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9  
 10 UNITED STATES DISTRICT COURT  
 11 NORTHERN DISTRICT OF CALIFORNIA  
 12 SAN JOSE DIVISION

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

16 Plaintiffs,

17 v.

18 APPLE INC.,

19 Defendant.

Case No. C-08-04969 JF  
 Case No. C-09-01649 JF

**APPLE INC.'S MEMORANDUM  
 OF POINTS AND AUTHORITIES  
 IN SUPPORT OF ITS MOTION  
 TO DISMISS THE SECOND  
 AMENDED COMPLAINT**

Date: February 5, 2010  
 Time: 9:00 am  
 Courtroom: 3

21  
 22 THOMAS WAGNER, SCOTT MEYERS, On  
 behalf of themselves and all others similarly  
 situated,

23 Plaintiffs,

24 v.

25 APPLE INC.,

26 Defendant.

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## INTRODUCTION

1  
2 Plaintiffs have had three chances to properly allege their claims, and have failed to do so.<sup>1</sup>  
3 Plaintiffs cannot avoid the fact that (1) Apple's express warranty limits any implied warranties to  
4 one year and (2) the Plaintiffs' computers allegedly malfunctioned more than a year after any  
5 implied warranties had expired. Thus, *Daugherty v. American Honda Motor Co.*, 144 Cal.  
6 App. 4th 824 (2006), and cases of this Court interpreting *Daugherty*, bar Plaintiffs' claims.  
7 Accordingly, Plaintiffs' Second Amended Complaint ("SAC") should be dismissed.

8 Recognizing that the terms of Apple's express warranty barred Plaintiffs' claims, the  
9 Court dismissed all claims in the First Amended Complaint ("FAC"), but granted Plaintiffs leave  
10 to amend. With regard to the implied warranty claim, the Court gave Plaintiffs the opportunity to  
11 add allegations that would avoid the fatal effect of the express warranty's one-year limit on  
12 implied warranties. Plaintiffs have not succeeded. As in the FAC, Plaintiffs allege that the  
13 limitation of implied warranties is "ineffective," and claim that there is no pre-sale notice; their  
14 only new allegation is that the express warranty is provided to consumers in the product  
15 packaging. That is not enough. That the warranty is included in the product packaging does not  
16 establish that it was not otherwise available pre-sale.<sup>2</sup> Most fundamentally, however, as in the  
17 FAC, Plaintiffs conspicuously fail to allege that *they* did not receive pre-sale notice of the  
18 warranty. This omission is particularly telling, given that Apple has squarely and repeatedly  
19 challenged Plaintiffs to deny that they were on notice of the warranty prior to sale.

20 Moreover, three of the six Plaintiffs exercised their rights under the express warranty. Not  
21 only does this establish that Plaintiffs were aware of the warranty, it also bars them as a matter of  
22 law from denying the warranty's validity. Similarly, four of the six purchased an AppleCare

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23  
24 <sup>1</sup> The Second Amended Complaint ("SAC") that is the subject of Apple's motion was  
25 filed in both the *Berenblat* and the *Wagner* (formerly *Vail*) actions. The previous complaints in  
26 the *Wagner* action asserted a violation of the Consumers Legal Remedies Act, as well as the  
27 Unfair Competition Law, but under a different theory than that asserted in the SAC. By filing the  
28 SAC without these claims or allegations, the *Wagner* Plaintiffs have abandoned them. *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). Accordingly, this brief  
will only address the complaints in the *Berenblat* action.

<sup>2</sup> See footnote 5, *infra*.

1 Protection Plan (“APP”), which explicitly extends repair coverage for two years from the date the  
2 express warranty expires. Plaintiffs could not have purchased the APP without being aware of  
3 the underlying express warranty and its durational limitations. Plaintiffs’ new allegations do not  
4 establish their lack of pre-sale notice.

5 Plaintiffs also add the allegation that the express warranty is a contract of adhesion. But  
6 California law is clear that the mere fact that a warranty is a contract of adhesion does not  
7 invalidate it. Were the rule otherwise, no manufacturer of consumer goods would be able to  
8 enforce its warranty terms. A warranty, like any other contract of adhesion, is only invalid if its  
9 terms are vague, ambiguous, or unconscionable. The SAC does not allege that the limitation on  
10 the duration of implied warranties in Apple’s express warranty, or any other term of the warranty,  
11 is vague or ambiguous. Moreover, the provision at issue — the limitation of implied warranties  
12 to one year — cannot be unconscionable, since it had been expressly endorsed by the California  
13 legislature. Plaintiffs have failed to avoid the express warranty’s durational limitation of implied  
14 warranties. Accordingly, Plaintiffs’ implied warranty claim, and their Unfair Competition Law  
15 (“UCL”) “unlawful” claim predicated on the implied warranty claim, are barred by  
16 *Daugherty* and its progeny and should be dismissed.

