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\*\*E-Filed 4/9/2010\*\*

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION**

RUEBEN BERENBLAT, ANDREW  
PERSONETTE, EARL. C. SIMPSON, and  
LAURA MILLER,

Plaintiffs,

v.

APPLE, INC.,

Defendant.

Case Number 08-4969 JF (PVT)  
Case Number 09-1649 JF (PVT)

ORDER<sup>1</sup> GRANTING MOTION TO  
DISMISS WITH LEAVE TO AMEND  
IN PART

[re: docket nos. 58; 41]

THOMAS WAGNER, SCOTT MEYERS,

Plaintiff,

v.

APPLE, INC.,

Defendant.

Plaintiffs Reuben Berenblat, Andrew Personette, Earl C. Simpson, Laura Miller, Thomas  
Wagner, and Scott Meyer bring the instant putative class actions on behalf of all original

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<sup>1</sup> This disposition is not designated for publication in the official reports.

1 purchasers of PowerBook G4 portable computers from Defendant Apple, Inc. (“Apple”) between  
2 January 1, 2005 and the present. Plaintiffs initially filed two separate suits against Apple in  
3 October 2008 and April 2009. The Berenblat Plaintiffs amended their initial complaint and filed  
4 a First Amended Complaint (“FAC”) on April 2, 2009. The Wagner Plaintiffs filed their initial  
5 complaint on April 15, 2009, and the Court related the two actions on April 30, 2009. On July 1,  
6 2009, Apple moved to dismiss the claims in both suits. In an order dated August 21, 2009  
7 (“August 21 Order”), the Court granted Apple’s motion to dismiss with leave to amend.  
8 Plaintiffs jointly filed the operative Second Amended Complaint (“SAC”) on September 21,  
9 2009, alleging three claims for relief: (1) unlawful, unfair, and fraudulent business practices in  
10 violation of the California Unfair Competition Law (“UCL”); (2) breach of the implied warranty  
11 of merchantability pursuant to California Commercial Code § 2314; and (3) unjust enrichment.  
12 Apple moves to dismiss the claims in the SAC for failure to state a claim upon which relief may  
13 be granted. The Court has considered the parties’ briefs and oral argument presented at the  
14 hearing on February 5, 2010. For the reasons set forth below, the motion will be granted, with  
15 leave to amend in part.

## 16 I. BACKGROUND

17 Apple designs, manufactures, and sells personal computers, including the PowerBook G4.  
18 SAC ¶¶ 19, 23. At all relevant times, the PowerBook G4 computers were sold with a standard  
19 one-year limited express warranty, which limits the duration of any implied warranties to the  
20 duration of the express warranty. *Id.* ¶ 25; Klestoff Decl. Ex. A at 2. Apple’s Aluminum  
21 PowerBook G4 computers were marketed in part for their ability to accommodate expanded  
22 random access memory (RAM) via two memory slots. SAC ¶¶ 24-25. Apple represented to  
23 purchasers that the computer could support up to a total of 2GB of additional RAM. *Id.* ¶ 26.

24 Berenblat, a New York resident, purchased a PowerBook G4 on July 12, 2005. *Id.* ¶¶ 11,  
25 49. He alleges that in September 2008, he added memory to his computer, and when its  
26 performance worsened, he took the computer to an Apple store. He was told that there was a  
27 problem with the hard drive, but he later learned that “the lower memory slot was defective and  
28 degraded his computer’s performance.” *Id.* at ¶¶ 50, 51. Personette, who also is a New York

1 resident, purchased a PowerBook G4 in 2005. Two years later, he determined that “the computer  
2 did not recognize one of the memory cards because the lower memory slot was defective.” *Id.* ¶¶  
3 12, 54. Simpson, a Washington resident, purchased a PowerBook G4 on August 20, 2005. *Id.* ¶¶  
4 13, 57. He alleges that on October 12, 2008 “he realized that the lower memory slot was  
5 defective and did not recognize the memory.” *Id.* ¶ 58.

6 Miller, a California resident, purchased a PowerBook G4 in early 2006. *Id.* ¶¶ 14, 61.  
7 She subsequently purchased an AppleCare Protection Program, an extended service agreement  
8 that provided her with repair coverage for an additional two years beyond the term of the express  
9 warranty. *Id.* ¶ 63; Klestoff Decl. Ex. B. She alleges that “just after expiration of her AppleCare  
10 extended protection” and approximately three years after she purchased her PowerBook G4, she  
11 learned that “the lower memory slot of her PowerBook G4 was defective and did not recognize  
12 the memory she attempted to load into the computer.” SAC ¶ 64.

