

1 PENELOPE A. PREVOLOS (CA SBN 87607)
 (PPrevolos@mofo.com)
 2 ANDREW D. MUHLBACH (CA SBN 175694)
 (AMuhlbach@mofo.com)
 3 ALEXEI KLESTOFF (CA SBN 224016)
 (AKlestoff@mofo.com)

4 MORRISON & FOERSTER LLP
 5 425 Market Street
 San Francisco, California 94105-2482
 6 Telephone: 415.268.7000
 Facsimile: 415.268.7522

7 Attorneys for Defendant
 8 APPLE INC.

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 THIRD
 AMENDED COMPLAINT**

Date: September 24, 2010
 Time: 9:00 am
 Courtroom: 3

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

24 Plaintiffs,

25 v.

26 APPLE INC.,

27 Defendant.

1 **TABLE OF CONTENTS**

2 **Page**

3 TABLE OF AUTHORITIES.....ii

4 INTRODUCTION..... 1

5 ISSUES TO BE DECIDED..... 2

6 FACTUAL BACKGROUND 3

7 ARGUMENT 3

8 I. PLAINTIFFS FAIL TO STATE A CLAIM UNDER THE UCL..... 4

9 A. Plaintiffs’ UCL Claim is Barred by *Daugherty* and its Progeny..... 5

10 B. Plaintiffs Cannot Avoid *Daugherty* by Alleging Exclusive Knowledge and
11 Active Concealment. 6

12 1. As a Matter of Law, Neither Exclusive Knowledge nor Active
13 Concealment Can Create a Duty to Disclose. 6

14 2. Plaintiffs Fail to Allege Facts Demonstrating Exclusive Knowledge
15 or Active Concealment of a Defect. 7

16 a. Plaintiffs Fail to Allege Facts Demonstrating the Existence
17 of a Defect. 7

18 b. Plaintiffs Fail to Allege Facts Demonstrating Apple’s
19 Exclusive Knowledge of a Defect. 8

20 c. Plaintiffs Fail to Allege Facts Demonstrating Apple’s
21 Active Concealment of a Defect..... 15

22 C. Plaintiffs Have Not Pled Their UCL Claim with Sufficient Particularity..... 18

23 II. PLAINTIFFS’ UNJUST ENRICHMENT CLAIM FAILS 20

24 CONCLUSION 20

25

26

27

28

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page(s)

CASES

Ashcroft v. Iqbal,
129 S. Ct. 1937 (2009) 2, 3

Bardin v. DaimlerChrysler Corp.,
136 Cal. App. 4th 1255 (2006)..... 7, 15

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007) 2, 3

Berenblat v. Apple, Inc.,
Nos. 09-4969 JF (PVT), 09-1649 JF (PVT), 2009 U.S. Dist. LEXIS 80734
(N.D. Cal. Aug. 21, 2009) 4, 5

Berenblat v. Apple, Inc.,
Nos. 09-4969 JF (PVT), 09-1649 JF (PVT), 2010 U.S. Dist. LEXIS 46052
(N.D. Cal. Apr. 9, 2010).....*passim*

Brown v. Superior Court,
44 Cal. 3d 1049 (1988)..... 11

Centeno v. Doe,
No. 1-08-01435-FJM, 2009 U.S. Dist. LEXIS 118739 (E.D. Cal. Dec. 3, 2009)..... 15

Clemens v. DaimlerChrysler Corp.,
534 F.3d 1017 (9th Cir. 2008)..... 3, 5, 6, 15

Daugherty v. Am. Honda Motor Co.,
144 Cal. App. 4th 824 (2006).....*passim*

Higginbotham v. Baxter Int’l, Inc.,
495 F.3d 753 (7th Cir. 2007)..... 13

Hoey v. Sony Elecs. Inc.,
515 F. Supp. 2d 1099 (N.D. Cal. 2007)..... 5

Hovsepian v. Apple, Inc.,
No. 08-5788 JF (PVT), 2009 U.S. Dist. LEXIS 117562 (N.D. Cal. Dec. 17, 2009) 18, 19

Ind. Elec. Workers’ Pension Trust Fund IBEW v. Shaw Group, Inc.,
537 F.3d 527 (5th Cir. 2008)..... 13

Kearns v. Ford Motor Co.,
567 F.3d 1120 (9th Cir. 2009)..... 4, 19

1	<i>Long v. Hewlett-Packard Co.</i> ,	
2	No. C 06-02816 JW, 2007 U.S. Dist. LEXIS 79262 (N.D. Cal. July 27, 2007),	
3	<i>aff'd</i> , 2009 U.S. App. LEXIS 4422 (9th Cir. Cal. Mar. 3, 1009)	<i>passim</i>
4	<i>Markel Am. Ins. Co. v. Pac. Asian Enters., Inc.</i> ,	
5	No. C-07-5749 SC, 2008 U.S. Dist. LEXIS 60536 (N.D. Cal. July 28, 2008)	7
6	<i>McGlinchy v. Shell Chem. Co.</i> ,	
7	845 F.2d 802 (9th Cir. 1988)	4
8	<i>Morgan v. Harmonix Music Sys., Inc.</i> ,	
9	No. C 08-5211 BZ, 2009 U.S. Dist. LEXIS 57528 (N.D. Cal. July 7, 2009)	<i>passim</i>
10	<i>Oestreicher v. Alienware Corp.</i> ,	
11	544 F. Supp. 2d 964 (N.D. Cal. 2008),	
12	<i>aff'd</i> , 2009 U.S. App. LEXIS 7259 (9th Cir. Apr. 2, 2009)	<i>passim</i>
13	<i>Provencio v. Armor Holdings, Inc.</i> ,	
14	No. CV-F-07-00651 AWI-TAG, 2007 U.S. Dist. LEXIS 70831	
15	(E.D. Cal. Sept. 25, 2007)	7
16	<i>Sinaltrainal v. Coca-Cola Co.</i> ,	
17	578 F.3d 1252 (11th Cir. 2009)	15
18	<i>Stearns v. Select Comfort Retail Corp.</i> ,	
19	No. 08-2746 JF, 2009 U.S. Dist. LEXIS 48367 (N.D. Cal. June 5, 2009).....	12, 17, 18
20	<i>Tietsworth v. Sears, Roebuck & Co.</i> ,	
21	No. 5:09-cv-00288 JF (HRL), 2009 U.S. Dist. LEXIS 98532	
22	(N.D. Cal. Oct. 13, 2009)	<i>passim</i>
23	<i>Transphase Sys., Inc. v. S. Cal. Edison Co.</i> ,	
24	839 F. Supp. 711 (C.D. Cal. 1993).....	4
25	<i>Vess v. Ciba-Geigy Corp. USA</i> ,	
26	317 F.3d 1097 (9th Cir. 2003)	4, 19
27	<i>Zucco Partners, LLC v. Digimarc Corp.</i> ,	
28	552 F.3d 981 (9th Cir. 2009)	13, 19
	OTHER AUTHORITIES	
	Fed. R. Civ. P. 9(b).....	4

1 **INTRODUCTION**

2 Plaintiffs have failed, for the fourth time, to state a claim for relief. Plaintiffs cannot
3 remedy this failure because their computers functioned properly long after all applicable warranty
4 periods had expired. Thus, *Daugherty v. Am. Honda Motor Co.*, 144 Cal. App. 4th 824 (2006),
5 and cases of this Court interpreting *Daugherty*, bar Plaintiffs’ claims. The Third Amended
6 Complaint (“TAC”) should be dismissed with prejudice.

