Daugherty* rule and should be dismissed.

Plaintiffs' "unfairness" claim under the UCL also must be dismissed. *Daugherty*, the Ninth Circuit, and this Court have all rejected similar UCL "unfairness" claims, and have held that there is nothing unfair about manufacturing and selling a product that functions properly for the duration of all applicable warranties. Plaintiffs cite inapposite cases generally discussing the "unfairness" test under the UCL, but do not even address the on-point authority of *Daugherty* and its progeny.

Finally, plaintiffs' unjust enrichment claim fails because, as plaintiffs' own authorities establish, no such claim exists in the circumstances of this case. It is clear that an unjust enrichment theory cannot be pursued where, as here, plaintiffs also allege a separate statutory claim that provides a restitutionary remedy. Plaintiffs' unjust enrichment claim should be dismissed.

ARGUMENT

I. PLAINTIFFS' IMPLIED WARRANTY-BASED CLAIMS FAIL

A. Because the Alleged Defects Manifested Themselves After All Warranties Expired, Plaintiffs' Implied Warranty Claims Are Barred.

Plaintiffs' own complaint establishes that their computers operated as warranted for substantially in excess of one year after their purchase. Thus, as established in Apple's opening brief, *Daugherty* and cases of this and other courts bar plaintiffs' implied warranty claims, whether asserted as a stand-alone claim (asserted by plaintiffs Berenblat and Personette only) or as a predicate violation supporting their claim under the "unlawful" prong of the UCL (asserted by all plaintiffs).[2] (*See* Memorandum of Points and Authorities in Support of Motion to Dismiss, 5:7-19.)

[2] In their opposition, plaintiffs claim for the first time that their "unlawful" UCL claim is also predicated on their unjust enrichment claim. (Opp. at 19:9-11 (citing FAC, ¶ 41).) Because plaintiffs fail to state a claim for unjust enrichment, as discussed below, any UCL claim based on unjust enrichment also fails.

This Court has applied the *Daugherty* rule in granting a motion to dismiss as recently as last month. *Stearns v. Select Comfort Retail Corp.*, No. 08-2746 JF, 2009 U.S. Dist. LEXIS 48367 (N.D. Cal. June 5, 2009). *Stearns* held that a defect that arose after implied warranties expired could not form the basis for a breach of implied warranty claim, relying on *Atkinson v. Elk Corp. of Texas*, 142 Cal. App. 4th 212, 230 (2006) and *Tietsworth v. Sears, Roebuck and Co.*, No. 09-00288 JF, 2009 U.S. Dist. LEXIS 40872, at *7-8 (N.D. Cal. May 14, 2009).[3] Plaintiffs' own authority is in accord. *See Payne v. Fujifilm U.S.A.*, No. 07-385, 2007 U.S. Dist. LEXIS 94765, at *10 (D.N.J. Dec. 28, 2007) ("'The case law almost uniformly holds that time-limited warranties do not protect buyers against hidden defects which are typically not discovered until after the warranty period.'") (quoting *Ne. Power Co. v. Balcke-Durr, Inc.*, No. 97-CV-4836, 1999 U.S. Dist. LEXIS 13437, at *14 (E.D. Pa. Aug. 20, 1999)). These cases, as well as the other cases cited in Apple's opening brief, bar plaintiffs' claims.[4]

As this Court has recognized, there are strong policy reasons for not permitting claims such as those asserted by plaintiffs. Holding manufacturers liable for breaches that occur after all applicable warranties expire "would eliminate term limits on warranties, effectively making them perpetual," and manufacturers "would, in effect, be obliged to insure that a [product] it manufactures is defect-free for its entire life." *Oestreicher v. Alienware Corp.*, 544 F. Supp. 2d 964, 972 (N.D. Cal. 2008); *Daugherty v. Am. Honda Motor Corp.*, 144 Cal. App. 4th 824, 830 (2006). Plaintiffs' theory of liability here would lead to the exact situation *Oestreicher* and *Daugherty* warned against: "Failure of a product to last forever would become a 'defect,' a

[3] Plaintiffs attempt to distinguish *Atkinson* as a statute of limitations case. This is a mischaracterization. The *Atkinson* trial court ruled that the plaintiff's implied warranty claim was barred because the breach occurred after the expiration of the relevant implied warranty period, and the California Court of Appeal upheld that ruling. *Atkinson*, 142 Cal. App. 4th at 226-27, 232. Notably, *Stearns* relied on *Atkinson* in dismissing implied warranty claims. *Stearns*, 2009 U.S. Dist. LEXIS 48367.