17 Plaintiffs’ “unfair” and “fraudulent” claims under the UCL should also be dismissed. All  
18 Plaintiffs have added in the SAC is the allegation that Apple failed to inform its customers about  
19 the alleged defect until after their warranties had ended. Yet this is exactly what this Court, the  
20 Ninth Circuit, and *Daugherty* have held was *insufficient* to constitute an unfair or fraudulent  
21 business practice under the UCL. In addition, both claims are grounded in fraud, and thus must  
22 be pleaded with specificity under Federal Rule of Civil Procedure 9(b). Plaintiffs do not even  
23 attempt to satisfy this standard. Plaintiffs have once again failed to adequately plead a claim  
24 under any prong of the UCL.

25 Finally, Plaintiffs’ allegations regarding unjust enrichment are identical to those in the  
26 FAC. Thus, the claim fails for the same reasons it failed in the FAC: no such claim exists in  
27 California; Plaintiffs’ underlying claims are without merit; and nothing about Apple’s actions was  
28 unjust.

1 The SAC demonstrates that Plaintiffs cannot sufficiently plead their implied warranty,  
2 UCL, and unjust enrichment claims. Accordingly, the SAC should be dismissed with prejudice.

### 3 ISSUES TO BE DECIDED

4 1. Whether Plaintiffs can state a claim for breach of the implied warranty of  
5 merchantability when the alleged defect manifested itself after the one-year implied warranty  
6 period had expired.

7 2. Whether Plaintiffs can state a claim under the “unlawful,” “unfair,” or “fraudulent”  
8 prongs of the UCL, where the claim is based on the manifestation of an alleged defect after the  
9 expiration of any applicable implied warranties, and where the computer operated as represented  
10 during the life of all applicable warranties.

11 3. Whether Plaintiffs have pleaded their claim under the “unfair” or “fraudulent”  
12 prongs of the UCL with the specificity required by Federal Rule of Civil Procedure 9(b).

13 4. Whether Plaintiffs can state a claim for unjust enrichment, when no such claim  
14 exists in California and when Plaintiffs’ computers functioned as warranted during any applicable  
15 warranty period.

### 16 FACTUAL BACKGROUND

17 As this Court has recognized, Apple’s PowerBook G4 models came with a one-year  
18 limited express warranty, which limits the duration of any implied warranties to the duration of  
19 the express warranty. (Declaration of Alexei Klestoff in support of Apple’s Motion to Dismiss  
20 First Amended Complaint, Docket No. 40, ¶ 2, Ex. A (“Apple Warranty”), Docket No. 40-2.)<sup>3</sup>

21 The SAC makes the same allegations regarding Reuben Berenblat’s, Andrew Personette’s,  
22 Earl Simpson’s, and Laura Miller’s computers as the FAC. (*Compare* FAC ¶¶ 31-47 *with* SAC  
23 ¶¶ 49-65.) The allegations establish that these Plaintiffs’ computers functioned properly long  
24 after the implied warranty period had expired.

25 \_\_\_\_\_  
26 <sup>3</sup> In its August 21, 2009 Order Granting (Apple’s) Motions to Dismiss with Leave to  
27 Amend, the Court granted Apple’s request for judicial notice of its express warranty because the  
28 FAC referenced the warranty and two of the Plaintiffs exercised their rights under the warranty.  
*Berenblat v. Apple, Inc.*, Nos. 08-4969, 09-1649, 2009 U.S. Dist. LEXIS 80734, at \*2 n.3 (N.D.  
Cal. Aug. 21, 2009). The SAC also references the warranty, and three of the Plaintiffs exercised  
their rights under the warranty. (SAC ¶¶ 25, 40-42, 53, 62-67, 72-73, 88, 97.)



1 The SAC adds two new Plaintiffs. The allegations regarding these Plaintiffs also  
2 demonstrate that their computers functioned properly throughout the warranty period and well  
3 beyond. Plaintiff Thomas Wagner, a North Carolina resident, allegedly purchased a PowerBook  
4 G4 in the summer of 2005. (SAC ¶¶ 15, 66.) He purchased an APP with his computer. (*Id.*  
5 ¶ 66.)<sup>4</sup> He alleges that at unspecified times, his computer “appeared sluggish.” (*Id.* ¶ 67.) He did  
6 not make a claim under the warranty for this sluggishness, however. He then alleges that three-  
7 and-a-half years after his purchase, in January 2009, he learned that his computer was only  
8 recognizing 1 GB of RAM and that his memory slot was allegedly defective. (*Id.* ¶¶ 68-69.)

9 Plaintiff Scott Meyer, a South Dakota resident, allegedly purchased a PowerBook G4 in  
10 June 2005. (*Id.* ¶¶ 16, 72.) He also purchased an APP with his computer. (*Id.* ¶ 72.) He alleges  
11 that more than three years later, in December 2008, he learned that his computer was not  
12 recognizing the memory card in the lower memory slot of his computer and that it was allegedly  
13 defective. (*Id.* ¶ 73.)

