

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

E-Filed 10/13/2009

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

RENEE TIETSWORTH, SUZANNE REBRO, and
SONDRA SIMPSON, on Behalf of Themselves and
All Others Similarly Situated,

Plaintiffs,

v.

SEARS, ROEBUCK AND CO., and WHIRLPOOL
CORPORATION,

Defendants.

Case Number 5:09-CV-00288 JF (HRL)

**ORDER GRANTING MOTION TO
DISMISS**

Re: Docket No. 32

Defendants Whirlpool Corporation (“Whirlpool”) and Sears, Roebuck and Co. (“Sears”) move to dismiss the First Amended Complaint (“FAC”) filed by Plaintiffs Renee Tietsworth (“Tietsworth”), Suzanne Rebro (“Rebro”) and Sondra Simpson (“Simpson”), on behalf of themselves and a putative class of similarly situated consumers. For the reasons discussed below, the motion will be granted, with leave to amend.

I. BACKGROUND

On December 22, 2008, Tietsworth filed suit in state court on behalf of herself and all others similarly situated, alleging that Defendants engaged in fraudulent concealment and nondisclosure, breached express and implied warranties, violated the California Consumers Legal Remedies Act (“CLRA”) and California Unfair Competition Law (“UCL”), and unjustly

1 enriched themselves at the expense of Tietsworth and the putative class. On January 22, 2009,
2 Defendants removed the action to this Court. One week later, Defendants moved to dismiss the
3 action pursuant to Federal Rules of Civil Procedure 9(b) and 12(b)(6). On May 14, 2009, this
4 Court dismissed the action with leave to amend.

5 On June 15, 2009, Plaintiffs filed the operative FAC, adding two individual plaintiffs,
6 Rebro and Simpson, re-alleging Tietsworth's original claims and adding a new claim under the
7 Magnuson-Moss Warranty Act ("MMWA"). 15 U.S.C. 2301 et seq. On July 15, 2009,
8 Defendants filed the instant motion to dismiss.

9 Plaintiffs allege that at all relevant times, Whirlpool manufactured top-loading Kenmore
10 Elite Oasis automatic washing machines ("the Machines") and Sears marketed, advertised,
11 distributed, warranted, and offered repair services for the Machines. FAC ¶¶ 6, 7. Each
12 individual plaintiff claims to have bought new an Oasis washer from Sears between May 2006
13 and January 2007; Plaintiffs allege that thousands of the Machines contain a defect that causes
14 them to "stop in mid-cycle and display a variety of 'F' error codes." FAC ¶¶ 22, 41, 46, 57, 64.¹
15 Plaintiffs claim that these electrical problems began within the first year after they purchased
16 their washers. *Id.* ¶¶ 42, 50, 60. Plaintiffs also allege that the "F" error codes are the result of
17 defective Electronic Control Boards and that the defect forces users to restart the Machines to
18 complete a single load of laundry. *Id.* ¶¶ 22, 111.

19 Plaintiffs claim that the alleged defects in the Electronic Control Boards belie Sears'
20 representation that "the Machines were and are the highest quality, top-of-the-line washers that
21 allow consumers to do laundry in a more convenient, faster and efficient manner and enable
22 consumers to save water, energy and time." *Id.* ¶ 11. They allege a series of misrepresentations
23 by Defendants, including: statements contained in stickers and informational placards on floor
24 models of the Machines in Sears' showrooms, that the Machines would use 47% less water and
25 53% less energy and would lower water and energy bills, *id.* ¶¶ 13-14; statements in the owner's

26
27 ¹ Plaintiffs claim that thousands of other Machine owners have experienced similar
28 problems with the Electronic Control Boards and refer to selected complaints from on-line
consumer forums.

1 manual that “[y]our new Kenmore product is designed and manufactured for years of dependable
2 operation” and that the Machine has features that “increase the ease of use and improve wash
3 performance,” including but not limited to, an electronic panel that is “easy to use,” *id.* ¶14; and
4 statements made in an extensive advertising and promotional campaign that repeated Defendants
5 representations with respect to the greater efficiency and durability of the Machines. *Id.* ¶¶ 13-
6 14, 19.

7 Plaintiffs allege that Defendants’ statements “relate directly to the functioning and
8 performance of the Machine’s Electronic Control Board because the Electronic Control Board
9 controls the laundry cycles, the water levels and spin speed.” *Id.* ¶ 15. They claim that a
10 functioning Electronic Control Board is necessary to operate the Machine in a manner that saves
11 energy and water and finishes loads of laundry as advertised. They argue that Defendants had a
12 duty to disclose the defect in the Electronic Control Board based on their alleged exclusive
13 knowledge of the defect.² *Id.* ¶¶ 25, 31, 40, 109-10. Plaintiffs also claim that Defendants’ failure
14 to disclose the defect is material in that they would not have purchased or would have paid
15 significantly less for their Machines had the defect been disclosed. *Id.* ¶¶ 28-29, 45, 56, 113.
16 Simpson alleges that she specifically asked a Sears agent about any potential problems with the
17 Electronic Control Board and that the agent failed to disclose the alleged defect. *Id.* ¶ 58.

18 Tietsworth alleges she first experienced an error code problem approximately eighteen
19 months after the purchase of her machine and that she contacted Sears in June 2008. *Id.* ¶¶ 41,
20 42. She claims that Sears informed her that “she could either purchase an extended warranty for
21 approximately \$218 or have someone come out to repair the Machine” at a cost of \$70, a
22 technician fee that did not include the cost of repair. *Id.* ¶ 43. She does not allege that she
23 incurred any actual expenses, *id.* ¶¶41-45, nor does she allege that she asked Sears to repair or
24

25 ² Plaintiffs assert that “Machines equipped with the Electronic Control Boards pose a
26 serious personal safety risk, as the defective boards have led to the Machines spinning out of
27 control and literally exploding on a number of occasions...causing the heavy metal lid to detach
28 and fly across the laundry room. . .causing severe property damage and threatening very serious
bodily injury.” FAC ¶ 26. It is not alleged that any named Plaintiffs have witnessed this or have
been harmed by such an occurrence.

1 replace her washer at no cost. *Id.*

2 Rebro alleges that she purchased her washer in May 2006 and that she began
3 experiencing Electronic Control Board problems “within the first months of purchasing the
4 Machine.” *Id.* ¶¶ 46, 50. She claims that the Sears salesperson assured her that the Machine
5 would save water, could handle very large loads, and was the best in its class. *Id.* ¶ 47. She
6 alleges that she contacted Sears during the warranty period regarding the error code problems,
7 and that a Sears representative told her that the Machine did not need service and instructed her
8 to lower the spin speed, which did not solve the problem. Rebro does not claim to have asked for
9 a replacement or repair at that time.