7 The Court recognized the *Daugherty* rule and dismissed all the claims in the Second
8 Amended Complaint (“SAC”), only granting leave to amend as to Plaintiffs’ claim under the
9 “fraudulent” prong of the Unfair Competition Law (“UCL”) and their unjust enrichment claim.
10 In dismissing the UCL claim, the Court found that Plaintiffs had failed to provide specific
11 allegations establishing a duty to disclose by Apple. The TAC does not remedy this defect.
12 Under *Daugherty* and its progeny, a manufacturer is not liable for failure to disclose a purported
13 defect that manifests itself after expiration of applicable warranty periods, unless the omission is
14 contrary to a representation actually made by the manufacturer or the alleged defect involves a
15 safety issue. Neither of these circumstances exists here, and thus the UCL claim fails.

16 Plaintiffs attempt to avoid this result by claiming that Apple had exclusive knowledge of
17 the purported defect and actively concealed it, and thus had a duty to disclose. The Ninth Circuit,
18 this Court, and the California Court of Appeal have rejected such attempts. As these courts have
19 recognized, all manufacturers have knowledge that a part will fail at some point in time, and
20 allowing such knowledge to give rise to liability would render warranty limitations meaningless.
21 These courts have also rejected claims based on active concealment where the product functioned
22 for the term of all applicable warranties. Thus, neither exclusive knowledge nor active
23 concealment can create a duty to disclose as a matter of law.

24 In addition, Plaintiffs have failed to adequately plead either exclusive knowledge or active
25 concealment. Most fundamentally, these theories are predicated on “exclusive knowledge” and
26 “active concealment” *of a product defect*, and the TAC does not plead any facts that would
27 support an inference of a product defect here. The TAC does not identify any aspect of the
28 memory slot’s design that allegedly rendered it defective, nor does the TAC specify the cause or

1 nature of the purported defect. Further, the TAC does not allege any other indicia of a defect.
2 The TAC contains no allegations of an unusually high failure rate, the number or percentage of
3 customer service calls relating to the memory slot, or the number or percentage of repairs. All the
4 TAC alleges is that some users experienced problems with their computers; under the *Daugherty*
5 rule, this does not establish the existence of a defect.

6 The TAC also fails to sufficiently allege Apple’s knowledge or concealment of a defect.
7 Plaintiffs rely on message board posts and Apple’s Repair Exchange Program (“REP”), which
8 this Court has previously found insufficient to create a duty to disclose. Plaintiffs also rely on
9 allegations of anonymous witnesses and alleged internal articles, but fail to provide sufficient
10 factual detail regarding either to meet the standard set forth in *Ashcroft v. Iqbal*, 129 S. Ct. 1937
11 (2009), and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), much less Federal Rule of Civil
12 Procedure 9(b)’s heightened pleading standard (which undisputedly applies here).¹ The UCL claim
13 should be dismissed.

14 Plaintiffs’ unjust enrichment claim should be dismissed as well. The claim fails for the
15 same reason it failed in the First Amended Complaint and in the SAC: no such claim exists in
16 California; Plaintiffs’ underlying claim is meritless; and Apple’s alleged actions were not
17 “unjust.”

18 Plaintiffs’ failure to properly plead their claims for the fourth time eliminates any doubt as
19 to the futility of further amendments. The TAC should be dismissed with prejudice.

20 **ISSUES TO BE DECIDED**

21 1. Whether Plaintiffs can state a claim under the “fraudulent” prong of the UCL
22 where their computers operated as represented during the term of all applicable warranties.

23 2. Whether Plaintiffs have pled their claim under the “fraudulent” prong of the UCL
24 with the specificity required by Rule 9(b).

25 _____
26 ¹ In seeking discovery before filing the TAC, (*see* Plaintiffs’ Motion for Administrative Relief,
27 Docket No. 83), Plaintiffs have conceded that they cannot meet these standards. The need for
28 discovery is not an excuse for deficient pleading, however. Under the Federal Rules, plaintiffs
have an obligation to state a claim *before* unlocking the door to discovery. *Twombly*, 550 U.S. at
557-59; *Iqbal*, 129 S. Ct. at 1949.

1 allegations or legal characterizations, nor need it accept unreasonable inferences or unwarranted
2 deductions of fact. *See McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 810 (9th Cir. 1988);
3 *Transphase Sys., Inc. v. S. Cal. Edison Co.*, 839 F. Supp. 711, 718 (C.D. Cal. 1993).

4 In addition, Rule 9(b) provides that “[i]n alleging fraud or mistake, a party must state with
5 particularity the circumstances constituting fraud or mistake.” Fed. R. Civ. P. 9(b). The rule
6 undisputedly applies to claims under the UCL when such claims are based on allegations of
7 fraudulent conduct. *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009); *Berenblat v.*
8 *Apple, Inc.*, Nos. 09-4969 JF (PVT), 09-1649 JF (PVT), 2009 U.S. Dist. LEXIS 80734, at *17 n.6
9 (N.D. Cal. Aug. 21, 2009) (“*Berenblat I*”). Rule 9(b) serves three purposes: “(1) to provide
10 defendants with adequate notice to allow them to defend the charge and deter plaintiffs from the
11 filing of complaints ‘as a pretext for the discovery of unknown wrongs’; (2) to protect those
12 whose reputation would be harmed as a result of being subject to fraud charges; and (3) to
13 ‘prohibit plaintiff[s] from unilaterally imposing upon the court, the parties and society enormous
14 social and economic costs absent some factual basis.’” *Kearns*, 567 F.3d at 1125 (citation
15 omitted).

16 Under Rule 9(b), conclusory allegations of fraud are insufficient. *Vess v. Ciba-Geigy*
17 *Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003). Rule 9(b)’s heightened pleading requirement
18 applies to allegations of fraud and allegations that sound in fraud, including false representations
19 or omissions. *Id.* at 1106-07. To meet Rule 9(b)’s standard, a complaint must provide the time,
20 place, and content of the alleged fraudulent representation or omission—the “who, what, when,
21 where, and how”—as well as the circumstances indicating fraudulent conduct. *See Vess*, 317
22 F.3d at 1106.