14 Plaintiffs have filed the present complaint on behalf of themselves and a putative class of  
15 PowerBook G4 purchasers. As in the FAC, they allege claims for breach of implied warranty,  
16 violation of the UCL, and unjust enrichment. (SAC ¶¶ 85-105.) They seek reimbursement of  
17 expenses incurred to repair defective memory slots, restitution, damages representing the  
18 difference in value of the allegedly defective PowerBooks purchased and the value the computers  
19 would have had if they had been as warranted, and disgorgement of profits. (*Id.* ¶¶ 6, 91,  
20 98, 105.)

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24 <sup>4</sup> As stated in Apple’s previous Motion to Dismiss, the APP is a service contract that  
25 provides customers with coverage for repairs for an additional two years after the expiration of  
26 the express warranty. (*See* Memorandum of Points and Authorities in Support of Apple’s Motion  
27 to Dismiss the First Amended Complaint, at 3:3-5, Docket No. 39; Declaration of Alexei Klestoff  
28 in Support of Motion to Dismiss Second Amended Complaint (“Klestoff Decl.”), Ex. A.) The  
APP is a proper subject of judicial notice because it is referenced in the SAC. *Branch v. Tunnell*,  
14 F.3d 449, 454 (9th Cir. 1994); *Berenblat*, 2009 U.S. Dist. LEXIS 80734, at \*2 n.3; *Hoey v.*  
*Sony Elecs. Inc.*, 515 F. Supp. 2d 1099, 1103 (N.D. Cal. 2007). The Court discussed the APP in  
its Order granting Apple’s previous motion to dismiss. *Berenblat*, 2009 U.S. Dist. LEXIS 80734,  
at \*3.

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**ARGUMENT**

Under Federal Rule of Civil Procedure 12(b)(6), a motion to dismiss should be granted if the plaintiff is unable to articulate enough facts to state a claim to relief that is “plausible on its face.” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1022 (9th Cir. 2008); *Long v. Hewlett-Packard Co.*, No. C-06-02816 JW, 2007 U.S. Dist. LEXIS 79262, at \*7 (N.D. Cal. July 27, 2007). A pleading that offers “labels and conclusions” or “a formulaic recitation of the elements of a cause of action will not do.” *Iqbal*, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 555).

The complaint must allege facts which, when taken as true, raise more than a speculative right to relief. *Twombly*, 550 U.S. at 555. The facts must “nudge[] [the] claims across the line from conceivable to plausible.” *Id.* at 570. The Court need not accept as true conclusory allegations or legal characterizations, nor need it accept unreasonable inferences or unwarranted deductions of fact. *See McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 810 (9th Cir. 1988); *Transphase Sys., Inc. v. S. Cal. Edison Co.*, 839 F. Supp. 711, 718 (C.D. Cal. 1993).

In addition, Rule 9(b) provides that “[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake.” Fed. R. Civ. P. 9(b). Under Rule 9(b), conclusory allegations of fraud are insufficient. *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003). Rule 9(b)’s heightened pleading requirement applies to allegations of fraud and allegations that sound in fraud, including false representations or omissions. *Id.* at 1106-07. It also applies to claims under the UCL when such claims are based on allegations of fraudulent conduct. *Kearns v. Ford Motor Co.*, 567 F.3d 1120 (9th Cir. 2009); *Berenblat*, 2009 U.S. Dist. LEXIS 80734, at \*17 n.6. The “allegations of fraud must be specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong.” *Bly-Magee v. California*, 236 F.3d 1014, 1019 (9th Cir. 2001) (citation and quotations omitted). To meet this standard, a complaint must provide the time, place, and content of the alleged

1 fraudulent representation or omission — the “who, what, when, where, and how” — as well as  
2 the circumstances indicating fraudulent conduct. *See Vess*, 317 F.3d at 1106.

3 All of Plaintiffs’ claims fail as a matter of law and should be dismissed in their entirety.

4 **I. PLAINTIFFS HAVE AGAIN FAILED TO PLEAD AN IMPLIED**  
5 **WARRANTY CLAIM**

6 Plaintiffs have failed to remedy the defects in their implied warranty claim. As in their  
7 previous complaint, Plaintiffs’ implied warranty claim fails because the SAC’s allegations  
8 establish that Plaintiffs’ computers performed without any issues long after any implied  
9 warranties had expired.

10 Apple’s express warranty limits the duration of implied warranties to the duration of the  
11 one-year express warranty. (*See Apple Warranty*, Docket No 40-2.) As the Court recognized in  
12 its Order granting Apple’s previous motion to dismiss, this is fully consistent with applicable law.  
13 *Berenblat*, 2009 U.S. Dist. LEXIS 80734, at \*13 (“the limitation on the implied warranty appears  
14 to comply with the requirements of Cal. Com. Code § 2316”); *see also Hovsepian v. Apple, Inc.*,  
15 Nos. 08-5788, 09-1064, 2009 U.S. Dist. LEXIS 80868, at \*24 (N.D. Cal. Aug. 21, 2009)  
16 (“manufacturers may impose limitations on implied warranties”); Magnuson-Moss Warranty Act,  
17 15 U.S.C. § 2308(b) (“implied warranties may be limited in duration to the duration of a written  
18 warranty of reasonable duration”). Thus, any implied warranty of merchantability was limited to  
19 one year.

