

E-Filed 7/6/2010

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

MICHAEL A. KENT, BOYD DAUGHERTY,
DANIEL JOHANNING, AND JAKUB CMIRAL,
individually and on behalf of all those similarly
situated,

Plaintiffs,

v.

HEWLETT-PACKARD COMPANY, a Delaware
corporation,

Defendant.

Case Number 09-5341 JF (PVT)

ORDER¹ GRANTING IN PART AND
DENYING IN PART MOTION TO
DISMISS WITH LEAVE TO AMEND

[re: docket no. 25]

Defendant Hewlett-Packard Company (“HP”) moves pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss Plaintiffs’ first amended complaint. The Court has considered the moving and responding papers and the oral arguments of counsel presented at the hearing on May 7, 2010. For the reasons discussed below, the motion will be granted in part and denied in part, with leave to amend.

I. BACKGROUND

On November 12, 2009, Plaintiff Michael A. Kent (“Kent”) filed the instant putative class

¹ This disposition is not designated for publication in the official reports.

1 action on behalf of purchasers of Hewlett-Packard Pavilion Elite series computers. On February
2 25, 2010, Kent filed his first amended complaint (“FAC”), naming as additional Plaintiffs Jakub
3 Cmiral (“Cmiral”), Boyd Daugherty (“Daugherty”), and Daniel Johanning (“Johanning”)
4 (collectively, “Plaintiffs”). The FAC alleges (1) unlawful, unfair, and fraudulent business
5 practices in violation of the California Unfair Competition Law, Cal. Bus. & Profs. Code §
6 17200 *et seq.* (“UCL”), (2) breach of express warranty, (3) breach of the implied warranty of
7 merchantability, and (4) violation of the California Consumer Legal Remedies Act, Cal. Civ.
8 Code § 1750 *et seq.* (“CLRA”). HP moves to dismiss the FAC for failure to state a claim upon
9 which relief may be granted.

10 HP designs, manufactures, and sells personal computers, including the following
11 Hewlett-Packard Pavilion Elite Series computers equipped with Pegatron “Truckee”
12 motherboards and Intel i7 series CPUs: Pavilion Elite e9150t, e9180f, e9180t, m9600t, and
13 m9650f (collectively, the “computers in suit”). (FAC ¶¶ 2, 3.) Plaintiffs allege that “[t]hese
14 computers are inherently defective and are prone to frequent failures, the symptoms of which
15 include the system becoming unresponsive or locking-up within thirty minutes [of] turning it on
16 (‘cold boot’).” (FAC ¶ 2.) In its limited warranty for the computers in suit, HP “guarantees that
17 the HP Hardware products that you have purchased . . . are free from defects in materials or
18 workmanship under normal use during the Limited Warranty Period.” (FAC ¶ 5.)

19 Kent, a Colorado resident, purchased an e9150t computer on July 22, 2009. (FAC ¶ 11.)
20 Before purchasing his computer, “he visited [HP]’s online store . . . in order to compare features
21 and prices on the various computers offered for sale.” (*Id.*) He purchased the computer in
22 reliance on “HP’s representations that the HP Pavilion Elite was reliable, was free from defects,
23 and was of merchantable quality and workmanship.” (*Id.*) After two weeks, his computer began
24 to experience errors, including lock-ups, freezes, and “blue screen” errors, requiring him to
25 reboot the computer. (*Id.*) After searching for a potential solution by reviewing online forums,
26 Kent installed a BIOS update from HP, but this did not resolve the problem. (*Id.*) Thirty days
27 before filing the instant action, Kent provided notice to HP pursuant to Cal. Civ. Code § 1782,
28 but HP has not responded to the notice. (FAC ¶¶ 82-83.)