[4] Contrary to plaintiffs' contention, *Atkinson* was not the only implied warranty case cited by Apple in its opening brief. (*See* Mot. at 5:13-17 (citing *Andrews v. Kern's TV & Appliance, Inc.*, 2000 Ohio 1752, at *11 (Ohio Ct. App. 2000); *In re Ford Motor Co. Ignition Switch Prods. Liab. Litig.*, Nos. 96-3125, 96-1814, 1999 U.S. Dist. LEXIS 22891, at *5-6 (D.N.J. July 27, 1999) (same); *Holman Motor Co. v. Evans*, 314 S.E.2d 453, 455 (Ga. Ct. App. 1984).) Plaintiffs fail to address these cases.

manufacturer would no longer be able to issue limited warranties, and product defect litigation would become as widespread as manufacturing itself." *Oestreicher*, 544 F. Supp. 2d at 972 (quoting *Daugherty*, 144 Cal. App. 4th at 829).[5]

Plaintiffs ignore the fundamental policy and reasoning of the *Daugherty* line of cases. Plaintiffs attempt to distinguish these cases by arguing that their holdings are limited to express warranties, but such a limitation would render *Daugherty* meaningless and would entirely undercut its purpose. Under plaintiffs' interpretation, manufacturers would merely become insurers for the life of their products by virtue of implied, rather than express, warranties. Such a reading cannot be right. To the contrary, *Stearns*, *Atkinson*, *Tietsworth*, and the other cases cited by Apple expressly apply the *Daugherty* rule in dismissing implied warranty claims. Indeed, creating an indefinite duration for implied warranties would be particularly inappropriate given that implied warranties are not voluntary, but rather are imposed by law.

B. Plaintiffs' Warranty Cases Are Inapplicable.

Plaintiffs also rely on *Mexia* in attempting to evade *Daugherty* and the rulings of this Court, but plaintiffs' reliance on *Mexia* is misplaced. *Mexia* construed the implied warranties created by Song-Beverly, but there is no Song-Beverly claim in this case. Plaintiffs asserted Song-Beverly claims in their original complaint, but abandoned it in the FAC, recognizing that they do not have Song-Beverly claims. *See London v. Coopers & Lybrand*, 644 F.2d 811, 814 (9th Cir. 1981) (claims in the original complaint that are not realleged in an amended complaint are waived). Thus, *Mexia* is not relevant here.

Even if the present case involved Song-Beverly claims and *Mexia* were relevant, *Mexia* is directly contrary to *Daugherty*, *Atkinson*, and their progeny, and should not be followed. If *Mexia* is followed, *Oestreicher* and *Daugherty*'s prophecy will come true: manufacturers will be required to insure that their products are defect-free for their entire lives, and product defect litigation will become as widespread as manufacturing itself.

[5] While *Oestreicher* was brought under the California Consumers Legal Remedies Act, Cal. Civ. Code §§ 1750 *et seq*., the policy ramifications of a finding of liability in that case were identical to those here.

The other cases plaintiffs rely on are also inapposite. Plaintiffs cite *Brittalia Ventures v. Stuke Nursery Co.*, 153 Cal. App. 4th 17 (2007), *Hicks v. Kaufman and Broad Home Corp.*, 89 Cal. App. 4th 908 (2001), and *Hewlett-Packard Co. v. Super. Ct.*, 167 Cal. App. 4th 87 (2008), none of which supports their arguments. The issue in *Brittalia* was whether a document containing a disclaimer of warranties was the operative contract between the parties, and the jury's verdict, which the court upheld, was that it was not. *Brittalia*, 153 Cal. App. 4th at 24-25. Moreover, the duration of implied warranties was not at issue in *Brittalia*; rather, the case involved an attempt to disclaim the warranties entirely. *Id.* at 21. Both *Hicks* and *Hewlett-Packard* are distinguishable because they were class certification cases, and, as *Hewlett-Packard* reaffirmed, California courts cannot consider the merits of the action in determining whether to certify a class.[6] *Hewlett-Packard*, 167 Cal. App. 4th at 95.