20 Plaintiffs are bound by the express warranty’s limitation of implied warranties, and their  
21 computers allegedly malfunctioned long after the implied warranty had expired. Accordingly,  
22 their implied warranty claim is meritless.

23 **A. Plaintiffs Are Bound by the Terms of the Limited Warranty.**

24 Plaintiffs once again attempt to avoid the express warranty by contending that it is  
25 “ineffective.” (SAC ¶ 41.) To support this contention in the FAC, Plaintiffs alleged that Apple’s  
26 limitation of warranties is ineffective because “it is not delivered to consumers in advance of their  
27 purchases, consumers are not permitted to negotiate the terms, and the terms of the limited  
28 warranty unreasonably favor Apple.” (FAC ¶ 25.) The FAC further alleged that “[t]he

1 unconscionability of Apple’s purported limitation of warranties is compounded by Apple’s  
2 knowledge that it manufactured defective computers, yet continued to sell them without  
3 correcting the defects.” (*Id.*) The Court found that these allegations were insufficient to support  
4 an exception to “an otherwise binding contractual agreement.” *Berenblat*, 2009 U.S. Dist. LEXIS  
5 80734, at \*13; *see also Hovsepien*, 2009 U.S. Dist. LEXIS 80868, at \*24 (plaintiff’s allegation  
6 that Apple’s express warranty’s limitation of implied warranties is “unreasonable,  
7 unconscionable, and void” was insufficient to overcome the presumption of validity of the  
8 warranty).

9 The SAC fails to remedy this defect. It contains the same allegations as the FAC; the only  
10 new allegation is that customers received the warranty in the product packaging. (SAC ¶ 41.) But  
11 this adds nothing of significance to the allegations already contained in the FAC that customers  
12 did not receive the warranty pre-sale and were not able to bargain regarding its terms, allegations  
13 that the Court already has found insufficient.<sup>5</sup> Fatally, Plaintiffs still do not plead — and it is now  
14 clear they cannot plead — that *they* did not receive pre-sale notice of the warranty. Plaintiffs’  
15 allegations do not rebut the presumption of validity of the warranty. *See Hovsepien*, 2009 U.S.  
16 Dist. LEXIS 80868, at \*24 (Apple’s express warranty is presumptively valid).

17 **1. Plaintiffs Have Not Pleaded Their Lack of Pre-Sale Notice or**  
18 **Awareness of Apple’s Express Warranty.**

19 The SAC’s allegations regarding lack of pre-sale notice are fatally defective. As in the  
20 FAC, Plaintiffs do not plead that *they* lacked notice or awareness of the express warranty. This  
21 defect was squarely raised by Apple’s previous motion, yet Plaintiffs have not attempted to  
22 remedy it. *See Apple’s Reply in Support of its Motion to Dismiss*, at 6:16-18 (“None of the  
23 plaintiffs plead that they in fact failed to receive notice of Apple’s express warranty”); *Berenblat*,  
24 2009 U.S. Dist. LEXIS 80734, at \*13 (“the Berenblat FAC is devoid of factual allegations that  
25

26 \_\_\_\_\_  
27 <sup>5</sup> Nor does the fact that the warranty was contained in the product packaging establish, as  
28 Plaintiffs contend, that the warranty was not available pre-sale. If this case progresses past the  
pleading stage, discovery will show that Apple’s warranty was also available on Apple’s website  
and upon request prior to sale.

1 would support an exception to an otherwise binding contractual agreement”). It is now apparent  
2 that Plaintiffs cannot do so.

3 Moreover, three of the six Plaintiffs exercised their rights under the express warranty,  
4 demonstrating that they were aware of the warranty and its terms. (SAC ¶ 53 (alleging that Apple  
5 replaced Personette’s computer in 2005), ¶ 62 (alleging that Apple replaced Miller’s motherboard  
6 in 2006), ¶ 67 (alleging that Apple repaired other problems with Wagner’s computer).) In  
7 addition, a party who accepts the benefits of a contract cannot deny its validity. *Cal. Packing*  
8 *Corp. v. Sun-Maid Raisin Growers*, 81 F.2d 674, 678 (9th Cir. 1936) (where party accepted  
9 benefits of the contract, it ratified the contract); *Fairlane Estates, Inc. v. Carrico Constr. Co.*, 228  
10 Cal. App. 2d 65, 70 (1964) (acceptance of the benefits of the contract was a ratification that cured  
11 any defect in the execution of the contract); *see also Larson v. Speetjens*, No. C 05-3176 SBA, 2006  
12 U.S. Dist. LEXIS 66459, at \*14 (N.D. Cal. Sept. 1, 2006) (“A party should not be allowed to claim  
13 the benefit of the contract and simultaneously avoid its burdens.”).