1 Daugherty, a Tennessee resident, purchased an e9150t computer from HP on July 6,
2 2009. (FAC ¶ 12.) “Prior to purchase[,] he reviewed the e9150t’s specifications and product
3 reviews placed on . . . HP’s website.” (*Id.*) In purchasing the computer, Daugherty “specifically
4 relied on HP’s representations that he was purchasing a computer that was free from defects”.
5 (*Id.*) Within ten minutes of its first use, the computer exhibited the lock-up and freezing
6 problems, requiring Daugherty to reboot it. (*Id.*) Daugherty contacted HP’s customer service
7 about the issue. (*Id.*) HP provided Daugherty with a new Vista operating system and software
8 package, which he installed, but this did not resolve the problem. (*Id.*) Daugherty requested a
9 refund. HP refused to provide a refund and requested that Daugherty install the Windows 7
10 operating system. (*Id.*) Daugherty did so, but it did not resolve the problem. (*Id.*) Daugherty
11 again requested a refund and was refused. (*Id.*)

12 Johanning, a Florida resident, purchased an m9600t computer from HP in or around June
13 2009. (FAC ¶ 13.) He “purchased the HP Elite m9600t based, in large part, on HP’s
14 representations that it was reliable, of merchantable quality and workmanship and free from
15 defects.” (*Id.*) Johanning’s computer “routinely locked up and froze each morning on a cold
16 boot”. (*Id.*) Johanning contacted HP technical support, which asked him to run diagnostic tests.
17 (*Id.*) HP technical support determined that Johanning’s wireless mouse and keyboard were the
18 source of the problem, so it shipped him replacements. (*Id.*) The computer continued to have
19 performance issues, so HP technical support requested that Johanning perform a system restore,
20 but this did not resolve the problem either. Johanning then spoke with an “HP technical support
21 person” and “asked to have his case escalated, but HP technical support refused.” (*Id.*)

22 Cmiral, a California resident, purchased an e9180f computer in or around September 3,
23 2009. (FAC ¶ 14.) He “purchased the HP Elite e9180f based, in large part, on HP’s
24 representations that it was reliable, of merchantable quality and workmanship and free from
25 defects.” (*Id.*) Cmiral’s computer exhibited the “blue screen” errors on the first day of use and
26 exhibited the lock-up and freezing issues shortly thereafter. (*Id.*) At least three times, Cmiral
27 called HP’s customer service to seek help. (*Id.*) During the third call, the HP customer service
28 representative asked Cmiral to update the computer’s BIOS. (*Id.*) Having previously read

1 postings on internet forums stating that the BIOS update did not resolve the problem, Cmiral
2 declined to install the updated BIOS. (*Id.*) Cmiral asked to send his computer to HP for repair,
3 but HP denied the request because Cmiral refused to update the BIOS. (*Id.*)

4 Plaintiffs allege that the computers in suit incorporate defective motherboards that cause
5 the lock-ups, freezing, and blue screen errors. (FAC ¶ 28.) They allege that HP knew, should
6 have known, or was reckless in not knowing that the motherboards were defective. (FAC ¶ 28.)
7 Plaintiffs point to an internet message board with 268 pages of consumers' complaints regarding
8 the subject problems with the computers in suit. (FAC ¶ 35.)

9 II. LEGAL STANDARD

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

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

27 In assessing whether to grant Plaintiffs another opportunity to amend, the Court considers
28 "the presence or absence of undue delay, bad faith, dilatory motive, repeated failure to cure

1 deficiencies by previous amendments, undue prejudice to the opposing party[,] and futility of the
2 proposed amendment.” *Lee v. SmithKline Beecham, Inc.*, 245 F.3d 1048, 1052 (9th Cir. 2001)
3 (quoting *Moore v. Kayport Package Exp., Inc.*, 885 F.2d 531, 538 (9th Cir. 1989)). When
4 amendment would be futile, dismissal may be ordered with prejudice. *Dumas v. Kipp*, 90 F.3d
5 386, 393 (9th Cir. 1996).