10 According to the FAC , a Sears representative “later told [Rebro] that these problems
11 were caused by the Electronic Control Board.” The FAC does not specify when “later” was or if
12 it was within the warranty period. Rebro claims that she had her washer serviced in November
13 2008 and that at that time a Sears repair person admitted that the Board was defective. The FAC
14 also alleges that the repair person told Rebro that it would cost \$383.94 to replace the defective
15 Board and that she thereafter attempted to find the part at a lower price on the Internet. *Id.* ¶ 51.
16 Later, when she could not find the part, she called Sears. One representative allegedly told Rebro
17 that the part was on recall, but another said that this information was incorrect and that the cost
18 of repair would be approximately \$400, plus another \$200 for an additional one-year warranty.
19 Rebro alleges that after she complained about the expense, Sears offered her a “special” for \$214,
20 which would include parts, labor and a one-year limited “Service Smart Protection Agreement.”
21 *Id.* ¶ 52. Finally, Rebro claims that she continued to experience similar problems with her new
22 Electronic Control Board. *Id.* ¶ 53.

23 Simpson alleges that she purchased her Machine in January 2007 and that she began
24 experiencing error code problems in July 2007. *Id.* ¶¶ 57, 60. She claims that at the time of the
25 purchase she asked about potential problems with the Electronic Control Boards and that a
26 “Sears agent specifically told her she could reasonably expect the Machine equipped with the
27 Electronic Control Board to last for at least eight years.” *Id.* ¶ 58. She does not allege that the
28 salesperson promised that the Electronic Control Board itself would function properly for that

1 period of time. She states that a service technician came to her home on three separate occasions
2 to service her Machine and that the technician did not correct the problem and refused to replace
3 the defective Board. *Id.* ¶ 61. Simpson alleges that it was only when her Machine failed shortly
4 after expiration of the warranty period that Sears admitted that the Electronic Control Board was
5 defective and charged her \$320 for an out-of-warranty repair. *Id.* ¶ 62.

6 Plaintiffs claim that “Sears represented that the Machines’ control boards would perform
7 free of defects for a period of years in its written materials, including the owner’s manual.” *Id.*
8 ¶¶ 27, 98, 99, 118, 120. However, the actual terms of the one-year limited warranty, which
9 properly may be considered under the incorporation by reference doctrine, *see Branch v. Tunnell*,
10 14 F.3d 449, 454 (9th Cir. 1994), *cert. denied*, overruled on other grounds by *Galbraith v. City of*
11 *Santa Clara*, 307 F.3d 1119 (9th Cir. 2002), provide that if the “appliance fails due to a defect in
12 material or workmanship within one year from the date of purchase” the purchaser is entitled to
13 “arrange for free repair,” *see* Affidavit of William Griego, Ex. A, or have the Machine “replaced
14 if repair proves impossible.” *See id.*, Ex. B.

15 Finally, Plaintiffs allege that, in April 2009, Defendants attempted to engage in a
16 purported “secret warranty program” by sending letters to some, but not all, affected consumers,
17 offering a free “upgraded control board” that would improve performance and adjust for balance
18 if a response to the offer was received “within 90 days of receipt.” FAC ¶¶ 39, 54. The letter
19 makes no admission of any defect in the Electronic Control Boards.

20 II. LEGAL STANDARD

21 A complaint may be dismissed for failure to state a claim upon which relief may be
22 granted if a plaintiff fails to proffer “enough facts to state a claim to relief that is plausible on its
23 face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Allegations of material fact must
24 be taken as true and construed in the light most favorable to the nonmoving party. *Pareto v.*
25 *FDIC*, 139 F.3d 696, 699 (9th Cir. 1998), *see also Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336,
26 337-38 (9th Cir. 1997). However, the Court need not accept as true allegations that are
27 conclusory, unwarranted deductions of fact, or unreasonable inferences. *See Sprewell v. Golden*
28 *State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001); *see also Twombly*, 550 U.S. at 561 (“a wholly

1 conclusory statement of [a] claim” will not survive motion to dismiss). Leave to amend should
2 be granted unless it is clear that the complaint’s deficiencies cannot be cured by amendment.
3 *Lucas v. Dep’t of Corr.*, 66 F. 3d 245, 248 (9th Cir. 1995).

4 III. DISCUSSION

5 Although their claims arise under state law, Plaintiffs' allegations are subject to the
6 pleading requirements of the Federal Rules. Accordingly, claims alleging fraud are subject to the
7 heightened pleading requirements of Fed. R. Civ. P. 9(b). *See Vess v. Ciba-Geigy Corp. USA*,
8 317 F.3d 1097, 1103-04 (9th Cir. 2003) (if “the claim is said to be “grounded in fraud” or to
9 “sound in fraud,” [then] the pleading of that claim as a whole must satisfy the particularity
10 requirement of Rule 9(b).”); *Kaplan v. Rose*, 49 F.3d 1363, 1370 (9th Cir.1994) (claims based in
11 fraud “must state precisely the time, place, and nature of the misleading statements,
12 misrepresentations, and specific acts of fraud.”).

13 A. Fraudulent Concealment and Nondisclosure

14 To establish a claim for fraudulent concealment, a plaintiff must allege that: (1) the
15 defendant concealed or suppressed a material fact, (2) the defendant was under a duty to disclose
16 the fact to the plaintiff, (3) the defendant intentionally concealed or suppressed the fact with the
17 intent to defraud the plaintiff, (4) the plaintiff was unaware of the fact and would not have acted
18 as she did if she had known of the concealed or suppressed fact, and (5) as a result of the
19 concealment or suppression of the fact, the plaintiff sustained damage. *Hahn v. Mirda*, 54 Cal.
20 Rptr. 3d 527, 532 (Cal. Ct. App. 2007).

21 The principal element of fraudulent concealment at issue here is whether Plaintiffs have
22 pled with sufficient particularity that Defendants had a duty of disclosure with respect to the
23 allegedly defective Electronic Control Boards. Plaintiffs argue that Defendants had such a duty
24 because Defendants allegedly “made partial disclosures about the Machines,” were in a “superior
25 position to know the truth about the Machines,” and “actively concealed” the claimed defect in
26 the Electronic Control Boards. FAC ¶ 110. Plaintiffs also allege that Defendants had a duty to
27 disclose because the machines “pose a serious safety hazard.” *Id.* ¶ 109. As was the case with
28 Tietsworth’s original complaint, these arguments are not persuasive.