Moreover, to the extent plaintiffs seek to rely on *Hicks* and their conclusory "substantially certain to fail" allegation, that reliance is misplaced. As discussed in Apple's opening memorandum, such a conclusory allegation does not avoid durational warranty limitations. In *Long v. Hewlett-Packard Co*, No. C-06-02816, 2007 U.S. Dist. LEXIS 79262, at *23 (N.D. Cal. July 27, 2007), this Court squarely rejected a similar attempt to extend a manufacturer's liability for the purported useful life of the product. Citing *Daugherty*, the Court held that unless the manufacturer has made an express representation as to the useful life of the product — which was not alleged either in *Long* or in the present case — "the only expectation that a purchaser could have had was that the product would function properly for the duration of the manufacturer's express warranty." *Id.*, at *23-24. Plaintiffs' attempt to distinguish *Long* on the basis that it is an express warranty case is meritless. *Long*'s rationale, like that in *Daugherty*, must apply equally to implied warranties or it is rendered meaningless.

Plaintiffs also attempt to avoid the import of the *Daugherty* line of cases by arguing that the "passage of time limitations under a predicate statute does not bar a claim under the UCL." (Opp. at 19:14-17 (citing *Cortez v. Purolator Air Filtration Prod. Co.*, 23 Cal. 4th 163, 179

[6] In addition, to the extent *Hicks* reached a substantive issue, it was decided five years before the same Court of Appeal decided *Daugherty*.

(2000)). This is far too broad a characterization of *Cortez*. *Cortez* merely held that the UCL's statute of limitations, not the statute of limitations of the predicate statute, governs a UCL claim. *Cortez*, 23 Cal. 4th at 178-79. It says nothing about the effect of the expiration of warranty terms. *Daugherty*, by contrast, squarely addresses the effect of the expiration of warranties on a UCL claim, and holds that UCL claims based on defects occurring after the warranty period are barred. *Daugherty*, 144 Cal App. 4th at 837.

C. Plaintiffs' Arguments Regarding the Express Warranty's Applicability Have No Merit.

Plaintiffs' efforts to avoid the provision of Apple's express warranty limiting implied warranties to one year are equally unavailing. First, plaintiffs contend that the FAC says nothing about whether consumers received pre-sale notice of the express warranty, and thus that the warranty does not apply. Second, they claim that the express warranty's one-year limit on implied warranties is unconscionable. Third, they argue that the Court should not consider the terms of the express warranty because it is not alleged in the FAC. All three arguments are wrong.

Plaintiffs' first argument regarding lack of pre-sale availability of the express warranty fails for several reasons. None of the plaintiffs plead that they in fact failed to receive notice of Apple's express warranty, although plaintiffs were certainly aware of this issue when they filed the FAC in response to Apple's initial motion to dismiss. Moreover, two of the four plaintiffs exercised their rights under the express warranty, clearly demonstrating that they were aware of the warranty and its term. (FAC, ¶ 35 (alleging that Apple replaced Personette's computer in 2005); ¶ 44 (alleging that Apple replaced Miller's motherboard in 2006).) In addition, it is well-settled that a party that accepts the benefits of a contract cannot deny its validity. *California Packing Corp. v. Sun-Maid Raisin Growers*, 81 F.2d 674, 679 (9th Cir. 1936) (where party accepted benefits of the contract, it ratified the contract); *Fairlane Estates, Inc. v. Carrico Constr. Co.*, 228 Cal. App. 2d 65, 70 (1964) (acceptance of the benefits of the contract was a ratification that cured any defect in the execution of the contract); *see also Larson v. Speetjens*, No. C 05-3176, 2006 U.S. Dist. LEXIS 66459, at *14 (N.D. Cal. Sept. 1, 2006) ("A party should not be

allowed to claim the benefit of the contract and simultaneously avoid its burdens."). Because both Miller and Personette accepted the benefits of the express warranty, they cannot deny its applicability now.