14 Further, four of the six Plaintiffs purchased an APP that provided them with coverage for  
15 repairs for an additional two years after their express warranty expired. (*See* SAC ¶ 53  
16 (Personette), ¶ 63 (Miller), ¶ 66 (Wagner), ¶ 72 (Meyer).) The APP contract explicitly discusses  
17 the express warranty: “Your coverage for defects begins on the date your Covered Equipment’s  
18 Apple hardware warranty expires.” (Klestoff Decl. Ex. A at 1.c.) Plaintiffs would have no reason  
19 to purchase an APP unless they were aware of the express warranty and knew that it was limited  
20 to one year. For this reason as well, Plaintiffs cannot plausibly argue that they were unaware of  
21 the warranty.

22 **2. The Alleged Inability to Negotiate Regarding the Warranty’s**  
23 **Terms Does Not Invalidate It.**

24 Plaintiffs also contend that because consumers cannot negotiate regarding the express  
25 warranty’s limitation of implied warranties, it is a “classic” contract of adhesion and is thus  
26 “ineffective.” (SAC ¶¶ 41-42.) This contention proves too much. If the fact that a warranty is  
27 adhesive sufficed to render the warranty limitations unenforceable, *no* manufacturer’s warranty  
28 could be enforced. That is not the law. The mere fact that a contract is adhesive does not render

1 it unenforceable unless its terms are otherwise vague, ambiguous, or unconscionable. That is not  
2 the case here.

3 “Adhesion contracts are not *per se* unenforceable, they are valid and will be enforced  
4 where they are reasonably certain and do not contain unconscionable terms.” *Stockton Metro.*  
5 *Transit Dist. v. Amalgamated Transit Union*, 132 Cal. App. 3d 203, 214 (1983) *Gamer v. duPont*  
6 *Glore Forgan, Inc.*, 65 Cal. App. 3d 280, 286 (1976) (adhesion contracts are “valid and enforced  
7 according to their terms unless they are ambiguous . . . It requires more than a showing that a  
8 contract was on a printed form prepared by one of the parties to make it invalid as a contract of  
9 adhesion.”).<sup>6</sup> The SAC contains no allegations that Apple’s express warranty is uncertain or  
10 ambiguous.

11 Nor is the limitation of implied warranties to one year unconscionable; indeed, the  
12 California Legislature has expressly approved such a limitation.<sup>7</sup> See Apple’s Reply in Support  
13 of Apple’s Motion to Dismiss at 7:4-8, Docket No. 51; *Wilson v. Hewlett-Packard Co.*, No. C-09-  
14 2253 RMW, 2009 U.S. Dist. LEXIS 92692, at \*4 (N.D. Cal. Sept. 17, 2009) (“Limitations on  
15 warranties [are] authorized by the California Uniform Commercial Code § 2316 and have been  
16 routinely upheld.”); see also *Tietsworth v. Sears, Roebuck & Co.*, C 09-00288, 2009 U.S. Dist.  
17 LEXIS 98532, at \*29-32 (N.D. Cal. Oct. 13, 2009) (rejecting argument that one-year warranty  
18 limitation was unconscionable because defendants limited the warranties and actively concealed a  
19 known defect). The SAC adds no allegations to demonstrate otherwise.

20 Accordingly, the express warranty properly limited the duration of any implied warranties  
21 to one year, and Plaintiffs are bound by those terms.

22  
23  
24 <sup>6</sup> See also *24 Hour Fitness, Inc. v. Super. Ct.*, 66 Cal. App. 4th 1199, 1213 (1998)  
25 (rejecting plaintiff’s attempt to invalidate arbitration clause by arguing that the contract was one  
26 of adhesion); cf. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593-595 (1991) (a non-  
negotiated forum selection clause included in a form contract may be enforced even if it was not  
the subject of bargaining).

27 <sup>7</sup> In addition, Plaintiffs had the right to return their computers and purchase a computer  
28 from another manufacturer if they did want to be bound by Apple’s warranty. There are no  
allegations in the SAC to the contrary.