13 Wagner, a resident of North Carolina, purchased his PowerBook G4 in the summer of  
14 2005, along with three years of Apple Care extended warranty coverage. *Id.* ¶¶ 15, 66. Wagner  
15 alleges that in March 2006, he purchased two 1GB memory expansion cards from the Apple  
16 Store, and although his computer appeared sluggish, he was not alerted by Apple about the  
17 memory slot defect. *Id.* ¶ 67. In January 2009, Wagner discovered that his computer was not  
18 recognizing the lower RAM slot; he does not know how long this had been the case. *Id.* ¶ 68.  
19 Wagner alleges that Apple Care suggested the problem was the memory card. *Id.* ¶ 69. Had  
20 Wagner known earlier of the memory slot problem, his machine (based on its serial number)  
21 would have been eligible for Apple’s Memory Slot Repair Program, which ended in July 2008.  
22 *Id.*

23 Meyer, a South Dakota resident, purchased his PowerBook G4 and an Apple Care  
24 extended warranty in June 2005. *Id.* ¶¶ 16, 72. After technicians at two Apple Stores allegedly  
25 failed to diagnose why his machine was running slowly, he purchased an additional 1GB RAM  
26 card in December 2008. *Id.* ¶ 73. Meyer alleges that when he tried to install the new RAM, he  
27 discovered that a RAM card already was in the lower memory slot and was not recognized by the  
28 computer. *Id.* Although he has two 1 GB RAM cards, Meyer alleges that he is able to use only

1 one of them. *Id.*

2 Plaintiffs allege that Apple knew that certain PowerBook G4 computers were  
3 manufactured with a single or double defective memory slot and attempted to conceal  
4 information about this defect. *Id.* ¶¶ 27, 28, 32. In response to consumer complaints, Apple  
5 extended the warranty for some PowerBook G4 customers through its PowerBook G4 Memory  
6 Slot Repair Extension Program. *Id.* ¶ 44. Apple otherwise has refused to warrant, repair or pay  
7 for any repairs relating to the PowerBook’s defective lower memory slot. *Id.* ¶ 47.

## 8 II. LEGAL STANDARD

9 A complaint may be dismissed for failure to state a claim upon which relief may be  
10 granted if a plaintiff fails to proffer “enough facts to state a claim to relief that is plausible on its  
11 face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Allegations of material fact must  
12 be taken as true and construed in the light most favorable to the nonmoving party. *Cahill v.*  
13 *Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1997). However, the Court need not accept  
14 as true allegations that are conclusory, unwarranted deductions of fact, or unreasonable  
15 inferences. *See Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). *See also*  
16 *Twombly*, 550 U.S. at 561 (“a wholly conclusory statement of [a] claim” will not survive a  
17 motion to dismiss).

18 On a motion to dismiss, the Court’s review is limited to the face of the complaint and  
19 matters judicially noticeable. *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir.  
20 1986); *N. Star Int’l v. Ariz. Corp. Comm’n*, 720 F.2d 578, 581 (9th Cir. 1983). However, under  
21 the “incorporation by reference” doctrine, the Court also may consider documents which are  
22 referenced extensively in the complaint and which are accepted by all parties as authentic. *In re*  
23 *Silicon Graphics, Inc. Sec. Litig.*, 183 F.3d 970, 986 (9th Cir.1999). Leave to amend should be  
24 granted unless it is clear that the complaint’s deficiencies cannot be cured by amendment. *Lucas*  
25 *v. Dep’t of Corr.*, 66 F. 3d 245, 248 (9th Cir. 1995).

26 In assessing whether to grant Plaintiffs another opportunity to amend, the Court considers  
27 “the presence or absence of undue delay, bad faith, dilatory motive, repeated failure to cure  
28 deficiencies by previous amendments, undue prejudice to the opposing party[,] and futility of the

1 proposed amendment.” *Lee v. SmithKline Beecham, Inc.*, 245 F.3d 1048, 1052 (9th Cir. 2001)  
2 (quoting *Moore v. Kayport Package Exp., Inc.*, 885 F.2d 531, 538 (9th Cir. 1989)). When  
3 amendment would be futile, dismissal may be ordered with prejudice. *Dumas v. Kipp*, 90 F.3d  
4 386, 393 (9th Cir. 1996).