Plaintiffs' argument regarding the alleged unconscionability of the express warranty's durational limitation of implied warranties also fails. Apple's express warranty limits the duration of implied warranties to one year. (Klestoff Decl., Ex. A.) The California Legislature has affirmatively approved limiting implied warranties to one year and, indeed, has provided that one year is the *maximum* duration of such warranties. Cal. Civ. Code § 1791.1(c). A limitation expressly approved by the Legislature cannot be "unconscionable."[7] Moreover, this Court has applied the *Daugherty* rule to bar claims brought after the expiration of a one-year warranty. *Long*, 2007 U.S. Dist. LEXIS 79262, at *25. Like the present case, *Long* involved claims regarding an alleged defect in a notebook computer component. Clearly, the *Long* court did not regard application of a one-year warranty to alleged defects in a notebook computer as unconscionable.

Finally, plaintiffs' arguments regarding whether the Court can take judicial notice of Apple's express warranty have no merit.[8] As the cases cited in Apple's Request for Judicial Notice and plaintiffs' own authority establish, courts can consider documents that are "integral or explicitly relied upon in the complaint" on a motion to dismiss. *Payne*, 2007 U.S. Dist. LEXIS 94765, at *5-6 (emphasis omitted); *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001) (stating that district court could have taken judicial notice of extradition hearing that was repeatedly referred to in the complaint); *Cooper v. Pickett*, 137 F.3d 616, 622 (9th Cir. 1997) (on a motion to dismiss, district court can consider documents referred to in the complaint); Apple's Request for Judicial Notice ("RJN") at 2:9-16 (citing *Branch v. Tunnell*, 14 F.3d 449, 454 (9th

[7] Plaintiffs also rely on cases outside of California and the Ninth Circuit in arguing unconscionability. (*See* Opp. at 15:10-16:2.) These cases are inapposite: they do not address California law or the situation where, as here, the Legislature has already approved the duration at issue.

[8] These arguments are apparently plaintiffs' response to Apple's Request for Judicial Notice. Because plaintiffs address judicial notice in the text of their brief rather than in a separate document, Apple will do the same.

Cir. 1994); *Hoey v. Sony Elecs. Inc*., 515 F. Supp. 2d 1099, 1103 (N.D. Cal. 2007)). Contrary to plaintiffs' contention, the FAC does make allegations regarding the express warranty. (*See* FAC, ¶¶ 24-25, 30, 69; RJN at 2:17-28.) Those allegations discuss the length of the express warranty, as well as the warranty's limitation of implied warranties. (FAC, ¶ 24 (alleging that Apple had a one-year limited warranty period); ¶ 25 (contending that express warranty's limitation of warranties is "ineffective").)

Although plaintiffs seek to create the appearance of a dispute about the express warranty, they do not dispute the aspects of the express warranty at issue here: its one-year duration, and its limitation of implied warranties to one year. Moreover, plaintiffs do not and cannot point to any Apple PowerBook warranty with different durational provisions.

Plaintiffs cite two cases that declined to consider express warranties on a motion to dismiss, but both cases are inapposite. As an initial matter, *Blennis* has not been designated for publication and expressly states that it may not be cited. *Blennis v. Hewlett-Packard Co.*, No. C 07-00333 JF, 2008 U.S. Dist. LEXIS 106464, at *1 n.1 (N.D. Cal. 2008). Even if plaintiffs could properly rely on the case, plaintiffs themselves point out why the case is distinguishable — the express warranty was not alleged in the complaint. (Opp. at 14:1-4.) Here, the express warranty was alleged in the FAC. In *Cartwright v. Viking Industries, Inc.*, 249 F.R.D. 351 (E.D. Cal. 2008), several warranties were referenced and defendants argued as part of their motion to dismiss that it was unclear which one applied. Here, plaintiffs do not and cannot point to any warranty with different or conflicting durational provisions; there is *no* dispute regarding the provisions relevant to Apple's motion. Apple's express warranty is a proper subject of judicial notice.

It is undisputed that each of plaintiffs' computers' alleged malfunctions occurred well after any implied warranties had expired. Thus, plaintiffs' "unlawful" UCL claim and Plaintiffs Berenblat and Personette's stand-alone implied warranty claims fail.