1 It is true that a duty to disclose exists if a plaintiff can demonstrate that defendant has
2 made a partial representation about a product that is related to an allegedly fraudulent omission.
3 *LiMandri v. Judkins*, 52 Cal. App. 4th 326, 336 (1997). In this case, Plaintiffs point to numerous
4 factual statements in the owner’s manual, including statements that the Machines were “designed
5 and manufactured for years of dependable operation,” and that they would “conserve resources
6 and also lower[] your water and energy bills.” FAC ¶ 14. However, there is no allegation at all,
7 let alone an allegation with Rule 9 specificity, that Defendants made any representations about
8 the allegedly defective Electronic Control Boards.³

9 Nor can Plaintiffs establish a duty by pleading, in purely conclusory fashion, that
10 Defendants were in a “superior position to know the truth about the Machines” and “actively
11 concealed” the defect. FAC ¶ 11. In *Oestreicher v. Alienware Corp.*, 544 F. Supp. 2d 964, 974
12 (N.D. Cal. 2008), the court concluded that the plaintiff had failed to plead with particularity facts
13 that would establish that defendants had a duty to disclose. The court held that a determination
14 in plaintiffs’ favor, given plaintiffs’ general allegations of “exclusive knowledge as the
15 manufacturer” and active concealment of a defect, would mean that any unsatisfied customer
16 could make a similar claim every time a product malfunctioned. *Id.* at 974. As was the case in
17 *Oestreicher*, the FAC does not plead any specific facts to support the claim.⁴

19 ³ Plaintiffs allege that Simpson asked a Sears sales representative about potential
20 problems with the Electronic Control Board and that the representative “specifically told her she
21 could reasonably expect the Machine equipped with the Electronic Control Board to last for at
22 least eight years.” FAC ¶ 58. This specific inquiry related to the Electronic Control Boards only
23 is alleged to have been made by Simpson. Moreover, by its own terms, the salesman’s assurance
24 was given with respect to the long-lasting quality of the “Machine equipped with the Electronic
25 Control Board,” not the Electronic Control Board itself. A representation made by a single
26 salesman employed by Sears is not the equivalent of a misrepresentation by Whirlpool and Sears
27 for the purpose of creating an affirmative duty to disclose as to all potential purchasers.

28 ⁴ Plaintiffs also argue that their allegations with respect to Defendants’ “secret warranty
program” support their position that Defendants had exclusive knowledge and actively concealed
the allegedly defective Electronic Control Boards, but as is explained in greater detail later in this
order, Defendants’ policy of providing a free upgrade of the Electronic Control Boards to
consumers could serve “many legitimate business purposes” and does not in and of itself bolster
Plaintiffs’ fraudulent concealment claim. *Stearns v. Select Comfort Retail Corp.*, No. 08-2746,

1 Plaintiffs next allege that they have pled adequately the existence of a safety defect that
2 gives rise to a duty to disclose. The FAC alleges that:

3 [T]he Machines equipped with the Electronic Control Boards pose a serious personal
4 safety risk, as the defective boards have led to the Machines spinning out of control and
5 literally exploding on a number of occasions...causing the heavy metal lid to detach and
fly across the room. . .causing severe property damage and threatening very serious bodily
injury. FAC ¶26.

6 There is no obvious nexus, however, between this allegation and the specific defect in the
7 Electronic Control Board asserted continuously throughout the FAC. According to Plaintiffs, the
8 defect in the Board causes the Machines to shut down, results in “F” error codes, and forces
9 consumers to restart their loads, sometimes repeatedly. There are no factual allegations that any
10 named Plaintiff or any identifiable member of the putative class actually experienced a
11 malfunction involving the machine “spinning out of control.” Under these circumstances,
12 Plaintiffs lack standing to pursue a claim based on the nondisclosure of the alleged safety defect.
13 *In re Apple & AT & TM Antitrust Litig.*, 596 F. Supp. 2d 1288, 1309 (N.D. Cal. 2008), quoting
14 *Lewis v. Casey*, 518 U.S. 343, 347 (1996) (concluding that “named plaintiffs who represent a
15 class must allege and show that they personally have been injured, not that injury has been
16 suffered by other, unidentified members of the class to which they belong and which they purport
17 to represent.”)

18 Finally, Plaintiffs claim that Defendants maintain a “secret warranty program.” FAC ¶¶
19 39, 40. This Court was presented with similar allegations in *Stearns v. Comfort Retail Corp.*,
20 No. 08-2746 JF, 2009 WL 1635931, at *9-10 (N.D. Cal. June 5, 2009). In *Stearns*, the plaintiffs
21 claimed that the defendants actively sought to conceal the fact that their “Sleep Number” beds
22 grew mold, and that they did so by providing refunds of the purchase price to any purchaser who
23 complained about a “Sleep Number” bed. The Court concluded that “the fact that Select
24 Comfort offered a full refund does not support the theory that it had a plan to deceive Plaintiffs
25 by somehow placating Plaintiffs and other potential litigants,” and noting that return of a
26 defective product “has been recognized by courts as a standard business practice, serving many

27 _____
28 2009 WL 1635931, at *9-10 (N.D. Cal. June 5, 2009).

1 legitimate business purposes.” *Id.* at 9. The Court held further that allegations with respect to
2 implementation of a new design or other remedial action were immaterial for the purpose of
3 establishing the elements of a fraudulent concealment claim. *Id.* at 9, citing Fed. R. Evid. 407.
4 Similarly, Plaintiffs’ allegation in this case that Defendants offered free upgrades of the
5 Electronic Control Boards does not support a permissible inference that Defendants actively
6 concealed the alleged defect. As in *Stearns*, Defendants’ alleged replacement policy properly is
7 characterized as a standard business practice serving “many legitimate business purposes.” *Id.* at
8 9. As Rule 407 suggests, to hold otherwise would create a perverse incentive for manufacturers
9 not to provide consumers with refunds or upgrades when defects exist.

10 **B. Unfair Competition Law (UCL)**

11 As a threshold matter, the parties disagree with respect to whether Plaintiffs’ UCL and
12 CLRA claims are subject to the heightened pleading requirements of Rule 9(b). This issue was
13 addressed by the Ninth Circuit in *Kearns v. Ford Motor Co.*, 567 F.3d 1120 (9th Cir. 2009),
14 which reiterated that “Rule 9(b)’s heightened pleading standards apply to claims for violations of
15 the CLRA and UCL” where such claims are based on a fraudulent course of conduct. *Id.* at
16 1124, citing *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1102-05 (9th Cir. 2003). Although
17 Plaintiffs argue that their UCL allegations do not rely upon allegations of fraudulent conduct, it
18 appears that their claims are entirely dependent upon allegations that Defendants made
19 misrepresentations, failed to disclose material facts, and concealed known information regarding
20 the allegedly defective Electronic Control Boards. *See Kearns*, 567 F.3d at 1126 (concluding
21 that nondisclosure is a claim for misrepresentation in a cause of action for fraud and that it must
22 be pled with particularity as such). Because Plaintiffs’ UCL claims are predicated on
23 misrepresentations and omissions that are “grounded in fraud,” those claims are subject to the
24 heightened pleading requirements of Rule 9(b). *See Kearns*, 567 F.3d at 1124; *Vess*, 317 F.3d at
25 1103-04.