### 5 III. DISCUSSION

6 Apple moves to dismiss the SAC without leave to amend, arguing that the additional facts  
7 alleged by Plaintiffs are not materially different from those found insufficient in the August 21  
8 Order. Plaintiffs claim that their additional factual allegations show that prior to purchase  
9 consumers did not have notice of or negotiating power with respect to the limitations of the  
10 express warranty, and that Apple knew of the latent defect at the time of sale and did not disclose  
11 that information to consumers. Plaintiffs contend that Apple’s disclaimer of implied warranties  
12 is ineffective and unconscionable, both procedurally and substantively, and that Apple’s business  
13 practices are unfair, unlawful, and fraudulent under the UCL. Because Apple benefitted from  
14 Plaintiffs’ purchases of allegedly defective computers, Plaintiffs also allege that Apple unjustly  
15 enriched itself at their expense.

#### 16 I. Breach of Implied Warranty of Merchantability

17 As explained in the August 21 Order, Plaintiffs are bound by the limitations in Apple’s  
18 express warranty unless they can allege facts that would create an exception to it.<sup>2</sup> Aug. 21 Order  
19 7:16-18 (“[T]he limitation on the implied warranty appears to comply with the requirements of  
20 Cal. Com. Code § 2316, and the Berenblat FAC is devoid of factual allegations that would  
21 support an exception to an otherwise binding contractual agreement.”). Plaintiffs claim that they  
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23 <sup>2</sup> There is some disagreement among the California appellate courts as to whether the duration of  
24 the implied warranty of merchantability, limited to one year under § 1791.1 of the Song-Beverly  
25 Consumer Warranty Act, applies to latent defects. Compare *Mexia v. Rinker Boat Co., Inc.*, 174 Cal.  
26 App. 4th 1297 (2009) (§ 1791.1 does not bar an action for breach of implied warranty based upon a latent  
27 defect discovered by the purchaser more than one year after the sale) to *Larsen v. Nissan N. Am.*, No.  
28 A121838, 2009 WL 1766797, at \*5 (Cal. Ct. App. 1st Dist. June 23, 2009) (unpublished) (“the warranty  
of merchantability implied as a matter of law in California is limited to one year after purchase”).  
However, even if the *implied* warranty of merchantability is breached by the very existence of a latent  
defect at the time of sale, *see Mexia* at 1304-05, the limitations imposed by Apple’s *express* warranty still  
would apply.

1 are entitled to such an exception on both procedural and substantive grounds.

2 A. Notice

3 Plaintiffs first contend that any limitation on or disclaimer of implied warranties must be  
4 made available to the consumer prior to the sale of the product. *See, e.g., Dorman v. Int'l*  
5 *Harvester Co.*, 46 Cal. App. 3d 11, 19-20 (1975) (holding that a limitation of warranties given in  
6 writing by the seller to the buyer after the time of sale is not binding). The SAC alleges that  
7 consumers first receive Apple's express warranty disclosure in the product packaging, and thus  
8 "obtain[] a copy of the warranty only after they purchase the product and open the packaging."  
9 SAC ¶¶ 41, 97. The named Plaintiffs do not allege, however, that they themselves did not  
10 receive pre-sale notice of the warranty, or that they could not or did not access the warranty  
11 online or at the Apple Store. Also absent from the SAC is any allegation that the limitation of  
12 implied warranty disclaimer is placed in an obscure location within the product packaging, or  
13 that the section of the express warranty addressing the limitation is not prominently displayed.

14 The fact that Apple provides a copy of the warranty limitations in its product packaging,  
15 rather than on the exterior of the box, may have the practical effect that some customers do not  
16 receive pre-sale notice. However, that fact alone is insufficient to undo the binding terms of the  
17 warranty. Section 2316 of the California Commercial Code requires that language excluding or  
18 limiting the implied warranty of merchantability "mention merchantability" and "be  
19 conspicuous." Section 2308 of the Magnuson-Moss Warranty Act requires that limitations on  
20 implied warranties be "limited in duration to the duration of a written warranty of reasonable  
21 duration," and that the limitation be "conscionable" and "set forth in clear and unmistakable  
22 language and prominently displayed on the face of the warranty." 15 U.S.C. § 2308(b). Plaintiffs  
23 do not allege that the exclusionary language in Apple's express warranty is inconspicuous or is  
24 not prominently displayed on the face of the warranty, or that it imposes a limitation of  
25 unreasonable duration.