1                   **B.     Because Any Alleged Defects Manifested Themselves After the**  
 2                   **Expiration of any Implied Warranties, Plaintiffs' Claims Are Barred.**

3                   As was true of the FAC, the SAC makes plain that the Plaintiffs' alleged defects  
 4 manifested themselves more than a year after Plaintiffs purchased their PowerBooks:

- 5                   • Reuben Berenblat purchased his computer on July 12, 2005, and the alleged defect  
 6 manifested itself over three years later, in September 2008. (SAC ¶¶ 49-50.)
- 7                   • Andrew Personette purchased his computer in 2005, and the alleged defect  
 8 manifested itself two years later, in 2007. (*Id.* ¶¶ 53-54.)
- 9                   • Earl Simpson purchased his computer on August 20, 2005, and the alleged defect  
 10 manifested itself over three years later, on October 12, 2008. (*Id.* ¶¶ 57-58.)
- 11                  • Laura Miller purchased her computer in early 2006, and the alleged defect  
 12 manifested itself over three years later, in early 2009. (*Id.* ¶¶ 61-64; Klestoff  
 13 Decl., Ex. A.)
- 14                  • Thomas Wagner purchased his computer in the summer of 2005, and the alleged  
 15 defect manifested itself approximately three-and-a-half years later, in January  
 16 2009. (SAC ¶¶ 66, 68.)
- 17                  • Scott Meyer purchased his computer in June 2005, and the alleged defect  
 18 manifested itself approximately three years later, in 2008. (*Id.* ¶¶ 72-73.)

19                  Thus, the alleged defects manifested themselves long after any implied warranties had  
 20 expired. As this and numerous other courts have held, a plaintiff has no implied warranty claim  
 21 for alleged defects that manifest themselves after the warranty period has expired. *Berenblat*,  
 22 2009 U.S. Dist. LEXIS 80734, at \*13; *Hovsepian*, 2009 U.S. Dist. LEXIS 80868, at \*24  
 23 (dismissing implied warranty claim where Apple product allegedly failed outside of the one-year  
 24 implied warranty period); *Atkinson v. Elk Corp. of Tex.*, 142 Cal. App. 4th 212, 227-32 (2006)  
 25 (implied warranty of merchantability claim was barred as a matter of law because the defect  
 26 manifested itself after expiration of one-year implied warranty period); *Andrews v. Kern's TV &*  
 27 *Appliance, Inc.*, 2000 Ohio 1752, at \*11 (Ohio Ct. App. 2000) (no breach of implied warranties  
 28 where problems with product occurred after warranties had expired); *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) (same); *see also Daugherty*, 144 Cal. App. 4th at 830 (express warranty claim barred as a

1 matter of law because malfunction occurred after expiration of the warranty); *Clemens*, 534 F.3d  
 2 at 1023 (same); *Long*, 2007 U.S. Dist. LEXIS 79262, at \*10-11 (same).<sup>8</sup>

3 Plaintiffs' implied warranty claim accordingly fails. Plaintiffs have had three chances to  
 4 sufficiently plead an implied warranty claim, and have failed to do so. Accordingly, the claim  
 5 should be dismissed with prejudice.

6 **II. PLAINTIFFS HAVE FAILED TO REMEDY THE DEFECTS IN THEIR**  
 7 **UCL CLAIM**

8 As with their implied warranty claim, Plaintiffs have failed to remedy the defects in their  
 9 UCL claim. Like the FAC, the SAC alleges a UCL claim under the "unlawful" and "unfair"  
 10 prongs. (SAC ¶¶ 86-89.) It also adds a UCL claim under the "fraudulent" prong. (FAC ¶ 88.)  
 11 Their claim fails under all three prongs.

12 **A. Plaintiffs Have Failed to State a Claim Under the "Unlawful" Prong of**  
 13 **the UCL.**

14 Plaintiffs' UCL claim under the "unlawful" prong in the SAC fails for the same reason it  
 15 failed in the FAC. In its Order dismissing the FAC, the Court held that Plaintiffs' UCL claim  
 16 under the "unlawful" prong failed because their other claims failed, and because Plaintiffs had not  
 17 pleaded any other common law claims such as negligence.<sup>9</sup> *Berenblat*, 2009 U.S. Dist. LEXIS  
 18 80734, at \*16-17. Plaintiffs have added no allegations in the SAC that address these defects, and  
 19 as stated above, Plaintiffs' implied warranty claim still fails. Accordingly, Plaintiffs' UCL claim  
 20 under the "unlawful" prong is baseless.

21  
 22  
 23  
 24 <sup>8</sup> The SAC makes a vague allegation that plaintiff Wagner's computer "appeared  
 25 sluggish" at unspecified times. (SAC ¶ 67.) But this allegation is irrelevant, since Wagner never  
 26 made a claim during the one-year period as required by the express warranty. (*See* Apple  
 Warranty (stating that "[i]f a hardware defect arises *and a valid claim is received* within the  
 Warranty period" Apple will repair the defect, replace the product, or refund the purchase price)  
 (emphasis added), Docket No. 40-2.)

27 <sup>9</sup> In fact, Plaintiffs are foreclosed from asserting a negligence claim, because they pleaded  
 28 negligence in their first complaint, but abandoned it in the FAC. *London*, 644 F.2d at 814 (claims  
 in the original complaint that are not realleged in an amended complaint are waived).