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

24 **I. PLAINTIFFS FAIL TO STATE A CLAIM UNDER THE UCL**

25 Plaintiffs assert their UCL claim solely under the “fraudulent” prong, and base it on
26 Apple’s alleged failure to inform customers about the purported defect. (*See TAC* ¶¶ 104-105.)
27 The claim fails.

1 **A. Plaintiffs’ UCL Claim is Barred by *Daugherty* and its Progeny.**

2 It is well established that a manufacturer cannot be liable under any prong of the UCL for
3 failure to disclose an alleged defect that manifests itself after expiration of applicable warranty
4 periods. The Ninth Circuit, this Court, and the California Court of Appeal have all so held.
5 *Clemens*, 534 F.3d at 1026; *Oestreicher v. Alienware Corp.*, 544 F. Supp. 2d 964, 972 (N.D. Cal.
6 2008); *Hoey v. Sony Elecs. Inc.*, 515 F. Supp. 2d 1099, 1104-05 (N.D. Cal. 2007); *Long*, 2007
7 U.S. Dist. LEXIS 79262, at *23-24; *Morgan v. Harmonix Music Sys., Inc.*, No. C 08-5211 BZ,
8 2009 U.S. Dist. LEXIS 57528, at *11-12 (N.D. Cal. July 7, 2009); *Daugherty*, 144 Cal. App. 4th
9 at 838. There are only two exceptions to this rule: (1) where the omission is contrary to a
10 representation actually made by the defendant; or (2) where the omission pertains to facts relating
11 to product safety. *Oestreicher*, 544 F. Supp. 2d at 969, *aff’d* 2009 U.S. App. LEXIS 7259, at *9
12 (“A manufacturer’s duty to consumers is limited to its warranty obligations absent either an
13 affirmative misrepresentation or a safety issue.”); *Morgan*, 2009 U.S. Dist. LEXIS 57528, at *11-
14 12 (“According to all relevant case law, defendants are only under a duty to disclose a known
15 defect in a consumer product when there are safety concerns associated with the product’s use.”)
16 (citing *Daugherty*, 144 Cal. App. 4th at 835-36; *Bardin v. DaimlerChrysler Corp*, 136 Cal. App.
17 4th 1255 (2006); *Long*, 2007 U.S. Dist. LEXIS 79262, at *8).

18 The alleged defects in Plaintiffs’ computers manifested themselves long after all
19 applicable warranties had expired, and neither of the exceptions to the *Daugherty* rule applies
20 here. First, it is undisputed that safety is not an issue in this case. Second, the TAC simply re-
21 alleges the same representations that were alleged in the SAC. (*Compare* TAC ¶ 27 with SAC
22 ¶ 26.) This Court has twice held these representations not to be actionable. *Berenblat I*, 2009
23 U.S. Dist. LEXIS 80734, at *20; *Berenblat v. Apple, Inc.*, Nos. 09-4969 JF (PVT), 09-1649 JF
24 (PVT), 2010 U.S. Dist. LEXIS 46052, at *26-27 (N.D. Cal. Apr. 9, 2010) (“*Berenblat II*”).
25 Accordingly, Plaintiffs cannot establish either of the exceptions to the *Daugherty* rule, and the
26 UCL claim fails.

1 **B. Plaintiffs Cannot Avoid *Daugherty* by Alleging Exclusive Knowledge**
2 **and Active Concealment.**

3 Plaintiffs ignore the *Daugherty* rule. Instead, they attempt to impose a duty to disclose on
4 Apple by virtue of Apple’s alleged “exclusive knowledge” and “active concealment” of the
5 purported defect. (TAC ¶¶ 110-112.) This attempt fails.

6 **1. As a Matter of Law, Neither Exclusive Knowledge nor Active**
7 **Concealment Can Create a Duty to Disclose.**

8 As a matter of law, Plaintiffs’ allegations of exclusive knowledge and active concealment
9 cannot support their UCL claim. Where, as here, a product operates properly for the term of all
10 applicable warranties, knowledge of an alleged defect cannot give rise to liability for failure to
11 disclose. As Judge Patel recognized in *Oestreicher*, manufacturers always have knowledge
12 regarding the likelihood of a part failing within a particular period of time, and “[a] rule that
13 would make failure of a part actionable based on such ‘knowledge’ would render meaningless
14 time/mileage limitations in warranty coverage.” *Oestreicher*, 544 F. Supp. 2d at 972 (citation
15 omitted); *see also Daugherty*, 144 Cal. App. 4th at 830. Other courts have also rejected UCL
16 claims based on the defendant’s knowledge of an alleged defect. *Long* rejected a UCL claim
17 where the defendant allegedly learned of the purported defect through its call center, factory
18 failures, field failures, internal tests, and repair reports, and had repeated internal discussions
19 regarding the purported defect. 2007 U.S. Dist. LEXIS 79262, at *3-4, 24; *see also Morgan*,
20 2009 U.S. Dist. LEXIS 57528, at *18 (alleged knowledge that product would fail to work
21 properly after only slight use insufficient to create a duty to disclose). Thus, exclusive knowledge
22 cannot establish Apple’s liability under the UCL.

23 Active concealment similarly cannot give rise to liability where a product functions for the
24 length of all applicable warranties. Numerous courts have refused to find liability for failure to
25 disclose based on allegations of concealment. *See Clemens*, 534 F.3d at 1025-26 (affirming
26 dismissal of UCL claim based on fraudulent concealment of an alleged head gasket defect); *Long*,
27 2007 U.S. Dist. LEXIS 79262, at *4 (dismissing UCL claim where plaintiff alleged that
28 defendant “publicly denied” that there was any defect in its products); *Oestreicher*, 544 F. Supp.

1 2d at 966 (dismissing UCL and CLRA claims where plaintiff alleged that defendant “concealed
2 material information regarding a design defect when selling certain computers that [defendant]
3 knew to be defective”); *Bardin*, 136 Cal. App. 4th at 1275 (dismissing UCL claim where plaintiff
4 alleged that defendant “concealed material facts” about the use of certain materials in defendant’s
5 products). Thus, allegations of exclusive knowledge and active concealment cannot create a duty
6 to disclose here.

7 **2. Plaintiffs Fail to Allege Facts Demonstrating Exclusive**
8 **Knowledge or Active Concealment of a Defect.**

9 Even if exclusive knowledge or active concealment could be a basis for liability for failure
10 to disclose—which it is not—Plaintiffs have failed to sufficiently allege either circumstance here.