26 Plaintiffs cite a number of cases in which post-sale notice of a warranty limitation was  
27 held to render the limitation unenforceable. None of these cases involves facts similar those at  
28 issue here. For example, in *Dorman v. Int'l Harvester Co.*, 46 Cal. App. 3d 11, 20 (1975), the

1 court held that the limitation on warranties in a sales contract for a tractor and backhoe had to be  
2 bargained for specifically rather than located on the reverse side of a purchase order that may  
3 never have been seen by the purchaser. *Dorman* dealt with a sales contract containing a warranty  
4 disclaimer that was “not in bold face type” and “not sufficiently conspicuous,” and in which the  
5 purchaser was not even given a separate copy of the manufacturer’s warranty. *Id.* at 18-19. In  
6 this case, Plaintiffs had several means of accessing a copy of the express warranty, including the  
7 hard copy that was clearly placed in the top packaging of the computer box. They were able to  
8 review the warranty upon purchase and to return the product if they were dissatisfied with the  
9 warranty’s limitations. *See Tietsworth v. Sears, Roebuck & Co.*, 2009 WL 3320486, at \*10 (N.D.  
10 Cal. Oct. 13, 2009) (Although plaintiffs were “not informed of the language of the warranty until  
11 the [products] were delivered,” they “were provided with a ninety day period in which to return  
12 the Machines ‘for any reason.’”).

#### 13 B. Unconscionable Warranty Provision

14 Plaintiffs also claim that the express warranty’s limitations are unconscionable because  
15 the warranty is presented in the form of a non-negotiable contract of adhesion, which contains a  
16 durational limitation that Apple enforces with respect to a known, latent defect. Apple argues  
17 that neither contracts of adhesion nor durational limitations on warranties are per se  
18 unenforceable or unconscionable, in particular where the law authorizes such limitations  
19 expressly.

20 “Unconscionability has both a procedural and a substantive element.” *Aron v. U-Haul Co.*  
21 *of California*, 143 Cal. App. 4th 796, 808 (2006) (citing *Armendariz v. Foundation Health*  
22 *Psychcare Services, Inc.*, 24 Cal.4th 83, 114 (2000)). The procedural element focuses on factors  
23 of oppression and surprise. *Id.* (internal citation omitted). Oppression arises from an inequality  
24 of bargaining power which results in no real negotiation and an absence of meaningful choice.  
25 *Id.* (internal quotation and citation omitted). Plaintiffs focus on the oppression element, alleging  
26 that Apple’s standardized formulation is given to buyers post-sale and prohibits any negotiation  
27 over the terms of the limitation.

28 However, while the terms of the warranty are non-negotiable, Plaintiffs do not allege that

1 they lacked other options for purchasing laptop computers or for obtaining additional warranty  
2 protection from Apple itself. *See Dean Witter Reynolds, Inc. v. Super Ct.*, 211 Cal. App. 3d 758,  
3 768 (1989) (finding that a “claim of oppression may be defeated if the complaining party had  
4 reasonably available alternative sources of supply from which to obtain the desired goods ... free  
5 of the terms claimed to be unconscionable”). Nor do Plaintiffs claim that they were “surprised”  
6 by the terms of the express warranty. *See Aron*, 143 Cal. App. 4th at 808. Because the terms of  
7 the limitation are prominent in the warranty text, and consumers may choose to buy laptop  
8 computers from other sellers or to extend Apple’s automatic one-year warranty, Plaintiffs have  
9 not shown that the warranty is procedurally unconscionable.

10           Substantive unconscionability focuses on the actual terms of an agreement and whether  
11 the agreement creates overly harsh or one-sided results that shock the conscience. *Aron*, 143 Cal.  
12 App. 4th at 808. Plaintiffs allege that the limitation at issue here is unconscionable because  
13 Apple knew of the latent defect at the time of sale and nonetheless continued selling a defective  
14 product while conceding its intention to discontinue the product line in favor of its next  
15 generation laptops. Plaintiffs rely upon *Carlson v. General Motors Corp.*, 883 F.2d 287 (4th Cir.  
16 1989) for the proposition that a complaint alleging manufacturer’s knowledge of a latent defect  
17 and simultaneous enforcement of a durational limit on the warranty may be sufficient at the  
18 pleading stage to state a claim of substantive unconscionability. *Carlson*, however, was not  
19 based on California law. At most, the court held that in some circumstances, whether contractual  
20 language is substantively unconscionable may require parties to “present evidence of the  
21 circumstances surrounding the original consummation of their contractual relationship.” 883  
22 F.2d at 292-93. These “circumstances” involve procedural aspects of unconscionability, which  
23 as discussed above are insufficiently pled.