1                   **B. Plaintiffs Have Failed to State a Claim Under the “Unfair” Prong of**  
2                   **the UCL.**

3                   Plaintiffs’ UCL claim under the “unfair” prong is similarly meritless. The only new UCL  
4                   allegations in the SAC are as follows:

5                   As also described herein, Defendant failed to repair or replace the  
6                   defective laptops purchased by its customers when they were  
7                   brought in for repair as per their one-year warranty or Apple Care  
8                   extended protection. Apple engaged in an unfair and fraudulent  
9                   business practice in not informing their customers about the defect  
10                  until after their warranty protections lapsed.

11                  (SAC ¶ 88.) These allegations are deliberately ambiguous. To the extent these allegations can be  
12                  read to allege that Apple refused to repair computers that were within the express warranty period  
13                  or were still covered by AppleCare, the SAC itself demonstrates that they are false. Three of the  
14                  Plaintiffs *did* obtain service within the warranty period. (*See* SAC ¶ 53 (alleging that Apple  
15                  replaced Personette’s computer in 2005), ¶ 62 (alleging that Apple replaced Miller’s motherboard  
16                  in 2006), ¶ 67 (alleging that Apple repaired other problems with Wagner’s computer).) Similarly,  
17                  *none* of the Plaintiffs alleges that he or she made a warranty claim and was refused service within  
18                  the warranty or APP period. *See Tietsworth*, 2009 U.S. Dist. LEXIS, at \*15 (plaintiffs could not  
19                  pursue claims based on safety defects that they had not experienced). Finally, the allegations are  
20                  wholly conclusory and fail to meet the *Iqbal/Twombly* pleading standard.

21                  Alternatively, Plaintiffs may mean to allege that Apple should have repaired the memory  
22                  slots of computers that were tendered for repair for *other* issues during the warranty period, even  
23                  though there was *no* memory malfunction. However, there is no legal requirement that a  
24                  manufacturer repair a component that has not malfunctioned. Plaintiffs admit as much when they  
25                  do not include these allegations as part of their warranty claims. To suggest that failing to repair  
26                  a component that is functioning properly is somehow “unfair” is absurd.

27                  The real core of these allegations is nothing new. It is the same “unfairness” alleged in  
28                  the prior complaints: that Apple did not inform customers of the alleged defect during the  
29                  warranty period. These allegations fail under the holdings of this Court, the Ninth Circuit, and  
30                  *Daugherty*:

1 [T]he failure to disclose a defect that might, or might not, shorten  
2 the effective life span of [a product] that functions precisely as  
3 warranted throughout the term of its express warranty cannot be  
4 characterized as causing a substantial injury to consumers, and  
5 accordingly cannot constitute an unfair practice under the UCL.

6 *Berenblat*, 2009 U.S. Dist. LEXIS 80734, at \*17 (quoting *Clemens*, 534 F.3d at 1026-27);  
7 *Daugherty*, 144 Cal. App. 4th at 839.

8 Plaintiffs' UCL claim under the "unfairness" prong also must be dismissed for the  
9 additional reason that it fails to meet the pleading requirements of Rule 9(b). The only  
10 "unfairness" Plaintiffs point to was Apple's supposed concealment of the alleged defect, but they  
11 completely fail to plead the specific circumstances of this concealment. "Generalized  
12 allegations" regarding active concealment are insufficient to meet the Rule 9(b) standard. *See*  
13 *Hovsepian*, 2009 U.S. Dist. LEXIS 80868 at \*9, 14. Plaintiffs' UCL claim under the "unfairness"  
14 prong fails.

15 **C. Plaintiffs Have Failed to State a Claim Under the "Fraudulent" Prong**  
16 **of the UCL.**

17 Plaintiffs' UCL claim under the "fraudulent" prong also fails. To support this claim,  
18 Plaintiffs allege that Apple's failure to inform customers about the defect until after their  
19 warranty protections lapsed is a fraudulent business practice. (SAC ¶ 88.) But this is exactly  
20 what Plaintiffs alleged in the *Vail* complaint, and what the Court held insufficient: "Vail has not  
21 pled a claim based on any fraudulent omission or unfairness to consumers because the memory  
22 slots appear to have functioned throughout the term of the express warranty." *Berenblat*, 2009  
23 U.S. Dist. LEXIS 80734, at \*23 (citing *Clemens*, 534 F.3d at 1026-27). *Daugherty* similarly held  
24 that where a product functions properly for the length of applicable warranties, a plaintiff has no  
25 claim under the "fraudulent" prong of the UCL. *Daugherty*, 144 Cal. App. 4th at 838; *see also*  
26 *Hoey*, 515 F. Supp. 2d at 1106 (dismissing CLRA and fraudulent concealment claims, stating  
27 "plaintiffs must allege more than the existence of a warranty and a defect occurring outside the  
28 warranty period to survive a motion to dismiss"); *Tietsworth*, 2009 U.S. Dist. LEXIS, at \*25

1 (mere failure to disclose a latent defect does not constitute a fraudulent business practice under  
2 the UCL).<sup>10</sup>