II. PLAINTIFFS CANNOT STATE A CLAIM UNDER THE "UNFAIR" PRONG OF THE UCL

Plaintiffs' claim under the "unfair" prong of the UCL also fails. As the *Daugherty* line of cases holds, there can be nothing "unfair" about selling a product that functions properly for the duration of all applicable warranties. *Daugherty*, 144 Cal. App. 4th at 839; *Clemens v. DaimlerChrysler*, 534 F.3d 1017, 1026-27 (9th Cir. 2008); *Oestreicher*, 544 F. Supp. 2d at 973; *see also Tietsworth*, 2009 U.S. Dist. LEXIS 40872, at *14. Plaintiffs' opposition recites general propositions of law regarding "unfairness" under the UCL, but fails to cite any case that undercuts or even addresses *Daugherty* and the other cases cited by Apple. Plaintiffs do not so much as mention *Daugherty*, *Clemens*, or *Oestreicher* in their arguments regarding the "unfair" prong of the UCL.[9]

In sum, there was nothing unfair about Apple's alleged practices here, and thus plaintiffs' claim under the "unfair" prong of the UCL should be dismissed.

III. PLAINTIFFS CANNOT STATE A CLAIM FOR UNJUST ENRICHMENT

Plaintiffs' unjust enrichment claim also should be dismissed. Most fundamentally, there is no such claim as "unjust enrichment." A long line of cases, including recent decisions of this Court, have held that unjust enrichment is merely a remedy, not a separate cause of action.[10] *See* Mot. at 9:6-18; *see, e.g., Creager v. Yoshimoto*, No. C 05-01985 JSW, 2007 U.S. Dist. LEXIS 77309, at *13-14 (N.D. Cal. Oct. 9, 2007) ("unjust enrichment is a theory of recovery, not an independent legal claim"). In fact, plaintiffs' own authority recognizes this principle. *See McKell v. Washington Mut., Inc.*, 142 Cal. App. 4th 1457, 1490 (2006) ("There is no cause of action for unjust enrichment."). While some cases have reached a contrary result, the better-reasoned

[9] Plaintiffs incorrectly suggest that this Court cannot resolve their "unfair" UCL claim on a motion to dismiss. (Opp. at 18:3-13.) This contention is squarely rebutted by *Daugherty*, which upheld dismissal of an "unfair" UCL claim on a demurrer. *Daugherty*, 144 Cal. App. 4th at 827; *see also Tietsworth*, 2009 U.S. Dist. LEXIS 40872, at *14 (granting motion to dismiss "unfair" UCL claim).

[10] In their unjust enrichment argument, plaintiffs again cite to *Blennis*, despite its unpublished status. To the extent this Court considers citations to such opinions, Apple notes that in another unpublished decision, this Court held that unjust enrichment is not a cause of action. *Swanson v. USProtect Corp.*, No. C05-602 JF, 2007 U.S. Dist. LEXIS 37658, at *16 (N.D. Cal. May 10, 2007).

interpretation of California law is that unjust enrichment is merely a form of equitable remedy and not an independent claim for relief.

In any event, as Apple argued in its opening brief, plaintiffs' unjust enrichment "claim" is duplicative of their UCL claim and must be dismissed for this reason as well. Plaintiffs fail to address this argument, but admit that their unjust enrichment "claim" is a claim for restitution. (Opp. at 20:2-3.) Where a plaintiff can pursue restitution under other causes of action, dismissal of an unjust enrichment claim is appropriate. *Baggett v. Hewlett-Packard Co.*, 582 F. Supp. 2d 1261, 1271 (C.D. Cal. 2007) (citing *Falk v. General Motors Co.*, 496 F. Supp. 2d 1088, 1099 (N.D. Cal. 2007)). Here, the FAC is clear that plaintiffs are also seeking restitution under the UCL. (FAC, ¶ 63.) Thus, their unjust enrichment "claim" is duplicative and should be dismissed.

Finally, as set forth in Apple's opening brief, *Daugherty* holds that there is nothing "unjust" about selling a product that functions properly for the duration of any applicable warranties. Plaintiffs do not even attempt to address this argument, or the relevant holdings in *Daugherty* and *Long v. Hewlett-Packard Co*. Both cases establish that the only reasonable expectation plaintiffs could have about their computers was that they would function properly for the duration of any applicable warranties. *Daugherty*, 144 Cal. App. 4th at 838; *Long*, 2007 U.S. Dist. LEXIS 79262, at *23-24. That expectation was met. Accordingly, there has been no unjust enrichment, and the claim should be dismissed.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in Apple's opening brief, plaintiffs' complaint should be dismissed with prejudice.

Dated: July 31, 2009

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