24           Because the facts informing the Court’s analysis of unconscionability appear to be fully  
25 developed, it does not appear reasonably likely that Plaintiffs could cure the defects in their  
26 pleading by amendment. Accordingly, Plaintiff’s warranty claim will be dismissed without leave  
27 to amend.



1           **2. UCL Claim**

2           Plaintiffs renew their allegations that Apple engaged in unlawful and unfair business acts  
3 or practices under the UCL. They also add a claim under the “fraudulent” prong of the UCL.  
4 SAC ¶¶ 84-89, 91. The UCL prohibits “any unlawful, unfair or fraudulent business act or  
5 practice and unfair, deceptive, untrue or misleading advertising.” Cal. Civ. Code § 17200.  
6 Accordingly, “[a]n act can be alleged to violate any or all of the three prongs of the UCL –  
7 unlawful, unfair, or fraudulent.” *Berryman v. Merit Prop. Mgmt., Inc.*, 152 Cal. App. 4th 1544,  
8 1554 (2007). Although their claims arise under state law, Plaintiffs' allegations are subject to the  
9 pleading requirements of the Federal Rules. In particular, their allegations as to the fraud prong  
10 must meet the heightened pleading requirements of the Federal Rule of Civil Procedure 9(b). *See*  
11 *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103-04 (9th Cir. 2003) (If “the claim is said to  
12 be “grounded in fraud” or to “sound in fraud,” [then] the pleading of that claim as a whole must  
13 satisfy the particularity requirement of Rule 9(b).”)

14                     A.     Unlawful

15           For an action based upon an allegedly unlawful business practice, the UCL “borrows  
16 violations of other laws and treats them as unlawful practices that the unfair competition law  
17 makes independently actionable.” *Cel-Tech Commc’ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20  
18 Cal. 4th 163, 180 (1999). The Court previously dismissed Plaintiffs’ claim under Cal. Civ. Code  
19 § 17200 because Plaintiffs failed to state a cognizable claim under another state statute, such as  
20 Cal. Com. Code § 2314. Aug. 21 Order 9:16-18. Plaintiffs argue that the SAC now pleads a  
21 violation of Cal. Com. Code § 2314 based upon Apple’s actions in selling a product with a  
22 known, latent defect.

23           Section 2314 provides an implied warranty of merchantability “[u]nless excluded or  
24 modified” under § 2316. Cal. Com. Code § 2314. Plaintiffs have not adequately alleged an  
25 exception to Apple’s express warranty limitation under § 2316 and therefore have failed to state a  
26 claim for breach of implied warranty under § 2314. Without a predicate violation, the alleged  
27 violation of Cal. Com. Code § 2314 fails as a matter of law, and the UCL claim as to the  
28 unlawful prong cannot be sustained.

1                    B.      Unfair

2                    A UCL claim predicated on unfair business practices may be grounded upon a violation  
3 of a statute, or be a “standalone” claim based on an alleged act that “violates established public  
4 policy or if it is immoral, unethical, oppressive or unscrupulous and causes injury to consumers  
5 which outweighs its benefits.” *McKell v. Washington Mut., Inc.*, 142 Cal. App. 4th 1457, 1473  
6 (2006). Plaintiffs argue that a determination of whether a business act or practice is unfair  
7 “requires a review of the evidence from both parties ... [and] thus cannot usually be made [at the  
8 pleading stage].” *See id.* at 1473. Plaintiffs also contend that although they satisfy the  
9 heightened pleading requirements of Rule 9(b), their UCL claims for unfair business practices do  
10 not sound in fraud, and thus need not meet the heightened pleading requirement. *See Vess*, 317  
11 F.3d at 1104. Defendants argue that the “unfair” claim is subject to Rule 9(b), because the  
12 complaint alleges a unified course of fraudulent conduct. *See Hovsepian v. Apple, Inc.*, 2009 WL  
13 5069144 \*4 (N.D. Cal. Aug. 21, 2009) (citing *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125  
14 (9th Cir. 2009)).

15                    The SAC alleges that Apple unfairly “failed to exercise reasonable care to test the  
16 memory slots in its PowerBook computers prior to sale” and “continued to sell” those computers  
17 even after learning that the memory slots were defective. Opp’n 19:22-27; SAC ¶¶ 86, 87.  
18 Plaintiffs also allege that Apple “failed to repair or replace the defective laptops ... when they  
19 were brought in for repair as per their one-year warranty or Apple Care extended protection.”  
20 SAC ¶ 88. Apple suggests that the latter allegation is “deliberately ambiguous” and, if implying  
21 that Apple should have repaired memory slots of computers that were brought in for other issues  
22 during the warranty period, cannot be deemed unfair when there was no complaint about memory  
23 malfunction at the time. Reply to Opp’n 12:8-23.