6 Finally, although their claims arise under state law, Plaintiffs’ allegations are subject to
7 the Federal Rules of Civil Procedure. Specifically, allegations sounding in fraud are subject to
8 the heightened pleading requirements of Fed. R. Civ. P. 9(b). *See Vess v. Ciba-Geigy Corp.*
9 *USA*, 317 F.3d 1097, 1103-04 (9th Cir. 2003) (if “the claim is said to be ‘grounded in fraud’ or to
10 ‘sound in fraud,’ [then] the pleading of that claim as a whole must satisfy the particularity
11 requirement of Rule 9(b).”); *Kaplan v. Rose*, 49 F.3d 1363, 1370 (9th Cir.1994) (claims based in
12 fraud “must state precisely the time, place, and nature of the misleading statements,
13 misrepresentations, and specific acts of fraud.”). However, in the context of a fraudulent
14 omission claim, a plaintiff cannot plead a specific time or place of a failure to act. *Washington v.*
15 *Baenziger*, 673 F. Supp. 1478, 1482 (N.D. Cal. 1987). Accordingly, a plaintiff may plead fraud
16 in alternative ways. *Id.*

17 III. DISCUSSION

18 A. Breach of implied warranties

19 Plaintiffs allege that HP breached the implied warranties of merchantability and of fitness
20 for a particular purpose. (FAC ¶¶ 71, 72.)

21 1. Implied warranty of merchantability

22 “There exists in every contract for the sale of goods by a merchant a warranty that the
23 goods shall be merchantable.” *Atkinson v. Elk Corporation of Texas*, 142 Cal. App. 4th 212, 228
24 (Cal. App. 6th Dist. 2006). “Merchantability” requires that a product conform to its ordinary and
25 intended use. *See, e.g., Hauter v. Zogarts*, 14 Cal. 3d 104, 117-18 (1975). Under Cal. Com.
26 Code § 2314(2), products are merchantable if they:

- 27 (a) Pass without objection in the trade under the contract
28 description; and

1 (b) In the case of fungible goods, are of fair average quality within
2 the description; and

3 (c) Are fit for the ordinary purposes for which such goods are used;
4 and

5 (d) Run, within the variations permitted by the agreement, of even
6 kind, quality and quantity within each unit and among all units
7 involved; and

8 (e) Are adequately contained, packaged, and labeled as the
9 agreement may require; and

10 (f) Conform to the promises or affirmations of fact made on the
11 container or label if any.

12 The implied warranty of merchantability does not “impose a general requirement that goods
13 precisely fulfill the expectation of the buyer. Instead, it provides for a minimum level of
14 quality.” *Am. Suzuki Motor Corp. v. Super. Ct.*, 37 Cal. App. 4th 1291, 1295 (1995) (citation
15 omitted). Accordingly, a defect must render the product unfit for its ordinary purpose. *See id.*;
16 *see also Isip v. Mercedes-Benz USA, LLC*, 155 Cal. App. 4th 19, 26 (Cal. App. 2d Dist. 2007)
17 (“We reject the notion that merely because a vehicle provides transportation from point A to
18 point B, it necessarily does not violate the implied warranty of merchantability. A vehicle that
19 smells, lurches, clanks, and emits smoke over an extended period of time is not fit for its
20 intended purpose.”).

21 **a. Vertical privity is necessary**

22 “California courts have painstakingly established the scope of the privity requirement
23 under California Commercial Code section 2314.” *Clemens v. DaimlerChrysler Corp.*, 534 F.3d
24 1017, 1024 (9th Cir. 2008). “A buyer and seller stand in privity if they are in adjoining links of
25 the distribution chain.” *Id.* (citing *Osborne v. Subaru of Am. Inc.*, 198 Cal. App. 3d 646, 656 n.6,
26 (Cal. App. 3d Dist. 1988)). The FAC, read in the light most favorable to Plaintiffs, alleges that
27 Kent, Daugherty, and Johanning purchased their computers directly from HP. (FAC ¶¶ 11-13.)
28 Plaintiffs concede that Cmiral lacks privity with HP; accordingly, Cmiral cannot state a claim for
breach of the implied warranty of merchantability.

b. Fitness for ordinary purpose

Plaintiffs also allege that the computers in suit are not fit for their ordinary purpose