26 The UCL prohibits “any unlawful, unfair or fraudulent business act or practice and unfair,
27 deceptive, untrue or misleading advertising.” Cal. Civ. Code § 17200. Accordingly, “[a]n act
28 can be alleged to violate any or all of the three prongs of the UCL—unlawful, unfair, or

1 fraudulent.” *Berryman v. Merit Prop. Mgmt., Inc.*, 152 Cal. App. 4th 1544, 1554 (2007). For an
2 action based upon an allegedly unlawful business practice, the UCL “borrows violations of other
3 laws and treats them as unlawful practices that the unfair competition law makes independently
4 actionable.” *Cel-Tech Commc’ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 180
5 (1999). A UCL claim predicated on unfair business practices may be grounded upon a violation
6 of a statute, *see Freeman v. Time, Inc.*, 68 F.3d 285, 289 (9th Cir. 1995), or be a “standalone”
7 claim based on an alleged act that “violates established public policy or if it is immoral,
8 unethical, oppressive or unscrupulous and causes injury to consumers which outweighs its
9 benefits.” *McKell v. Wash. Mut., Inc.*, 142 Cal. App. 4th 1457, 1473 (2006). *See also Cel-Tech*,
10 20 Cal. 4th at 180 (“[A] practice may be deemed unfair even if not specifically proscribed by
11 some other law.”) Plaintiffs allege that Defendants violated the UCL by failing to comply with
12 California Civil Code §§ 1572, 1668, 1709, 1710, 1770(a)(2), 1770(a)(5), 1770(a)(7), 1770(a)(9),
13 1770(a)(19), § 17500 of the Business and Professions Code, the Song-Beverly Warranty Act and
14 the Magnuson-Moss Warranty Act. FAC ¶ 84.

15 **1. Unlawful Business Practices**

16 Plaintiffs claim that Defendants’ conduct violates California Civil Code Section § 1668,
17 which prohibits a party from contracting away liability “for his own fraud, or willful injury to the
18 person or property of another.” Cal. Civ. Code. § 1668. Plaintiffs point specifically to
19 Defendants’ disclaimer of implied warranties, which purports to limit any implied warranty to
20 one year or the shortest period allowed by law, with the sole remedy under the express warranty
21 being repair or replacement. Opp. Mot. at 11. Plaintiffs cite no authority holding that a
22 disclaimer limiting an implied warranty to the same time period as an express warranty or
23 limiting the consumer’s remedy to repair or replacement amounts to contracting away liability for
24 “fraud or willful injury.” The cases that Plaintiffs do cite are inapposite. *See Baker Pacific*
25 *Corp. v. Suttles* 220 Cal. App. 3d 1148, 1151, 1154 (1990) (invalidating release covering “all
26 risks in connection with potential exposure of asbestos” because the release concerned would
27 release Defendants from “fraud and intentional acts”); *Klein v. Asgrow See Co.*, 246 Cal. App. 2d
28 87, 100 (1966) (invalidating disclaimer of warranty where fraud existed). Plaintiffs thus cannot

1 rely on Section 1668 to support a violation of the UCL’s “unlawful” prong. *See Daugherty*, 51
2 Cal. Rptr. 3d at 128 n. 7 (rejecting UCL claim because the complaint failed to allege any facts
3 suggesting a violation of the underlying statutes).

4 Plaintiffs also base their UCL claim on California Civil Code Sections 1572, 1709, and
5 1710, arguing that Defendants “fraudulently concealed material information” or suppressed the
6 truth. Opp. Mot. At 10-11. As discussed above Plaintiffs have failed to allege the elements of
7 fraud with the particularity required by Rule 9(b). *See supra* III.A (explaining that Plaintiffs fail
8 to allege any factual support beyond a conclusory statement that “at all relevant times,
9 Defendants had exclusive possession and control of all facts necessary to know that the
10 Machines’ Electronic Boards were defective.” FAC ¶ 31.); *Fisher v. Paul Revere Ins. Group*, 55
11 Fed.Appx. 412, 414 (9th Cir. 2002).

12 Finally, Plaintiffs claim that Defendants have violated Section 17500 of California’s
13 Business and Professions Code by making misleading representations in informational placards
14 on the floor models of the Machines and in owners’ manuals. FAC ¶¶ 11-14. Plaintiffs argue
15 that statements that the Machines are “designed and manufactured for years of dependable
16 operation” and that the Machines “save you time by allowing you to do fewer, larger loads”
17 amount to “misdescriptions of specific or absolute characteristics of a product.” *Southland Sod*
18 *Farms v. Stover Seed Co.*, 108 F.3d 1134, 1145 (9th Cir. 1997) (claiming that turfgrass requires
19 “50% less mowing” is a specific and measurable claim.) However, these alleged
20 “misdescriptions” are not statements about “specific or absolute characteristics of a product,” but
21 properly are considered non-actionable puffery. *See Anunziato v. eMachines Inc.*, 402 F. Supp.
22 2d 1133, 1139 (C.D. Cal. 2005) (holding that the representations concerning the “outstanding
23 quality, reliability, and performance” of a product were non-actionable puffery.)⁵

24
25 ⁵Other such statements include the following: that the Machines are of the “highest
26 quality,” FAC ¶ 11; “top-of-the-line,” *id.* ¶¶ 11, 12, 58; easy to use, *id.* ¶¶ 11, 41; better at
27 cleaning clothes than other unspecified washers, *id.* ¶¶ 11, 41; or the “best” in their class, *id.* ¶
28 47. The closest Plaintiffs come to identifying a factually verifiable statement is Defendants’
alleged claim that the Machines “would save the consumer energy and water (purportedly using
at least 47% less water and 53% less energy). *Id.* ¶ 11. Ultimately, however, this statement also

1 **2. Unfair Business Practice**

2 “An act or practice is unfair if the consumer injury is substantial, is not outweighed by
3 any countervailing benefit to consumers or to competition, and is not an injury the consumers
4 themselves could reasonably have avoided.” *Daugherty v. Am. Honda Motor Co.*, 51 Cal. Rptr.
5 118, 129 (Cal. Ct. App. 2006). Plaintiffs must allege facts to support all three elements of a UCL
6 unfair business practice claim. *Id.* Plaintiffs do allege with specificity that the Machines are
7 substantially certain to fail within the useful life of the product - and often within the first year of
8 use - despite the fact that the retail price of the Machines is \$1,000. Plaintiffs also allege that as a
9 result of known but undisclosed defects in the Machines, consumers have incurred costly service
10 expenses. FAC ¶¶ 32, 34, 52, 62. However, Plaintiffs still have not pled adequately the second
11 and third elements of their claim. Instead, they allege that there cannot be a benefit to consumers
12 when a manufacturer is permitted knowingly to market and sell a defective product. This
13 argument is circular. Plaintiffs also fail to allege that they could not reasonably have avoided
14 their claimed injuries, for example by purchasing an extended warranty. *Daugherty*, 51 Cal.
15 Rptr. 3d at 129.