24                    Even accepting Plaintiffs’ argument that their claim under the unfair prong stands  
25 independently of the fraud allegations and is not subject to Rule 9(b) pleading requirements, the  
26 SAC still fails to state a claim. Under the unfair prong of the UCL, Plaintiffs must allege that  
27 “the consumer injury is substantial, is not outweighed by any countervailing benefits to  
28 consumers or to competition, and is not an injury the consumers themselves could reasonably

1 have avoided.” Aug. 21 Order 9:18-21 (quoting *Daugherty v. Am. Honda Motor Co.*, 144 Cal.  
2 App. 4th 824, 839 (2006)). In its August 21 Order, the Court pointed out that the alleged defect  
3 did not manifest until after expiration of the express warranty, and failure to disclose a defect in a  
4 product that functions “precisely as warranted throughout the term of its express warranty cannot  
5 be characterized as causing a substantial injury to consumers, and accordingly does not constitute  
6 an unfair practice under the UCL.” Aug. 21 Order 9:22-26 (quoting *Clemens v. DaimlerChrysler*  
7 *Corp.*, 534 F.3d 1017, 1026-27 (9th Cir. 2008)). See also *Daugherty*, 144 Cal. App. 4th at 839.

8 The additional allegations in the SAC still fail to get Plaintiffs past the bar set by *Clemens*  
9 and *Daugherty*. Although Plaintiffs allege that the memory slot defect “exists at the time of  
10 manufacture” and “renders the PowerBook substantially certain to malfunction during the  
11 computer’s useful life,” SAC ¶ 40, Plaintiffs do not allege that the computers failed to function  
12 as warranted during the warranty period, or that Apple failed to repair a memory slot problem  
13 while a computer was still under warranty. Only one of the named Plaintiffs – Wagner – implies  
14 that the memory slot defect may have manifested prior to expiration of the warranty:

15 While covered under Apple Care, [Wagner] twice sent his  
16 computer to Apple to repair other issues. He purchased two 1GB  
17 SO-DIMMs memory expansion from the Apple Store in March of  
18 2006. He noticed at times that his computer appeared sluggish. He  
19 had not been told by Apple about the RAM slot defect, even when  
20 his machine was being repaired by Apple for other issues. In  
21 January of 2009, Mr. Wagner’s computer stopped making a startup  
22 tone. Upon opening the “about this Mac” tab, Mr. Wagner learned  
23 his computer was only recognizing 1GB of RAM. He does not  
24 know how long his PowerBook failed to recognize his lower RAM  
25 slot.

26 SAC ¶¶ 67-68.

27 It is unclear from the SAC whether Wagner alerted Apple as to the “sluggish” problem, or  
28 whether that problem only emerged after he had twice had the computer repaired for other issues,  
in which case there would have been no basis upon which to expect Apple to inform him about  
the RAM slot defect. Wagner did not learn that his lower RAM slot was not recognized until  
January 2009, after expiration of the three-year Apple Care extended warranty and nearly three  
years after he purchased the memory expansion in March 2006. Moreover, Wagner’s account  
falls far short of alleging substantial injury to all members of the putative class.

1 C. Fraudulent

2 A claim based upon the fraudulent prong of the UCL may be brought based upon conduct  
3 akin to common-law fraud or an alleged course of conduct that is likely to deceive the public.  
4 *Bardin v. DaimlerChrysler Corp.*, 136 Cal. App. 4th 1255, 1274 (2006) (“A violation can be  
5 shown even if no one was actually deceived, relied upon the fraudulent practice, or sustained any  
6 damage.”). Accordingly, Plaintiffs must allege with specificity that Defendants'  
7 misrepresentations or omissions were likely to deceive members of the public. *Daugherty*, 144  
8 Cal. App. 4th at 838.