1 because they are rendered “unusable” by the lock-up, freeze, and blue screen errors. Computers
2 that routinely lock-up may be inconvenient, and a lock-up can cause the loss of data, but the
3 question is whether the computers are unfit for their ordinary purpose. Plaintiffs do not allege
4 that they have been forced to abandon the use of their computers completely, that the computers
5 freeze multiple times per day, or that they in fact have lost data as a result of the malfunctions.
6 At most, Johannig alleges that his computer “routinely locked up and froze each morning on a
7 cold boot”. (FAC ¶ 13.) The FAC does not allege how often Kent’s or Daugherty’s computers
8 exhibit the subject problems. In their present form, these allegations fall short of showing that
9 the computers are unusable or fail to serve their ordinary purpose.

10 **2. Implied warranty for a particular purpose**

11 An implied warranty of fitness for a particular purpose arises only where (1) the
12 purchaser at the time of contracting intends to use the goods for a particular purpose, (2)
13 the manufacturer or seller at the time of contracting has reason to know of this particular
14 purpose, (3) the buyer relies on the manufacturer or seller’s skill or judgment to select or
15 furnish goods suitable for the particular purpose, and (4) the manufacturer or seller at the
16 time of contracting has reason to know that the buyer is relying on such skill and
17 judgment.

18 *Harlan v. Roadtrek Motorhomes, Inc.*, No. 07-CV-0686 IEG (BLM), 2009 WL 928309, at *8
19 (S.D. Cal. 2009) (citing *Keith v. Buchanan*, 173 Cal. App. 3d 13, 25 (Cal. App. 2d Dist. 1985)).
20 “A ‘particular purpose’ . . . ‘differs from the ordinary purpose for which the goods are used in
21 that it envisages a specific use by the buyer which is peculiar to the nature of his business
22 whereas the ordinary purposes for which goods are used are those envisaged in the concept of
23 merchantability and go to uses which are customarily made of the goods in question.” *Id.*
24 (quoting *Suzuki*, 37 Cal. App. 4th 1291 at 1295 n.2).

25 Plaintiffs have not alleged that they used the computers in suit for anything other than
26 their ordinary purpose. (*See, e.g.*, FAC ¶ 11 (“[Kent] purchased his . . . computer for personal,
27 family or household use”), *Id.* ¶ 12 (“[Daugherty] purchased his e9150t for personal, family or
28 household use”), *Id.* ¶ 13 (“Mr. Johannig has used his . . . m9600t for its intended purpose . . .”),
Id. ¶ 14 (“Mr. Cmiral has used his . . . e9180t for its intended purpose . . .”).) Thus, Plaintiffs
have not stated a claim for a breach of an implied warranty for a particular purpose.

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1 **B. Breach of express warranty**

2 Plaintiffs allege that HP has breached the express limited warranty that accompanies each
3 of the computers in suit. The warranties of the various computers differ slightly, but the core
4 terms remain consistent. (*See* Loose Decl. Ex. A-C (the limited warranties for the e9150t,
5 m9600t, and the e9180f computers, respectively).²) Plaintiffs allege that HP has breached the
6 warranty by failing to provide a product free from defects in material or workmanship within the
7 warranty period, failing adequately to repair or replace the defective component or unit, and
8 failing to provide a refund of the purchase price. (Plaintiffs’ Opp’n at 14:20-23.)

9 **1. Failing to provide a product free from defects**

10 “HP warrants that the HP Hardware Products that you have purchased or leased from HP
11 are free from defects in materials or workmanship under normal use during the Limited Warranty
12 Period.”³ (Loose Decl. Ex. A at 4.) “HP will, at its discretion, repair or replace any component
13 or hardware product that manifests a defect in materials or workmanship during the Limited
14 Warranty Period.” (*Id.*) Also, “[i]n the unlikely event that your HP Hardware Product has
15 recurring failures, HP . . . may elect to provide you with (a) a replacement . . . or (b) to give you a
16 refund . . .”. (*Id.*)

17 Plaintiffs contend that because “recurring failures” are an “unlikely event,” HP has
18 warranted that the computers in suit will be “reliable” and that HP has breached that warranty
19 because the computers in suit manifest recurring failures.⁴ However, “HP does not warrant that
20 the operation of [the] product will be uninterrupted or error-free.” (*Id.* at 5.) Specifically, the

21
22 ² The FAC references the warranties, (*see* FAC ¶¶ 5, 27), and no party questions the
23 authenticity of these documents. Accordingly, the Court may consider these documents in
24 determining the instant motion. *In re Silicon Graphics*, 183 F.3d at 986. For purposes of
25 brevity, this discussion focuses on Exhibit A.