11 **a. Plaintiffs Fail to Allege Facts Demonstrating the**
12 **Existence of a Defect.**

13 The TAC’s fundamental flaw is that it states that the memory slot was defective but fails
14 to plead facts demonstrating that this was so. The TAC offers only the generalized allegation that
15 a “widespread product defect and design flaw existing at the time of manufacture . . . renders one
16 or more of Apple’s PowerBook G4’s memory slots inoperative during the computer’s useful life.”
17 (TAC ¶ 1.) This allegation is wholly conclusory and does not contain any facts identifying what,
18 if anything, specifically was wrong with the memory slot. It cannot pass the *Iqbal/Twombly* test.
19 *See, e.g., Markel Am. Ins. Co. v. Pac. Asian Enters., Inc.*, No. C-07-5749 SC, 2008 U.S. Dist.
20 LEXIS 60536, at *14 (N.D. Cal. July 28, 2008) (dismissing claim alleging that vessel was
21 “dangerous” and “defective” on *Iqbal/Twombly* grounds because the claims failed, among other
22 things, to identify the purported defect); *Provencio v. Armor Holdings, Inc.*, No. CV-F-07-00651
23 AWI-TAG, 2007 U.S. Dist. LEXIS 70831, at *6 (E.D. Cal. Sept. 25, 2007) (dismissing claim
24 because it failed, among other things, to identify “how or why the product was allegedly
25 defective”).

26 Nor does any other allegation in the TAC plead facts that establish the existence of a
27 defect. The TAC does not identify any specific aspects of the memory slot’s design that allegedly
28 rendered it defective. The TAC does not even purport to identify the nature of the alleged defect,

1 much less its cause. To allege a product defect, Plaintiffs must plead something more than
2 anecdotal evidence of individual users' computers malfunctioning. Some percentage of products
3 (and product components) will always fail; that is the nature of products. To suggest the
4 existence of a defect, the failures rate must be unusually high. The TAC alleges no such
5 unusually high failure rate for the memory slot. In fact, *the TAC does not allege any failure rate*
6 *at all*. The TAC merely alleges that some users experienced problems with their computers long
7 after all applicable warranties had expired. The fact that a product ceases to function years after
8 its warranties have expired cannot establish a defect. If it could, *all* products would be considered
9 defective, because all parts eventually fail. This is not the law. *See Oestreicher*, 544 F. Supp. 2d
10 at 972 (acknowledging that all parts will fail eventually, and holding that knowledge of this fact
11 cannot be actionable) (citing *Abraham v. Volkswagen of Am., Inc.*, 795 F.2d 238, 250 (2d Cir.
12 1986)).

13 The TAC also fails to allege any other facts that might suggest the possibility of a defect.
14 For example, it does not allege a number or percentage of calls to customer support regarding the
15 memory slot. Nor does it allege a number or percentage of repairs of the memory slot.
16 Moreover, Plaintiffs fail to account for potential damage to the memory slot by customers
17 improperly installing memory cards or using incorrect memory cards. Thus, the TAC fails to
18 plead facts establishing the fundamental requirement for Plaintiffs' claim: the existence of a
19 defect.²

20 **b. Plaintiffs Fail Allege to Facts Demonstrating Apple's**
21 **Exclusive Knowledge of a Defect.**

22 Plaintiffs' contention that Apple had exclusive knowledge of the alleged defect does not
23 create a duty to disclose. As established above, exclusive knowledge cannot form the basis of

24 ² The TAC suggests that Apple's REP is evidence of a widespread defect. (TAC ¶¶ 49-50.) It is
25 not. An REP is a subsequent remedial measure and cannot establish a defect. Allowing plaintiffs
26 to use an REP to establish a defect "would create a perverse incentive for manufacturers not to
27 provide consumers with refunds or upgrades when defects exist." *Tietworth v. Sears, Roebuck &*
28 *Co.*, No. 5:09-cv-00288 JF (HRL), 2009 U.S. Dist. LEXIS 98532, at *17 (N.D. Cal. Oct. 13,
2009). The appropriate inference from the REP is that to the extent there was an issue with
computers for certain weeks of manufacture, Apple fixed it. Such a program does not indicate the
existence of a problem with units not covered by the program.

1 liability for failure to disclose as a matter of law. *Oestreicher*, 544 F. Supp. 2d at 972;
2 *Daugherty*, 144 Cal. App. 4th at 830; *Long*, 2007 U.S. Dist. LEXIS 79262, at *3-4, 24; *Morgan*,
3 2009 U.S. Dist. LEXIS 57528, at *18. In any event, the TAC fails to allege facts demonstrating
4 Apple's exclusive knowledge of an alleged defect here. Again, there are no allegations regarding
5 the part's failure rate; the number or percentage of calls to customer support regarding the
6 memory slot; the number or percentage of repairs related to the memory slot; or any other facts
7 that might suggest Apple's knowledge of a widespread defect. Instead of alleging such facts,
8 Plaintiffs cite to online message board posts, Apple's REP, the allegations of anonymous former
9 Apple employees, and alleged internal articles. (TAC ¶ 111.) None of these allegations
10 sufficiently pleads Apple's exclusive knowledge of any widespread defect affecting Plaintiffs'
11 computers.

12 **Message Board Posts.** Public internet message board posts cannot create a duty to
13 disclose here. Many of the posts alleged in the TAC are the same as those included in the SAC,
14 which the Court previously found insufficient to establish Apple's knowledge of a defect.
15 (*Compare* TAC ¶¶ 29, 65 *with* SAC ¶¶ 31, 33.) The new posts alleged in the TAC are not
16 meaningfully different from those alleged in the SAC, and also fail to establish Apple's
17 knowledge. As this Court stated in dismissing the SAC, "the complaints posted on Apple's
18 consumer website merely establish the fact that some consumers were complaining. By
19 themselves they are insufficient to show that Apple had knowledge that the memory slot in fact
20 was defective."³ *Berenblat II*, 2009 U.S. Dist. LEXIS 46052, at *27.

21 Other opinions of this Court have also recognized that customer complaints cannot create
22 a duty to disclose. *See Oestreicher*, 544 F. Supp. 2d at 967 (plaintiff claimed that manufacturer
23 was made aware of the alleged defects through "consumer complaints and postings on the
24 internet"); *Long*, 2007 U.S. Dist. LEXIS 79262, at *3-4 (plaintiff alleged that manufacturer
25 received "thousands of calls and conducted thousands of repairs" related to the alleged defect);
26

27 ³ Plaintiffs admit that message board complaints cannot establish Apple's knowledge, stating,
28 "Given the prevalence of complaints, discovery will likely reveal Apple's awareness of the
inherent defect in the PowerBook computers." (TAC ¶ 94.)

1 *see also Daugherty*, 144 Cal. App. 4th at 828 (plaintiff alleged that manufacturer received
2 “adverse event reports and actual notice” of the alleged defect). Thus, the posts alleged in the
3 TAC cannot create a duty to disclose.⁴

4 Furthermore, these posts do not establish “exclusive knowledge.” Many of the posts are
5 simply customers complaining about problems they had with their own particular computer. (*See*,
6 *e.g.*, TAC ¶¶ 36, 65.) Anecdotal complaints regarding a few users’ computer problems cannot
7 establish Apple’s exclusive knowledge of a widespread defect. Another set of posts contain
8 complaints regarding the alleged lack of notice of Apple’s REP,⁵ which also cannot establish
9 exclusive knowledge of any defect. (*See, e.g., id.* at ¶¶ 60-61.) Other posts relate to use of non-
10 Apple memory cards (*See, e.g., id.* at ¶ 36), suggesting that any alleged problem originated with
11 the third-party memory card, not with the user’s computer.