16 **3. Fraudulent Business Practices**

17 “Unlike a common law fraud claim, a UCL fraud claim requires no proof that the plaintiff
18 was actually deceived.” *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1025-26 (9th Cir.
19 2008), citing *Daugherty*, 144 Cal.App.4th at 838. “Instead, the plaintiff must produce evidence
20 showing “a likelihood of confounding an appreciable number of reasonably prudent purchasers
21 exercising ordinary care.” *Id.* at 1026, citing *Brockey v. Moore*, 107 Cal.App.4th 86, 99 (2003).
22 Accordingly, Plaintiffs must allege with specificity that Defendants’ alleged misrepresentations:

23 _____
24 amounts to puffery, as the statement does not indicate how much water or energy should be
25 consumed by the Machine and makes no verifiable comparison to any identifiable competitive
26 machine or model. Moreover, Plaintiffs do not allege that the Machines do not save water or
27 energy while functioning. They claim only that when the Electronic Control Boards malfunction,
28 consumers are forced to restart the Machines, resulting in the loss of any savings. As Defendants
suggest, if this allegation were permitted to substantiate a claim of misrepresentation, virtually
any product malfunction could form the basis of a claim of fraudulent misrepresentation. Mot. to
Dismiss at 9.

1) were relied upon by the named plaintiffs; 2) were material; 3) influenced the named plaintiffs' decisions to purchase the defective Machines; and 4) were likely to deceive members of the public. *See In re Tobacco II Cases*, 46 Cal. 4th 298, 326-28 (2009).

To the extent that Plaintiffs base their claim on Defendants' alleged failure to disclose a known defect in the Machines, a mere failure to disclose a latent defect does not constitute a fraudulent business practice. For example, in *Daugherty*, the court found that without a duty to disclose a particular fact, it is not likely that such a failure would deceive anyone within the meaning of the UCL. *Daugherty*, 51 Cal. Rptr. 3d at 128 (rejecting plaintiffs argument that Honda's failure to disclose a defect in the engine at the time of sale and failure to give proper notice of the potential for oil leaks were "likely to deceive those customers into believing that no such defect exists.") As discussed previously, Defendants owed no affirmative duty to Plaintiffs to disclose any alleged defect with the Electronic Control Boards, as Defendants did not make any misrepresentations regarding this component of the Machines.

As to the representations that Defendants did make, for example that the Machines were "designed, manufactured and tested for years of dependable operations," such representations are mere puffery, *see supra* III.B.1, and they as a matter of law could not deceive a reasonable consumer. Moreover, the alleged misrepresentations are not related directly to the Electronic Control Boards.

C. California Consumers Legal Remedies Act ("CLRA")

Plaintiffs allege that Defendants violated Civil Code Sections 1770(a)(2), (5), (7), (9) and (19) by misrepresenting information related to the Machines, omitting information in connection with the sale of the Machines, and inserting an unconscionable provision in the express warranties. FAC ¶¶ 165-185.

1. CLRA Claim for Misrepresentation

The CLRA proscribes active misrepresentations about the standard, quality, or grade of goods. *Morgan v. Harmonix Music Sys., Inc.*, No. C08-5211, 2009 WL 2031765, at *3 (N.D.Cal. July 07, 2009), citing *Outboard Marine Corp. v. Superior Court*, 52 Cal.App.3d 30, 36 (1972)). Plaintiffs fail to allege sufficient facts to support a CLRA claim for misrepresentation

1 because, as discussed above, alleged representations pled in the FAC are either “puffery” or do
2 not relate to the Machine’s allegedly defective Electronic Control Boards. *See* III.A, B.
3 (providing a more detailed analysis of why Plaintiffs’ claims of misrepresentation are mere
4 puffery or unrelated to the alleged defective Electronic Control Board); *see also Berenblat v.*
5 *Apple, Inc.*, No. 09-CV-01649-JF, 2009 WL 2591366, at *6 (N.D. Cal. Aug. 21, 2009)
6 (dismissing CLRA claim where the “complaint does not allege that Apple made any specific
7 representation with respect to” the alleged defect).

8 **2. CLRA Claim for Omissions**

9 For an alleged omission to be actionable under the CLRA, “the omission must be contrary
10 to a representation actually made by the defendant, or an omission of a fact the defendant was
11 obliged to disclose.” *Daugherty*, 144 Cal.App.4th at 835; *see also Bardin*, 136 Cal.App.4th at
12 1276. Although Plaintiffs claim that Defendants made many affirmative representations,
13 including that the Machines necessitate less water and energy and can accommodate larger loads
14 of laundry, Plaintiffs’ failure to allege an actionable misrepresentation or omission related to the
15 Electronic Control Board defeats their CLRA claim for omissions. *See Hoey v. Sony Elec., Inc.*,
16 515 F. Supp 2d 1099, 1103 (N.D. Cal. 2007) (dismissing CLRA claims where the only alleged
17 statements were that “Sony represented and warranted to Plaintiffs and all Class members that
18 the Affected Computers were free from defects and that they were of merchantable quality and
19 workmanship, as evidenced by Sony’s express warranty.”); *Daugherty v. Am. Honda Motor Co.*,
20 51 Cal. Rptr. 3d 118, 127 (Cal. Ct. App. 2006); Cal. Civ. Code. §1770(7).

21 Plaintiffs’ argument that mere omissions, absent some affirmative representation or duty
22 to disclose, are actionable under CLRA is unpersuasive. Although *Outboard Marine Corp. v.*
23 *Superior Court*, 124 Cal. Rptr. 852 (Cal. Ct. App. 1975) arguably supports Plaintiffs’ legal
24 position, *Daugherty* quite clearly holds to the contrary. *See Daugherty*, 51 Cal. Rptr. 3d at 125
25 (clarifying that *Outboard Marine* is good law, but that it is so because it holds that a
26 representation of fact that “works a concealment of the true fact” is required for a CLRA claim of
27 omission).

28 **3. Unconscionable warranty provision**

1 “Unconscionability has both a procedural and a substantive element.” *Aron v. U-Haul*
2 *Co. of California*, 143 Cal.App.4th 796, 808, 49 Cal.Rptr.3d 555 (2006), citing *Armendariz v.*
3 *Foundation Health Psychcare Services, Inc.* 24 Cal.4th 83, 114, 99 Cal.Rptr.2d 745, 6 P.3d 669
4 (2000). The procedural element of unconscionability focuses on two factors: oppression and
5 surprise. *Id.* (internal citation omitted). Oppression arises from an inequality of bargaining
6 power which results in no real negotiation and an absence of meaningful choice. *Id.* (internal
7 quotation and citation omitted). Surprise involves the extent to which the supposedly
8 agreed-upon terms of the bargain are hidden in a prolix printed form drafted by the party seeking
9 to enforce the disputed terms. *Id.* (internal quotation and citation omitted). The substantive
10 element of unconscionability focuses on the actual terms of the agreement and evaluates whether
11 they create overly harsh or one-sided results as to shock the conscience. *Id.* (internal quotation
12 and citation omitted).