26 ³ HP does not dispute that Plaintiffs’ computers still are under warranty.

27 ⁴ To the extent that the FAC claims the existence and breach of an extra-contractual
28 warranty by description regarding the “reliability” of the computers in suit, this claim will be
dismissed. The express warranty includes a disclaimer of all warranties and conditions not stated
within it. (Loose Decl. Ex. A at 3.) Plaintiffs do not explain how a claim for an extra-
contractual warranty by description could survive this disclaimer.

1 warranty offers a remedy if the computer does exhibit recurring failures: replacement or refund.
2 Thus, HP is not liable for breach of express warranty merely because a product manifests
3 recurring failures during the warranty period. Rather, the question is whether Plaintiffs sought
4 repairs, refunds, or replacements and, if so, whether HP responded appropriately under the
5 warranty.

6 **2. Failing adequately to repair, replace, or refund**

7 HP claims that it cannot be liable for failing to repair Plaintiffs' computers because
8 Plaintiffs – with the exception of Cmiral – never requested repairs in the first instance. The
9 warranties provide for three types of warranty service: (1) self-repair, (2) send-in and return, and
10 (3) carry-in. (Loose Decl. Ex. A at 7.) For self-repair service, if HP determines that this service
11 is appropriate, it will ship the replacement parts directly to the consumer. (*Id.*) For send-in and
12 return, HP will ship packaging to the consumer for the consumer to use to ship the product back
13 to HP for repairs. (*Id.*) Carry-in service requires the consumer to deliver the product to a service
14 location for repairs. (*Id.*)

15 While HP contends that Plaintiffs have not taken the steps required in the warranties to
16 obtain repairs, it does not point to language in the warranty that requires consumers to follow a
17 specific procedure for that purpose. Daugherty alleges that he contacted HP's customer service
18 regarding the lock-up issues. (FAC ¶ 12.) Reading the FAC in the light most favorable to
19 Plaintiffs, it appears that HP actually attempted to repair Daugherty's computer: it sent him a new
20 Vista operating system and later requested that he install Windows 7. (*Id.*) Daugherty installed
21 both Vista and Windows 7, but this did not resolve the problem. (*Id.*) After these measures
22 failed, Daugherty requested a replacement computer. (*Id.*) Even if the previous measures were
23 not "repairs", Daugherty's *refused* request for a replacement could be construed at least as a
24 request in the alternative for a repair.

25 Similarly, HP appears to have attempted to repair Johannig's computer: it determined
26 that the mouse and keyboard could have caused the lock-up errors, so it sent him replacements.
27 (FAC ¶ 13.) HP must have understood Johannig's calls to its customer service department to be
28 requests for repairs, because it mailed him replacement parts. Moreover, while speaking to a

1 customer service representative about the lock-up problems, Johanning “asked to have his case
2 escalated”. (*Id.*) Reading the complaint in the light most favorable to Plaintiffs, it may be
3 inferred that even if Johanning was not requesting repairs up to that point in his interaction with
4 HP, he was requesting repairs from that point forward.

5 Kent does not allege that he called HP’s customer service to complain about the problems
6 with his computer. Instead, Kent provided notice to HP under Cal. Civ. Code § 1782 before
7 filing this action. Section 1782(a) provides that, 30 days before filing an action under the CLRA,
8 a consumer must “[d]emand [in writing] that the person correct, repair, replace, or otherwise
9 rectify the goods”. Section 1782(b) provides that a consumer cannot seek damages under the
10 CLRA if the person – in this case, HP – provides an appropriate remedy within 30 days. Kent
11 alleges that HP did not respond to his notice within thirty days. (FAC ¶ 83.)