12 Certain other posts claim Apple denied that the memory slot was defective. (*See, e.g.*,
13 TAC ¶¶ 35-36.) Such triple hearsay is not sufficient to plead a statement by Apple. Moreover,
14 these posts merely reflect Apple’s position that there was no product defect. That was and is true.
15 The TAC provides no facts that suggest otherwise.

16 Aside from those described above, there are six posts relating alleged Apple statements
17 regarding the purported problem. Several of these statements relate merely to Apple’s alleged
18 recognition that a user’s particular computer was experiencing a problem, and do not in any way
19 suggest that Apple had knowledge that a widespread defect existed in PowerBooks generally.
20 (*See, e.g.*, TAC ¶ 60 (“Tony Chien”), ¶ 65 (“Hotmac,” “Tony Chien”).) For example, user

21 ⁴ Plaintiffs’ selective quotation of these posts also fails to tell the whole story. For example,
22 Plaintiffs neglected to include the final posting in the 2004 thread quoted in paragraph 29 of the
23 TAC. The final posting states that “Jim Babcock” installed a different memory card and
24 experienced no further problems. (*See* Declaration of A. Klestoff in Support of Apple Inc.’s
25 Motion to Dismiss the TAC Ex. A.) Thus, the issue was the memory card, not any component of
26 the computer. Clearly, this 2004 thread cannot establish existence of a defect or Apple’s
27 knowledge of a defect.

28 ⁵ The REP, which was in place from January 2006 through July 2008, only covered 15-inch
PowerBook G4 models manufactured during certain weeks. (TAC Ex. A at 1.) As discussed
infra, such a program cannot be used as evidence of a defect, nor can it possibly suggest the
existence or knowledge of an issue with other units not covered by the program. At most, the
REP shows that when Apple became aware of a potential issue, it instituted a repair program to
address it.

1 “Hotmac” states that Apple support told him that *his computer* had a problem, not that this
2 problem existed in PowerBooks generally. (*Id.* at ¶ 65.)

3 Other posts were written in 2008 and 2009, long after Apple stopped selling PowerBooks.
4 (TAC ¶¶ 60, 65 (“Tony Chien,” “Aaron McFarland”).) Thus, these allegations are irrelevant to
5 the issue of Apple’s knowledge at the time of sale.⁶ *See, e.g., Daugherty*, 144 Cal. App. 4th at
6 837 n.6 (holding that press releases regarding repair program could not give rise to a duty to
7 disclose because they were issued “in 2000 and 2001, *not at the time of sale*”); *cf Brown v.*
8 *Superior Court*, 44 Cal. 3d 1049, 1065-66, 1072 (1988) (holding that claims of strict liability for
9 design defect premised on failure to warn and breach of warranty are conditioned on the actual or
10 constructive knowledge of the alleged defect “as of the time the product was sold or distributed”).

11 The remaining two posts fail to establish Apple’s exclusive knowledge as well. One post,
12 by “Jim Babcock,” was also alleged in the SAC and was among the posts the Court found
13 insufficient to establish a duty to disclose (further, as noted above, “Babcock’s” computer proved
14 not to be defective).⁷ *Berenblat II*, 2009 U.S. Dist. LEXIS 46052, at *27. The final post, by
15 “Sandy Pawlowski,” is not meaningfully different from the “Jim Babcock” post, and also cannot
16 establish Apple’s knowledge. Moreover, the alleged statement in that post appears to be based on
17 other posts. (TAC ¶ 65 (“[this ‘problem’] has occurred a number of times to many customers *as*
18 *evidenced by this [online consumer] petition*”).) Thus, “Sandy Pawlowski’s” post relates fourth-
19 hand, unreliable hearsay, which cannot suffice to plead Apple’s knowledge with the specificity
20 required here.

21
22 ⁶ These, and many other posts, post-date Plaintiffs’ purchases as well. In order to have standing
23 to pursue their UCL claim, however, Plaintiffs must establish that Apple had a duty to disclose at
24 the time they purchased their computers. Thus, complaints post-dating Plaintiffs’ purchases
25 cannot support Plaintiffs’ claim for failure to disclose the alleged defect. Plaintiff Personette
26 lacks standing for an additional reason: he did not buy the computer that contains the alleged
27 defect. (TAC ¶ 71 (alleging that he received the computer as a replacement for another computer
28 which had unspecified problems).) As a result, Personette cannot establish that he relied on any
representation or omission by Apple in obtaining the computer at issue in this case. *Tietsworth*,
2009 U.S. Dist. LEXIS 98532, at *15.

⁷ Moreover, the “Jim Babcock” post is not even on an Apple website, but a site called
“2-popforums.” (*See* TAC ¶ 29 n.1.) Plaintiffs cannot plausibly argue that Apple obtained
“exclusive knowledge” of a defect from a third party, public website.

1 **Repair Extension Program.** Apple’s REP also cannot demonstrate “exclusive
2 knowledge” of a defect.⁸ This Court has recognized on at least two occasions that programs of
3 this type cannot form the basis of liability for an alleged failure to disclose a defect. *See Stearns*
4 *v. Select Comfort Retail Corp.*, No. 08-2746 JF, 2009 U.S. Dist. LEXIS 48367, at *30 (N.D. Cal.
5 June 5, 2009) (defendant’s offer of refunds to customers did not support the theory that it had a
6 plan to deceive plaintiffs); *Tietsworth*, 2009 U.S. Dist. LEXIS 98532, at *17 (allegation that
7 defendant offered free upgrades of allegedly defective part was insufficient to establish fraud); *cf*
8 *Daugherty*, 144 Cal. App. 4th at 837 n.6 (holding that a recall of some vehicles cannot be
9 interpreted as a partial representation giving rise to a duty to disclose). Repair extension
10 programs, refunds, and offers of free upgrades are a “standard business practice, serving many
11 legitimate business purposes,” and “to hold otherwise would create a perverse incentive for
12 manufacturers not to provide consumers with refunds and upgrades when defects exist.”
13 *Tietsworth*, 2009 U.S. Dist. LEXIS 98532, at *17 (citation and quotations omitted).