9 Plaintiffs allege that Apple engaged in “active concealment and nondisclosure of material  
10 information about the memory slot defect.” Opp’n 15:16-17. The key alleged omissions and  
11 misrepresentations include failing to inform consumers of the defect and continuing to sell a  
12 product that Apple knew to contain a defect that would cause the product to malfunction during  
13 its expected useful life. See SAC ¶¶ 87, 88. Apple allegedly engaged in this practice because it  
14 “secretly planned to discontinue the PowerBook brand.” *Id.* ¶ 36. Plaintiffs argue that the SAC  
15 satisfies the heightened pleading standard under Rule 9(b) because they allege: (1) what the  
16 omissions were (information regarding the memory slot defect; SAC ¶¶ 31, 32); (2) the person  
17 responsible for the failure to disclose (Apple; *id.*); (3) the context of the omissions and the  
18 manner in which the omissions misled the plaintiff (RAM expansion was material to a  
19 consumer’s PowerBook purchase, and memory slot failure will not attract notice until after  
20 purchase; *id.* ¶¶ 24-26); and (4) what the defendant obtained through the fraud (unjust  
21 enrichment) (citing *Watts v. Jackson Hewitt Tax Service Inc.*, 579 F. Supp. 2d 334, 350  
22 (E.D.N.Y. 2008)).

23 However, conspicuously absent from the SAC are specific allegations establishing a duty  
24 to disclose the defect on the part of Apple. See *Daugherty*, 144 Cal. App. 4th at 838 (rejecting  
25 plaintiffs argument that Honda's failure to disclose a defect in the engine at the time of sale and  
26 failure to give proper notice of the potential for oil leaks were “likely to deceive those customers  
27 into believing that no such defect exists”). See also *Hovsepian v. Apple, Inc.*, 2009 WL 5069144  
28 at \*5 (N.D. Cal. Aug. 21, 2009) (requiring plaintiffs to allege specific representations made by

1 Apple with respect to the LCD screen that would give rise to a duty to disclose the defect  
2 alleged); *Tietsworth*, WL 3320486 at \*8 (finding that if the defendants “did not make any  
3 misrepresentations” regarding the allegedly defective component of the washing machines, they  
4 “owed no affirmative duty to plaintiffs to disclose any alleged defect” with that component).  
5 Plaintiffs seek to distinguish *Hovsepian* and *Tietsworth* by including evidence of consumer  
6 postings on the Apple website beginning in late 2004. These postings from affected consumers  
7 memorialize conversations between consumers and Apple personnel. Among other things, they  
8 accuse Apple of removing a thread of 350+ complaints about the memory slot defect from its  
9 website. SAC ¶¶ 31-32. Plaintiffs also point out that in 2006, Apple initiated the PowerBook  
10 Memory Slot Repair Extension Program for a limited number of PowerBooks manufactured in  
11 2005 but did not notify PowerBook purchasers generally of the program. *Id.* ¶¶ 44-45. Plaintiffs  
12 contend that by early 2005, Apple must have known and had to be actively concealing  
13 information relating to the memory slot defect. They argue that because none of the Plaintiffs  
14 purchased a PowerBook computer before mid-2005, the omission must have been material, since  
15 the RAM expansion feature was a material consideration in the purchase. *See id.* ¶¶ 24-25.

16 Plaintiffs’ argument is persuasive as far as it goes, but their allegations still fall short of  
17 establishing a duty on Apple’s part to disclose the memory slot defect. In *Tietsworth*, the  
18 plaintiffs pointed to representations in the owner’s manual about the dependability of the  
19 washing machines, but could not allege with particularity any representations regarding the  
20 allegedly defective Electronic Control Boards. *See* 2009 WL 3320486 at \*4. Similarly, in  
21 *Hovsepian*, the Court found inadequate under Rule 9(b) the plaintiffs’ allegations that Apple had  
22 a duty to disclose the LCD screen defect because it had exclusive knowledge of and actively  
23 concealed the alleged defect. *See* 2009 WL 5069144 at \*3. In this case, Plaintiffs allege  
24 particular representations made by Apple as to the memory expansion feature of the PowerBook  
25 brand. *See, e.g.*, SAC ¶ 26 (“For a considerable performance improvement ..., the memory in the  
26 12-inch model can be expanded to 1.25Gb, and the 15-inch and 17-inch models can  
27 accommodate up to 2GB. Both the 15-inch and 17-inch models come with 512MB of memory ...  
28 leaving a slot open for future memory upgrades.”).