13 Plaintiffs contend that Defendants’ warranties are procedurally and substantively
14 unconscionable because Defendants limited the warranties and actively concealed a known
15 defect. Opp. Mot.at 18:1-8. However, “any claim of oppression may be defeated if the
16 complaining party had reasonably available alternative sources of supply from which to obtain
17 the desired goods or services free of the terms claimed to be unconscionable.” *Dean Witter*
18 *Reynolds, Inc. v. Superior Court*, 211 Cal. App. 3d 758, 768 (1989). Plaintiffs fail to allege facts
19 demonstrating that there were no alternative manufacturers of washers or that they were surprised
20 by the terms of the warranty.

21 As was the case with Tietsworth’s original complaint, the FAC fails to state a claim of
22 oppression because it fails to allege the absence of an “available alternative source of supply
23 from which to obtain the desired goods or services free of the terms claimed to be
24 unconscionable.” *Dean Witter Reynolds, Inc. v. Superior Court*, 211 Cal. App.3d 758, 768
25 (1989). Plaintiffs argue that any material alternative product or choice was curtailed or
26 eliminated by the suggestions of Sears’ sales representatives that Defendants’ Machines were
27 “the best” and superior to other washers. Opp. Mot. At 18, citing FAC ¶ 47. However, far from
28 showing the absence of alternatives, the alleged statements highlight the fact that other machines

1 were available to Plaintiffs when they selected Defendants’ product. *Aron v. U-Haul Co. of Cal.*,
2 49 Cal. Rptr. 3d 555, 564 (Cal. Ct. App. 2007) (concluding that “any claim of oppression may be
3 defeated if the complaining party has a reasonably available source of supply from which to
4 obtain desired goods or services free of the terms claimed to be unconscionable.”).

5 Plaintiffs also allege that Defendants’ warranties are procedurally unconscionable because
6 the terms of the warranties were disclosed not at the time of purchase but rather at the time of
7 delivery. FAC ¶ 17. Plaintiffs claim that this distinguishes their case from *Aron*. 143 Cal. App.
8 4th at 809. While Plaintiffs do allege that they were not informed of the language of the warranty
9 until the Machines were delivered, they also admit that they were provided with a ninety day
10 period in which to return the Machines “for any reason.” There is no allegation that the terms of
11 the warranty were hidden or unclear to Plaintiffs when the Machines were delivered.

12 Defendants also point out that Plaintiffs have failed to plead which terms of the
13 warranties are unconscionable. Mot. to Dismiss at 22, n. 8, citing *See Nordberg v. Trilegiant*
14 *Corp.*, 445 F. Supp. 2d 1082, 1099 (N.D. Cal. 2006) (dismissing CLRA claim where the
15 plaintiffs did “not give this court any insight as to the precise language of the provisions
16 themselves or why they should be deemed unconscionable.”). This argument is well-taken.
17 While Plaintiffs allege that Defendants attempted, “to limit the express warranties in a manner
18 that would exclude coverage of the defective Electronic Control Board . . .and any such effort to
19 disclaim or otherwise limit liability for the defective Electronic Control Boards,” FAC ¶¶ 160,
20 177, they do not allege with specificity how this purpose was accomplished.

21 **4. CLRA claim against Whirlpool**

22 Defendants contend that the CLRA requires each plaintiff to plead and prove that he or
23 she entered into an agreement or transaction with the defendants that resulted in a sale or lease of
24 goods or services, Cal. Civ. Code §§ 1761(e), 1700(a), 1780(c), 1782(a)(2), and that because
25 Whirlpool did not engage directly in a “transaction” with Plaintiffs, it cannot be liable to
26 Plaintiffs under CLRA. *See* Cal. Civ. Code § 1780(a). Plaintiffs allege that Whirlpool and Sears
27 collectively provided written materials, including the express warranty, to Plaintiffs and other
28 putative class members. FAC ¶¶ 6, 7, 21. Plaintiffs also assert that Whirlpool acted in concert

1 with Sears to develop the written materials at issue. *Id.* However, Plaintiffs cite no authority
2 suggesting that Whirlpool’s involvement made it part of the “transaction” within the meaning of
3 Cal. Civ. Code § 1761(e). Plaintiffs contend that the CLRA’s intent is to protect consumers from
4 material omissions by manufacturers and sellers, regardless of whether the consumer dealt
5 directly with the manufacturer or seller, *Chamberlan v. Ford*, 369 F.Supp.2d 1138, 1144 (N.D.
6 Cal. 2005), but the FAC does not allege adequately any actual misrepresentation or omission by
7 Whirlpool.

8 **D. Claims by Rebro and Simpson under the Song-Beverly Act**

9 To plead an action for breach of express warranty under California law, a plaintiff must
10 allege: (1) the exact terms of the warranty; (2) reasonable reliance thereon; and (3) a breach of
11 warranty that proximately caused plaintiff’s injury. *Williams v. Beechnut Nutrition Corp.*, 185
12 Cal. App.3d 135, 142 (1986). A plaintiff also must plead that she provided the defendant with
13 pre-suit notice of the breach. California Commercial Code § 2607.

14 **1. Rebro failed to provide Defendants with a reasonable opportunity 15 to cure**

16 Rebro claims that Defendants breached the one-year limited warranty when they failed to
17 repair her Machine after it allegedly malfunctioned during the warranty period. FAC ¶¶ 36, 121.
18 Although the reasonableness of the number of repair attempts is ordinarily a question of fact, “at
19 a minimum there must be more than one opportunity to fix the nonconformity.” *Robertson v.*
20 *Fleetwood Travel Trailers of Cal., Inc.*, 50 Cal. Rptr. 3d 731, 741 (Cal. Ct. App. 2006).
21 Although Rebro claims to have provided Defendants with two such opportunities, the second
22 instance allegedly consisted of one conversation with a “Sears representative” regarding Rebro’s
23 past washer problems occurring on an unspecified “later” date. FAC ¶ 50. Rebro does not allege
24 that this conversation took place during the one-year warranty period or even that she requested
25 repair of the machine.

26 **2. Defendants’ express warranty and the alleged latent defects**

27 Plaintiffs contend that their express warranty claim may be based on the presence of an
28 alleged latent defect in the Electronic Control Board existing at the time the Machines were sold.