14 In addition, the REP was only for 15-inch PowerBook G4 models manufactured during
15 certain weeks. As set forth above, such a program cannot be used as evidence of a defect. Nor
16 does it suggest the existence or knowledge of an issue with other units not covered by the
17 program. To the contrary, the REP *contravenes* any claim that Apple had “exclusive knowledge”
18 of an alleged product defect and improperly concealed its existence. Rather, the REP shows that
19 when Apple becomes aware of a possible issue, it takes action to address it. Had there been an
20 issue with the memory slots of PowerBook G4s not covered by the REP, Apple would have taken
21 action as to those products as well. Apple’s REP cannot be the basis of the UCL claim here.
22 Moreover, Plaintiffs have made allegations regarding Apple’s REP from the very beginning of
23 this case, and this Court has never found them sufficient to state a UCL claim (or any other
24 claim). The TAC includes no new allegations that demonstrate otherwise.

25
26
27 ⁸ The TAC incorrectly claims that Apple sold the REP to customers. (*See* TAC ¶ 50.) The REP
28 was free. (*See* TAC Ex. A at 2 (“The repairs outlined in this program, including shipping charge
for a Mail-In repair where available, was [sic] covered at Apple’s cost.”).)

1 **Allegations of Anonymous Witnesses.** The TAC adds several allegations regarding
2 supposed statements by purported former Apple employees. While artfully drafted, a close
3 reading of these allegations demonstrates that they fail to provide any meaningful detail about
4 Apple’s alleged “exclusive knowledge” of any defect. They are insufficient to establish a duty to
5 disclose here.

6 The TAC provides no detail whatsoever regarding these purported witnesses. It identifies
7 them only as “former employees.” (*See* TAC, ¶¶ 30, 32-33, 58.) The TAC does not state who
8 these employees are or even how many of them there are. It does not identify their positions or
9 job responsibilities at Apple. The TAC alleges only that these purported ex-employees “worked
10 for Apple during the time period G4 PowerBooks were marketed,” carefully avoiding any
11 allegation that these purported ex-employees investigated any purported defect, made or read any
12 reports about it, or otherwise have any personal knowledge of it. Indeed, the TAC does not allege
13 that these individuals were involved with the PowerBook G4 in any way. In short, the TAC
14 supplies nothing that could demonstrate that these witnesses have any basis for making these
15 allegations.⁹

16 Courts routinely dismiss complaints based on such unfounded allegations. *See*
17 *Higginbotham v. Baxter Int’l, Inc.*, 495 F.3d 753, 756-57 (7th Cir. 2007) (refusing to consider
18 statements of confidential witnesses on motion to dismiss because such sources could be lying or
19 nonexistent); *Ind. Elec. Workers’ Pension Trust Fund IBEW v. Shaw Group, Inc.*, 537 F.3d 527,
20 535 (5th Cir. 2008) (“courts must discount allegations from confidential sources.”); *Zucco*
21 *Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 996 (9th Cir. 2009) (because confidential
22 sources were “simply not positioned to know the information alleged, many report only unreliable
23 hearsay, and others allege conclusory assertions of scienter,” they were deemed “not reliable”).
24 At a minimum, courts require that the complaint describe the confidential witnesses with
25 sufficient detail to establish their reliability and personal knowledge. *Zucco*, 552 F.3d at 995

26 _____
27 ⁹ Plaintiffs may argue that they are not required to disclose these alleged ex-employees’ identities.
28 Even if that were true, this argument does not excuse Plaintiffs’ failure to specify these
individuals’ positions and job responsibilities, or to otherwise provide any detail suggesting that
they have personal knowledge of the information alleged.

1 (complaint must identify witness’s position in the company and otherwise describe the witness
2 with sufficient particularity “to support the probability that the person in the position occupied by
3 the source would possess the information alleged”). The TAC utterly fails to meet this
4 requirement.

5 In any event, the alleged practices that these anonymous witnesses describe do not
6 establish Apple’s exclusive knowledge. The purported ex-employees claim that Apple executives
7 monitored customer call center operations and website comments to “determine whether Apple
8 products had recurring problems arising from a design or manufacturing defect.” (TAC ¶ 32; *see*
9 *also* TAC ¶¶ 58-59 (ex-employee claim that Apple executives monitored the number of
10 complaints by consumers whose computers were not included in the REP).) Even if true, this
11 allegation does not demonstrate knowledge of a defect. First, this allegation begs the question of
12 whether anything about the call center operations or website posts establishes the existence of an
13 alleged defect. As set forth above, Plaintiffs have not alleged that the call center reports indicated
14 the existence of a defect, nor do their allegations regarding the posts demonstrate the existence of
15 a defect. Accordingly, whether or not the call center operations or posts were “monitored” by
16 Apple cannot demonstrate knowledge of a defect.

17 Moreover, even if executives were monitoring customer calls and website posts, that
18 shows, at most, that they were aware of customer complaints. But this Court has already held that
19 awareness of customer complaints is insufficient to create a duty to disclose. *Berenblat II*, 2009
20 U.S. Dist. LEXIS 46052, at *27; *see also Oestreicher*, 544 F. Supp. 2d at 967; *Long*, 2007 U.S.
21 Dist. LEXIS 79262, at *3-4; *Daugherty*, 144 Cal. App. 4th at 828. Finally, the TAC does not
22 indicate whether the alleged monitoring ever focused on the PowerBook G4 or did so while the
23 product was still being sold.

24 **Internal Articles.** The claims of former employees that Apple prepared internal articles
25 regarding the memory slot (TAC ¶ 54) also fail to demonstrate Apple had exclusive knowledge of
26 a defect here. Conspicuously absent from the TAC is any allegation stating that the purported
27 articles concluded that a defect existed. Indeed, the TAC says absolutely nothing about the
28 contents of these purported articles. It also fails to provide any detail regarding when these

1 supposed articles were issued, or who prepared or received them. At best, these allegations
2 suggest only that articles existed. But the alleged existence of articles created at an unknown time
3 by unknown persons, whose contents are not specified, cannot demonstrate Apple’s exclusive
4 knowledge of a purported defect.¹⁰

5 In sum, the TAC’s allegations do not establish Apple’s alleged exclusive knowledge of a
6 defect, and cannot establish a duty to disclose here.¹¹

7 **c. Plaintiffs Fail to Allege Facts Demonstrating Apple’s**
8 **Active Concealment of a Defect.**

9 Plaintiffs allege that Apple also had a duty to disclose because it actively concealed the
10 purported defect. (TAC ¶ 112.) As a matter of law, concealment cannot be a basis for liability
11 where the product operated properly for the term of its warranties (as the computers did here).
12 *See Clemens*, 534 F.3d at 1025-26; *Long*, 2007 U.S. Dist. LEXIS 79262, at *4; *Oestreicher*, 544
13 F. Supp. 2d at 966; *Morgan*, 2009 U.S. Dist. LEXIS 57528, at *11-12; *Bardin*, 136 Cal. App. 4th
14 at 1275. Assuming, *arguendo*, that active concealment could be a basis for liability—which it
15 cannot—the TAC fails to allege facts sufficient to establish Apple’s concealment of a defect.
16 Plaintiffs again cite to message board posts, Apple’s REP, and allegations of purported former
17 employees, but none can establish concealment here.