1 To maintain a claim under the fraudulent prong of the UCL, Plaintiffs must be able to  
2 show that reasonable consumers “had an expectation or an assumption about” the functionality of  
3 the memory slots. See *Daugherty*, 144 Cal. App. 4th at 838, citing *Bardin v. DaimlerChrysler*  
4 *Corp.*, 136 Cal. App. 4th 1255, 1275 (2006). In its August 21 Order, the Court held that  
5 Plaintiffs “must allege something more than the bare fact that Apple stated that the PowerBook  
6 could support 2 GB of memory.” Aug. 21 Order 11:9-10. Without such a representation,  
7 Plaintiffs’ expectation regarding the ability to expand PowerBook computer memory is akin to  
8 that of the consumers in *Daugherty*, in which the plaintiffs could expect only “that [the product]  
9 would function properly for the length of [the] express warranty.” See *Daugherty*, 144 Cal. App.  
10 4th at 838. Representations by Apple that memory can be expanded to “accommodate up to  
11 2GB” do not suffice. Apple’s statement in the PowerBook Technology Overview that the design  
12 “leav[es] a slot open for future memory upgrades” is closer to being an actionable statement as to  
13 the *durability* of the extra memory slot beyond the warranty period.

14 Similarly, the complaints posted on Apple’s consumer website merely establish the fact  
15 that some consumers were complaining. By themselves they are insufficient to show that Apple  
16 had knowledge that the memory slot in fact was defective and sought to conceal that knowledge  
17 from consumers. The only allegation arguably reflecting an intent to conceal is that Apple  
18 deleted a discussion thread containing over 350 posts from its website. SAC ¶ 32. Like the  
19 conversation between a single washing machine purchaser and a store representative in  
20 *Tietsworth*, in which the representative allegedly stated that the specific machine could be  
21 expected to last up to eight years, this single statement is insufficient to support a claim of  
22 corporate fraud. See *Tietsworth*, 2009 WL 3320486 at \*FN3. At most the posting establishes  
23 knowledge that there were *complaints* about the memory card problem.

24 Plaintiffs contend that pursuant to *Morgan v. AT&T Wireless Servs., Inc.*, 177 Cal. App.  
25 4th 1235, 1257 (2009), a court must find that plaintiffs have stated a claim for relief under the  
26 fraudulent prong of the UCL if the court cannot find, as a matter of law, that members of the  
27 public were *not* likely to be deceived by defendant’s alleged conduct. Unlike *Morgan*, in which  
28 AT&T allegedly sold an expensive line of cell phones with multi-year service contracts that it

1 knew would be rendered “essentially useless” by network improvements before the contracts  
2 expired, Plaintiffs have not alleged any specific conduct of Apple that would be likely to deceive  
3 consumers. *See id.* at 1256. Conclusory statements that Apple failed to disclose the defect  
4 because it was secretly planning with Intel to retire the line of products do not meet the  
5 heightened pleading standard for claims sounding in fraud. However, because there is a  
6 reasonable possibility that Plaintiffs could provide additional factual support for this claim, leave  
7 to amend will be granted.

### 8 **3. Unjust Enrichment**

9 Plaintiffs renew their claim for unjust enrichment, reasserting the allegations first made in  
10 the Berenblat Plaintiffs’ FAC. In its August 21 Order, the Court held that a claim for unjust  
11 enrichment cannot stand alone without a cognizable claim under a quasi-contractual theory or  
12 some other form of misconduct. Aug. 21 Order 10:4-6 (citing *Jogani v. Superior Court*, 165 Cal.  
13 App. 4th 901, 911 (2008) (“[U]njust enrichment is not a cause of action. Rather, it is a general  
14 principle underlying various doctrines and remedies.”)). *See also Melchior v. New Line Prods.*,  
15 *Inc.*, 106 Cal. App. 4th 779, 793 (2003) (“The phrase “Unjust Enrichment” does not describe a  
16 theory of recovery, but an effect: the result of a failure to make restitution under circumstances  
17 where it is equitable to do so.”) (citations omitted)). Accordingly, the viability of Plaintiffs’  
18 claim for unjust enrichment depends upon the viability of their other claims. *Sanders v. Apple*  
19 *Inc.*, No. C 08-1713, 2009 WL 150950, at \*9 (N.D. Cal. Jan. 21, 2009). Because it concludes  
20 that Plaintiffs still have failed to state a cognizable claim with respect to their other claims for  
21 relief, the Court again will dismiss their claim for unjust enrichment, with leave to amend.  
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1 **IV. ORDER**

2 Good cause therefor appearing, the motion to dismiss is GRANTED without leave to  
3 amend as to Plaintiffs' claim of breach of warranty, and GRANTED with leave to amend as to  
4 Plaintiffs' claims under the UCL and for unjust enrichment. Any amended complaint shall be  
5 filed within thirty (30) days of the date of this order.

6  
7 DATED: April 7, 2010

8   
9 JEREMY FOGEL  
10 United States District Judge