1 According to Plaintiffs, the holdings in *Hicks v. Kaufmann & Broad Home Corp.*, 89 Cal. App.
2 4th 908 (2001) and *Hewlett-Packard v. Superior Court*, 83 Cal. Rptr. 3d 836 (2008) support their
3 argument that California law permits express-warranty claims based on latent product defects
4 even when the applicable express warranty excludes any coverage for such latent defects.
5 However, neither of these cases holds that a plaintiff may assert express-warranty claims for
6 latent defects under a warranty that by its express terms covers only defects that result in product
7 failure during the warranty period. *See Hewlett-Packard*, 83 Cal. Rptr. 3d at 836-43
8 (distinguishing itself from *Daugherty* and explaining that it need not determine the validity of the
9 claim for the purposes of determining the procedural issue of certifying a class); *Hicks*, 89 Cal.
10 App. 4th at 908-26. As this Court has held in a different context, if such a claim based upon
11 “latent defects” in products that are governed by an express warranty contract was recognized, it
12 would “eviscerate any limitations put in place by an express warranty.” *Hovsepian v. Apple, Inc.*,
13 Nos. 08-5788 2009 WL 2591445, *7 (Aug. 21, 2009), citing *Daugherty*, 144 Cal.App. 4th at
14 832; *see also Hoey*, 515 F. Supp. 2d at 1105.

15 **E. Implied Warranty under the Song-Beverly Act**

16 **1. Vertical Privity**

17 Vertical privity is a necessary element to an implied warranty claim. It is undisputed that
18 Rebro and Simpson lack vertical privity with Whirlpool. Plaintiffs contend that an exception to
19 the privity argument applies in this case because Plaintiffs relied on manufacturer advertisements
20 in purchasing their Machines. FAC ¶¶ 11, 16. Defendants argue persuasively, however, that this
21 exception applies only in the context of express warranties. *Blennis v. Hewlett-Packard Co.*, No.
22 C 07-00333 JF, 2008 WL 818526, *6 (N.D. Cal, Mar. 25, 2008), citing *Burr v. Sherwin Williams*
23 *Co.*, 42 Cal. 2d 682, 696 (1954) and *Chandler v. Chandler*, No. 96-1047 SI, 1997 WL 464827 at
24 *7 (N.D. Cal. 1997) (“vertical privity is a prerequisite in California for recovery on a breach of
25 implied warranty theory”).

26 **2. Implied Warranty of Merchantability**

27 “The mere manifestation of a defect by itself does not constitute a breach of the implied
28 warranty of merchantability. Instead, there must be a fundamental defect that renders the product

1 unfit for its ordinary purpose.” *Am. Suzuki Motor Corp. v. Super. Ct.*, 37 Cal.App.4th 1291,
2 1295 (Cal.Ct.App.1995). Plaintiffs fail to plead that their Machines are unfit for their ordinary
3 purpose of cleaning clothes. FAC ¶ 130. Plaintiffs allege many other things, including that their
4 Machines stop in mid-cycle and that they must be restarted, sometimes more than once, and that
5 they display “F” error messages. *Id.* ¶¶ 50, 60. However, Plaintiffs do not claim that they cannot
6 use their Machines at all or that they have been forced to replace their Machines with other
7 washers that are capable of washing clothes. *See Am. Suzuki Moto Corp.*, 37 Cal.App.4th at
8 1295.⁶

9 **F. Magnuson-Moss Warranty Act**

10 The FAC alleges that Defendants’ breach of the express warranty also constituted a
11 violation of the MMWA. FAC ¶¶ 140-160, 164. The MMWA provides a federal claim for relief
12 based upon certain state warranty claims. *Monticello v. Winnebago Indus. Inc.*, 369 F.Supp.2d
13 1350, 1356 (N.D. Ga. 2005). However, it does not expand consumers’ rights with respect to
14 such claims, and dismissal of the underlying state law claims requires the same disposition with
15 respect to an associated MMWA claim. *See id.*, *see also Clemens v. DaimlerChrysler Corp.*, 534
16 F.3d 1017, 1022 (9th Cir.2008) (“disposition of the state law warranty claims determines the
17 disposition of the Magnusson-Moss Act claims.”); *Daugherty v. Am. Honda Motor Co., Inc.*, 144
18 Cal.App.4th 824, 833, 51 Cal.Rptr.3d 118 (2006) (“the trial court correctly concluded that failure
19 to state a warranty claim under state law necessarily constituted a failure to state a claim under
20 Magnusson-Moss.”).

21 Plaintiffs also allege that Defendants’ failure to comply with Section 293.5 of the Code of
22 Federal Regulations (16 C.F.R. 293.5) gives rise to a claim under the MMWA. The regulatory
23

24 ⁶ Plaintiffs contend that the dismissal of Tietsworth’s original claim for breach of implied
25 warranty was incorrect in light of *Mexia v. Rinker Boat Co., Inc.*, 174 Cal. App. 4th 1297 (2009),
26 which held that an “implied warranty of merchantability may be breached by a latent defect
27 undiscoverable at the time of sale.” *Id.* at 1304-1305. While *Mexia* appears to be something of
28 an outlier, this Court need not determine whether *Mexia*’s holding changes its prior
determination, as Plaintiffs have failed to plead facts supporting a claim that their Machines no
longer are fit for their ordinary purpose of washing clothes.

1 language at issue provides that “[a] seller or manufacturer seller or manufacturer should advertise
2 that a product is warranted or guaranteed only if the seller or manufacturer, as the case may be,
3 promptly and fully performs its obligations under the warranty or guarantee.” 16 C.F.R. 293.5.
4 However, this Court need not decide whether an FTC regulation provides a separate basis for an
5 MMWA claim, as Plaintiffs have failed to allege a sufficient factual basis for their claim that
6 Defendants did not “promptly and fully perform [their] obligations’ under the warranty.” *See*
7 *supra* III.A.B.⁷

8 Plaintiffs also argue that they have alleged actionable independent violations of the
9 substantive provisions of the MMWA unrelated to their claims for relief under state law. The
10 MMWA requires that warrantors include certain disclosures “in simple and readily understood
11 language,” including “exceptions or exclusions from the terms of the warranty.” 15 U.S.C.
12 2302(a)(1)-(13); 15 U.S.C. 2302(a)(6). Plaintiffs’ Letter Brief at 2-3. The FAC alleges that
13 Defendants failed and refused to replace the Electronic Control Boards with non-defective parts
14 that conform to their written warranty. FAC ¶ 159. However, this factual allegation in and of
15 itself does not support an MMWA claim. In their present form, Plaintiffs’ pleadings contain only
16 a conclusory allegation that Defendants did not properly respond to complaints regarding the
17 Electronic Control Panels in breach of the promises contained in the warranty. “It is axiomatic
18 that the complaint may not be amended by briefs in opposition to a motion to dismiss.” *See Barbera*
19 *v. WMC Mortgage Corp.*, No. C 04-3738 (SBA), 2006 WL 167632, at *2 n.4 (N.D. Cal. Jan. 19,
20 2006) , quoting *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1107 (7th Cir. 1984).