18
19
20 ¹⁰ The TAC also provides no allegations that would establish that these purported ex-employees
21 received the articles, read them, or that these purported ex-employees have any personal
22 knowledge of them at all.

23 ¹¹ The TAC also alleges “[o]n information and belief” that “Apple’s engineers and quality
24 assurance personnel developed information about the defect before and during the period when
25 consumers complained about it.” (TAC ¶ 113.) This statement is vague, wholly conclusory, and
26 unsupported by any facts in the TAC. The fact that it is pled “on information and belief” does not
27 exempt the statement from the requirements of *Iqbal*, *Twombly*, and Rule 9(b). *See, e.g.,*
28 *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1268 (11th Cir. 2009) (allegation on information
and belief failed to provide sufficient factual content to satisfy *Iqbal*); *Centeno v. Doe*, No. 1-08-
01435-FJM, 2009 U.S. Dist. LEXIS 118739, at *6-7 (E.D. Cal. Dec. 3, 2009) (statement on
information and belief was conclusory and unsupported by facts and thus insufficient to state a
claim against defendant under *Iqbal*). This allegation meets none of those requirements.
Moreover, this Court has found similar allegations insufficient to state a UCL claim. *See Long*,
2007 U.S. Dist. LEXIS 79262, at *3-4, 24 (rejecting UCL claim where defendant’s engineers
allegedly learned of the problem through defendant’s call center, factory failures, field failures,
internal tests, and repair reports, and had repeated internal discussions regarding the problem).

1 **Message Board Posts.** The message board posts cited in the TAC do not demonstrate
2 Apple’s concealment of a defect. Plaintiffs also cited posts in the SAC to support their claim that
3 Apple was misleading customers regarding the problem. (*See, e.g.*, SAC ¶ 31.) This was
4 insufficient to create a duty to disclose in the SAC, *Berenblat II*, 2010 U.S. Dist. LEXIS 46052, at
5 *23-24, and it is also insufficient in the TAC. Third-hand hearsay statements from anonymous
6 individuals regarding what Apple purportedly told them cannot establish concealment.

7 Moreover, even if customer posts could demonstrate concealment—which they cannot—
8 the posts alleged in the TAC do not do so. Many of the posts are simply complaints that a
9 particular user’s computer was malfunctioning or allege lack of notice of the REP.¹² (*See, e.g.*,
10 TAC ¶¶ 36, 60-61, 65.) These posts cannot establish concealment by Apple. Other posts, if true,
11 simply allege that Apple accurately stated that there was no product defect. (*See* TAC ¶ 35 (“Eric
12 Gore”), ¶ 36 (“BellBucci,” “bob”).) Another post does not relate to the existence of a defect at
13 all, but relates Apple’s alleged disbelief that the user’s particular computer was experiencing a
14 problem. (TAC ¶ 36 (“Lillian”).) Yet another post discusses the use of an improper memory
15 card as the problem. (TAC ¶ 36 (“Deb Trazino”).) The accuracy of this diagnosis is
16 substantiated by the experience of “Jim Babcock,” who installed a different memory card and
17 experienced no more problems, suggesting that the problem was with the memory card, not the
18 computer. (*See* Klestoff Decl., Ex. A.) A final post states only that Apple said they did not have
19 any “complaints” about the issue. (TAC ¶ 36 (“Keith Parr”).) This is not a denial of any defect.
20 Even if it could be interpreted as such, the post is dated two years after Apple stopped selling
21 PowerBooks, and thus cannot demonstrate concealment at the time of sale.¹³

22 Plaintiffs also rely on a post alleging deletion of the message board posts. (TAC ¶ 41.)
23 The Court has already held that this post is insufficient to support Plaintiffs’ claim of
24 concealment. *Berenblat II*, 2010 U.S. Dist. LEXIS 46052, at *27-28. Furthermore, as set forth in

25 _____
26 ¹² In fact, the REP was prominently disclosed on Apple’s main support page.

27 ¹³ Moreover, the TAC does not allege Plaintiffs saw any of these posts or were otherwise
28 deceived by them. Further, many of the posts are dated after Plaintiffs’ purchases and after Apple
stopped selling the PowerBook G4. (*See, e.g.*, TAC ¶ 36 (posts dated October 2006–February
2008).) Thus, the posts cannot establish that Apple actively concealed a defect from Plaintiffs.

1 Apple’s prior briefs, the posts were restored ten days after they were taken down. Thus, the
2 message board posts in the TAC cannot establish active concealment by Apple. To the contrary,
3 these posts exist to this day, negating any inference of concealment.

4 **Repair Extension Program.** To further support their claim of concealment, Plaintiffs
5 allege that the REP—which only covered 15-inch PowerBook G4s manufactured during certain
6 weeks—created the “false impression that the defect was less widespread than it actually was.”
7 (TAC ¶ 112.) But Plaintiffs point to nothing which suggests that there was an issue with any
8 products not covered by the REP. Rather, the only reasonable inference from the REP is that
9 when Apple became aware of an issue, Apple took action and fixed it. Moreover, this Court has
10 clearly rejected Plaintiffs’ argument. *See Tietsworth*, 2009 U.S. Dist. LEXIS 98532, at *17;
11 *Stearns*, 2009 U.S. Dist. LEXIS 48367, at *30. Every complaint in this case has included
12 allegations regarding the REP, and this Court has never found the REP sufficient to create a duty
13 to disclose. Finally, Plaintiffs do not allege that they saw the REP before they purchased their
14 computers. Indeed, with the arguable exception of Laura Miller, none of the Plaintiffs *could* have
15 seen the REP, because it post-dated their purchases. Thus, the REP cannot establish Apple’s
16 concealment of any defect here.

17 **Allegations of Anonymous Witnesses.** Plaintiffs also seek to rely on vague, generalized
18 allegations attributed to unknown and unidentified former employees. They do not establish
19 active concealment here. According to these anonymous witnesses, Apple’s “policy and
20 practice” was to limit information provided to customers and to withhold facts regarding the
21 purported defect. (TAC ¶ 30.) However, the TAC offers no specific facts to support this
22 allegation. It does not indicate how the unidentified witnesses learned of the supposed policy.
23 The TAC does not even allege that the anonymous ex-employees were involved in any way with
24 the PowerBook G4. Nor does the TAC offer any specific facts about the supposed policy, how it
25 was communicated, how it was implemented, when it was in place, or any other facts. The
26 allegations are thus completely lacking in the “who, what, when, where, and how” to alleged a
27 fraud-based claim.

1 In any event, these contentions cannot demonstrate concealment here. Allegations
2 regarding a supposed “policy and practice” to withhold facts regarding a purported defect are
3 insufficient to create a duty to disclose. *Hovsepien v. Apple, Inc.*, No. 08-5788 JF (PVT), 2009
4 U.S. Dist. LEXIS 117562, at *8 (N.D. Cal. Dec. 17, 2009) (allegation that “Apple has responded
5 by implementing a corporate policy of concealing and uniformly denying in all public forums the
6 existence of the Defect” did not establish a duty to disclose); *see also Long*, 2007 U.S. Dist.
7 LEXIS 79262, at *4 (dismissing UCL claim where plaintiff alleged that defendant “publicly
8 denied” that there was any defect in its products).