3 Finally, to the extent Plaintiffs allege affirmative misrepresentations under the UCL, the  
4 claim is also meritless. First, the SAC fails to allege any actionable statements by Apple. The  
5 only representation by Apple alleged in the SAC is that that the PowerBook G4 could support 2  
6 GB of memory. (SAC ¶ 26.) But this Court has already held that this representation is not  
7 sufficient. *Berenblat*, U.S. Dist. LEXIS 80734, at \*20 (“Vail must allege something more than  
8 the bare fact that Apple stated that the PowerBook could support 2 GB of memory.”). Second,  
9 Plaintiffs do not even attempt to satisfy the requirements of Rule 9(b). The SAC does not so  
10 much as hint at, let alone adequately plead, where, when, how, or even if *Plaintiffs* were exposed  
11 to the alleged misrepresentation. *See Kearns*, 567 F.3d at 1126 (complaint for violations of UCL  
12 and CLRA failed to satisfy Rule 9(b) because it failed to allege when plaintiff was exposed to the  
13 alleged misrepresentations and which ones he relied on or found material). Plaintiffs’ UCL claim  
14 under the “fraudulent” prong fails.

15 The SAC’s failure to remedy any of the defects that led to dismissal of the UCL claim in  
16 the FAC demonstrates that any further amendment would be futile. Accordingly, Plaintiffs’ UCL  
17 claim should be dismissed with prejudice.

### 18 **III. PLAINTIFFS HAVE MADE NO AMENDMENTS TO THEIR** 19 **PREVIOUSLY DEFECTIVE UNJUST ENRICHMENT CLAIM**

20 The SAC’s unjust enrichment allegations are identical to those in the FAC, making the  
21 claim as fatally defective as it was in the FAC. First, “[t]here is no cause of action in California  
22 for unjust enrichment.” *Melchior v. New Line Prods., Inc.*, 106 Cal. App. 4th 779, 794 (2003)  
23 (affirming trial court’s dismissal of “unjust enrichment” claim on the ground that California law  
24 does not recognize such a cause of action). “Under California law, a claim for unjust enrichment  
25 cannot stand alone as an independent claim for relief.” *Tietsworth*, 2009 U.S. Dist. LEXIS

26 \_\_\_\_\_  
27 <sup>10</sup> The fraudulent omission claim also fails to satisfy Rule 9(b), because it fails to allege  
28 the circumstances of Apple’s alleged omission with specificity. *See Hovsepian*, 2009 U.S. Dist.  
LEXIS 80868, at \*9 (“Generalized allegations” regarding fraudulent omissions are insufficient to  
meet the Rule 9(b) standard).

1 98532, at \*42-43 (citing *Jogani v. Super. Ct.*, 165 Cal. App. 4th 901, 911 (2008)). Because  
2 Plaintiffs' other claims fail, their unjust enrichment claim fails as well. *See Oestreicher v.*  
3 *Alienware Corp.*, 544 F. Supp. 2d 964, 975 (N.D. Cal. 2008); *Hoey*, 515 F. Supp. 2d at 1106.

4 Second, even if it could be pleaded as an independent cause of action, Plaintiffs' unjust  
5 enrichment claim is without merit. Because Plaintiffs' computers functioned exactly as warranted  
6 during any applicable warranty period, none of Apple's alleged actions were unjust or  
7 inequitable. *Cf. Daugherty*, 144 Cal. App. 4th at 839 ("[T]he failure to disclose a defect that  
8 might, or might not, shorten the effective life span of an automobile part that functions precisely  
9 as warranted throughout the term of its express warranty cannot be characterized as causing a  
10 substantial injury to consumers, and accordingly does not constitute an unfair practice under the  
11 UCL."). All Plaintiffs could expect was that their computers would function properly for the  
12 duration of any applicable warranties, and that expectation was met here. *See id.* at 838 (absent a  
13 manufacturer representation as to the life span of the part in question, the only expectation that  
14 purchaser could have had was that the product would function properly for the duration of the  
15 express warranty); *Long*, 2007 U.S. Dist. LEXIS 79262, at \*23-24 (same) (citing *Daugherty*, 144  
16 Cal. App. 4th at 838).

17 Plaintiffs have not even attempted to remedy the defects that led to previous dismissal of  
18 their unjust enrichment claim. Accordingly, that claim should be dismissed with prejudice.

### 19 CONCLUSION

20 As was true in their prior two complaints, Plaintiffs do not dispute that their computers  
21 functioned properly for the term of all applicable warranties. Nor do Plaintiffs deny that *they*  
22 were fully aware of the durational limitation of all applicable warranties, despite repeated  
23 invitations to do so. Enough is enough. Plaintiffs' claims are barred by *Daugherty* and by the  
24 decisions of this Court. For the reasons stated herein, Plaintiffs' Second Amended Complaint  
25 should be dismissed with prejudice.

1 Dated: November 5, 2009

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