21 For the same reason, Plaintiffs’ contention that Defendants violated 15 U.S.C. 2302(a)(9)
22 by failing to include “a brief, general description of the legal remedies available to the consumer”
23

24 ⁷ In response to the Court’s request for further briefing with respect to this issue,
25 Plaintiffs also argue that Defendants’ failure to comply with 16 C.F.R. 293.5 is a separate basis
26 for a UCL claim under the “unlawful prong.” California courts have determined that “a violation
27 of a federal law or regulation ‘may serve as a predicate for a [UCL] action.’” *Smith v. Wells*
28 *Fargo Bank, N.A.*, 135 Cal.App.4th 1463, 1480 (2005), citing *Roskind v. Morgan Stanley Dean*
Witter & Co. 80 Cal.App.4th 345, 352 (2000). Nonetheless, Plaintiffs’ factual allegations are
insufficient for the reasons discussed at length above.

1 in the express warranty is unpersuasive. Neither the FAC nor Plaintiffs’ papers contain any
2 factual allegations that would support this claimed violation.

3 Defendants argue additionally that Plaintiffs have failed to state an MMWA claim against
4 Whirlpool because Plaintiffs do not plead that they notified Whirlpool directly of the alleged
5 breach of warranty. The MMWA requires that a plaintiff provide a defendant with an
6 opportunity to cure the alleged breach, and the defendant itself must have refused directly to
7 provide a cure. *Lewis v. Mercedes-Benz. USA LLC, No. Civ. A. 1:03CV4000JOF*, 2004 WL
8 3756384 at *3-4 (N.D. GA Sept. 13, 2004). Plaintiffs contend that *Lewis* is distinguishable,
9 pointing out that in *Lewis* the written warranty stated specifically that written notice of any
10 defects had to be provided to Mercedes Benz USA LLC (as distinct from the local dealership).
11 *See Id.* Plaintiffs argue that the warranty in this case contains no such provision, and that in fact
12 the warranty directs the consumer to contact Sears in case of a defect or problem. FAC ¶ 36.
13 Defendants reply that the MMWA “itself” requires consumers to provide the manufacturer
14 directly with its own opportunity to cure “before they may seek any remedies for breach of
15 warranty under [the MMWA’s] provisions.” *See Lewis*, 2004 WL 3756384 at *3.

16 Plaintiffs allege that Sears and Whirlpool acted in concert with respect to the
17 manufacturing, design, distribution and repair of the defect at issue here. The Court concluded
18 previously that Plaintiff had failed to allege in more than conclusory terms that Whirlpool knew
19 of the alleged defect at the time of sale. *See contra, Radford v. Daimler Chrysler Corp.*, 168 F.
20 Supp. 2d 751, 754 (N.D. Ohio 2001) (finding MMWA’s opportunity to cure requirement was
21 met where plaintiff did sufficiently plead that defendant manufacturer knew of the allegedly
22 defective instrument panel at the time of sale).

23 **G. Unjust Enrichment**

24 Plaintiffs’ claim for unjust enrichment is premised on the same alleged course of conduct
25 that underlies their other claims. *See* FAC ¶ 186 (incorporating by reference previous
26 allegations). Under California law, a claim for unjust enrichment cannot stand alone as an
27 independent claim for relief. *See Jogani v. Superior Court*, 165 Cal. App. 4th 901, 911 (2008)
28 (“unjust enrichment is not a cause of action. Rather, it is a general principle underlying various

1 doctrines and remedies, including quasi-contract.”) (citation omitted). *See also Melchior v. New*
2 *Line Prods., Inc.*, 106 Cal. App. 4th 779, 793 (2003), quoting *Lauriedale Assocs., Ltd. v. Wilson*,
3 7 Cal. App. 4th 1439, 1448 (1992) (“there is no cause of action in California for unjust
4 enrichment. ‘The phrase “Unjust Enrichment” does not describe a theory of recovery, but an
5 effect: the result of a failure to make restitution under circumstances where it is equitable to do
6 so.”) Because Plaintiffs have yet to allege a viable claim for relief, their claim for unjust
7 enrichment also must be dismissed with leave to amend. *See Oestreicher*, 544 F. Supp. 2d at 975
8 (“since plaintiff’s fraud-based claims have been dismissed, plaintiff has no basis for its unjust
9 enrichment claim.”); *see also Sanders v. Apple Inc.*, No. C 08-1713, 2009 WL 150950, at *9
10 (N.D. Cal. Jan. 21, 2009) (“[unjust enrichment] claim will depend upon the viability of the
11 Plaintiffs’ other claims.”).

12 Defendants argue additionally that Plaintiffs have not stated an unjust enrichment claim
13 against Whirlpool because Plaintiffs do not allege that Whirlpool received a benefit at Plaintiffs’
14 expense and retained that benefit unjustly. *See First Nationwide Sav. v. Perry*, 15 Cal. Rptr. 2d
15 173, 176 (Cal. Ct. App. 1992). Plaintiffs allege they purchased Oasis washers from various Sears
16 stores and outlets in California. FAC ¶¶ 41, 46, 57. The only reference to Whirlpool that
17 suggests unjust enrichment is a recitation of the elements of an unjust enrichment claim. FAC ¶¶
18 186-189. Plaintiffs allege no facts connecting Whirlpool to Plaintiffs’ payments for the
19 Machines or explaining how Whirlpool benefitted directly or indirectly from the sale of the
20 Machines. As is the case with many of Plaintiffs’ claims, this omission likely is curable by
21 amendment.

22 IV. ORDER

23 Good cause therefor appearing, Defendants’ motion to dismiss is GRANTED, with leave
24 to amend in a manner consistent with this order. Any amended complaint shall be filed within
25 thirty (30) days of the date this order is filed.
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

IT IS SO ORDERED.

DATED: 10/13/09



JEREMY FOGEL
United States District Judge_

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

This Order was served on the following persons:

- Clement L. Glynn cglynn@glynnfinley.com, dmenor@glynnfinley.com
- Galen Driscoll Bellamy bellamy@wtklaw.com
- James M. Hanlon , Jr jhanlon@glynnfinley.com
- Jennie Lee Anderson jennie@andrusanderson.com, jaime@andrusanderson.com
- Joel Steven Neckers neckers@wtklaw.com, keitlen@wtklaw.com
- Lori Erin Andrus lori@andrusanderson.com, jaime@andrusanderson.com
- Michael Timothy Williams williams@wtklaw.com, kemezis@wtklaw.com, mallett@wtklaw.com