9 Further, as a matter of law, these allegations cannot establish “active concealment.” *See*
10 *Daugherty*, 144 Cal. App. 4th at 828 (alleging that defendant “failed to warn” consumers of the
11 alleged defect); *Oestreicher*, 544 F. Supp. 2d at 967 (alleging that defendant “failed to inform”
12 consumers of the alleged problem); *Morgan*, 2009 U.S. Dist. LEXIS 57528, at *18 (alleging that
13 defendant “fail[ed] to disclose” alleged defect).

14 The only other allegation in the TAC that seeks to establish active concealment falls far
15 short of doing so. The TAC alleges that unidentified ex-employees claim that Apple’s “MO was
16 they never wanted you to tell the customer about defects, what it affects – just say you’re having a
17 problem, we’ll cover it this time.” (TAC ¶ 33.) In addition to sharing all the same inadequacies
18 as the “policy and practice” allegations, the only reasonable inference from this claim is that
19 Apple’s practice was to repair customers’ problems. Moreover, the alleged practice is akin to the
20 offers of free upgrades and refunds that *Tietzworth* and *Stearns* held could not create a duty to
21 disclose. *Tietzworth*, 2009 U.S. Dist. LEXIS 98532, at *17; *Stearns*, 2009 U.S. Dist. LEXIS
22 48367, at *30. In sum, none of the allegations in the TAC establish active concealment. And, as
23 discussed *supra*, active concealment cannot be a basis for liability here as a matter of law.

24 **C. Plaintiffs Have Not Pled Their UCL Claim with Sufficient**
25 **Particularity.**

26 Plaintiffs’ UCL claim fails for a second reason: it is not pled with particularity as required
27 by Rule 9(b). The rule undisputedly applies to Plaintiffs’ claim, and requires Plaintiffs to plead
28 the circumstances of Apple’s alleged fraudulent conduct, as well as the “who, what, when,

1 where, and how” of the conduct. *Vess*, 317 F.3d at 1106 (citation omitted); *see also Kearns*, 567
2 F.3d at 1127. Not one of Plaintiffs’ allegations meets this requirement. The TAC re-pleads many
3 of the same allegations that were pled in the SAC. These allegations were insufficient to satisfy
4 Rule 9(b) in the SAC, and they are insufficient now. The TAC’s new allegations also fail to
5 provide the detail required to plead Plaintiffs’ UCL claim with particularity.

6 **Message Board Posts.** As in the SAC, the posts cannot satisfy Rule 9(b). They are mere
7 third-hand party hearsay by message board users. Statements of such users cannot sufficiently
8 plead knowledge, statements, or actions *of Apple*. Anyone can say anything on the internet. To
9 allow an anonymous poster’s claim regarding a statement of a defendant to satisfy the
10 requirements of Rule 9(b) would eviscerate the rule. Even if posts could satisfy Rule 9(b)
11 generally, the posts alleged in the TAC fail to provide the “who, what, when, where, and how” of
12 the conduct. These posts do not satisfy Rule 9(b)’s requirements.

13 **Allegations of Anonymous Witnesses.** The allegations of purported ex-employees also
14 fail to provide the particularity required here. As established above, none of these individuals are
15 identified with any detail whatsoever. The TAC does not identify their titles, job descriptions, or
16 responsibilities, or provide any other information about them or their claims. The TAC does not
17 indicate that they were involved with the PowerBook G4 in *any* capacity, much less a capacity
18 that would give them personal knowledge regarding an alleged memory slot defect. These ex-
19 employee allegations cannot provide the particularity required by Rule 9(b). *Zucco*, 552 F.3d at
20 996.

21 This Court expressly held that generalized allegations of exclusive knowledge and active
22 concealment are insufficient to meet Rule 9(b). *Hovsepien*, 2009 U.S. Dist. LEXIS 117562, at
23 *10. Generalized allegations are all that these ex-employee statements provide.

24 **Internal Articles.** As stated above, the allegations regarding Apple’s purported internal
25 articles suggest, at best, that some articles might exist. They do not allege any other details
26 regarding these purported articles: their contents, who wrote them, who received them, and when
27 they were written. The allegations are not pled with any detail whatsoever, much less the detail
28 required by Rule 9(b) to allege fraud.

1 In sum, Plaintiffs have not pled their UCL claim with particularity, and the claim should
2 be dismissed. This is the fourth time Plaintiffs have failed to sufficiently plead their claim,
3 conclusively establishing that any further amendment would be futile. The claim should be
4 dismissed with prejudice.

5 **II. PLAINTIFFS' UNJUST ENRICHMENT CLAIM FAILS**

6 The TAC's unjust enrichment allegations are the same as those in the SAC, making the
7 claim as fatally defective as it was in the SAC. First, "Under California law, a claim for unjust
8 enrichment cannot stand alone as an independent claim for relief." *Tietzworth*, 2009 U.S. Dist.
9 LEXIS 98532, at *42-43 (citing *Jogani v. Superior Court*, 165 Cal. App. 4th 901, 911 (2008)).
10 Because Plaintiffs' other claims fail, their unjust enrichment claim fails as well. *See Berenblat II*,
11 2010 U.S. Dist. LEXIS 46052, at *29. Second, because Plaintiffs' computers functioned exactly
12 as warranted during any applicable warranty period, none of Apple's alleged actions were unjust
13 or inequitable. *Cf. Daugherty*, 144 Cal. App. 4th at 839 ("[T]he failure to disclose a defect that
14 might, or might not, shorten the effective life span of an automobile part that functions precisely
15 as warranted throughout the term of its express warranty cannot be characterized as causing a
16 substantial injury to consumers, and accordingly does not constitute an unfair practice under the
17 UCL.").

18 Plaintiffs have not attempted to remedy the defects that led to the previous dismissals of
19 their unjust enrichment claim. The claim should be dismissed with prejudice.

20 **CONCLUSION**

21 As was true in their three prior complaints, Plaintiffs do not dispute that their computers
22 functioned properly for the term of all applicable warranties. Accordingly, Plaintiffs' claims are
23 barred by *Daugherty* and by the decisions of this Court. For the reasons stated herein, Plaintiffs'
24 Third Amended Complaint should be dismissed with prejudice.

25 //

26 //

27 //

28 //

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Dated: June 28, 2010

PENELOPE A. PREVOLOS
ANDREW D. MUHLBACH
ALEXEI KLESTOFF
MORRISON & FOERSTER LLP

By: /s/ Penelope A. Prevolos
Penelope A. Prevolos

Attorneys for Defendant
APPLE INC.