12 Cmiral is situated differently from the other Plaintiffs. He requested specifically that HP
13 repair his computer, but he also refused HP’s request that he update his computer’s BIOS. (FAC
14 ¶ 14.) HP contends that Cmiral’s refusal to update his BIOS defeats his breach of warranty
15 claim. The warranty provides that “[t]o enable HP to provide the best possible support and
16 service during the Limited Warranty Period, you may be directed by HP to . . . load most recent
17 firmware, install software patches, . . . or use HP remote support solutions where applicable.”
18 (Loose Decl. Ex. A at 6.) The warranty continues: “HP strongly encourages you to accept the use
19 of or to employ available support technologies provided by HP. If you choose not to deploy
20 available remote support capabilities, you may incur additional costs due to increased support
21 resource requirements.” (*Id.*)

22 Determining whether Cmiral may pursue an express warranty claim requires a
23 construction of the warranty itself. Cmiral may be able to show that HP’s refusal to offer
24 anything other than the BIOS update was an unreasonable exercise of its discretion, depending on
25 whether the BIOS update is viewed as “support technology” or as part of HP’s “self-repair
26 warranty service.” If the updated BIOS is viewed as “support technology”, the warranty does not
27 appear to *require* Cmiral to install it. Instead, he is “strongly encouraged” to install it. However,
28 if the updated BIOS is considered part of a “self-repair warranty service”, Cmiral’s refusal to

1 install it is more damaging to his claim. The warranty gives HP the discretion to determine
2 which repair service applies and whether to replace the unit or refund the purchase price in lieu
3 of a repair. At the same time, the warranty does not appear to allow a consumer to dispute HP's
4 determination to offer a particular repair, even if that determination is unreasonable. The Court
5 is unable to determine the proper construction without more factual context, and because
6 Cmiral's proffered construction of the warranty is not implausible, Cmiral has stated a claim for
7 breach of express warranty.

8 **C. CLRA claim**

9 The CLRA proscribes "unfair methods of competition and unfair or deceptive acts or
10 practices undertaken by any person in a transaction intended to result or which results in the sale
11 or lease of goods or services to any consumer." Cal. Civ. Code § 1770(a). Plaintiffs allege that
12 HP violated Cal. Civil Code §§ 1770(a)(5), (7), and (9) by misrepresenting information related to
13 the computers in suit and omitting material information about existing defects within HP's
14 knowledge.

15 **1. CLRA claim for misrepresentation**

16 The CLRA proscribes active misrepresentations about the standard, quality, or grade of
17 goods. *Morgan v. Harmonix Music Sys., Inc.*, No. C08-5211 BZ, 2009 WL 2031765, at *3 (N.D.
18 Cal. July 07, 2009) (citing *Outboard Marine Corp. v. Superior Court*, 52 Cal. App. 3d 30, 36
19 (1972)). "California requires a plaintiff suing under the CLRA for misrepresentations in
20 connection with a sale to plead and prove she relied on a material misrepresentation." *Cattie v.*
21 *Wal-Mart Stores, Inc.*, 504 F. Supp. 2d 939, 946 (S.D. Cal. 2007) (citing *Caro v. Procter &*
22 *Gamble Co.*, 18 Cal. App. 4th 644, 668 (Cal. App. 4th Dist., 1993)).

23 **a. HP's alleged misrepresentation**

24 HP warranted that the computers in suit would be "free from defects in materials or
25 workmanship under normal use during the Limited Warranty Period." (Loose Decl. Ex. A at 4.)
26 Plaintiffs contend that this statement is a misrepresentation because the computers in suit have
27 manifested defects during the warranty period. However, HP's representation appears in the
28 limited warranty that accompanied the computers. As discussed above, HP did not guarantee

1 that the operation of the computers in suit would be “uninterrupted or error-free.” (Loose Decl.
2 Ex. A at 5.) Instead, HP warranted that it would offer repairs, replacements, or refunds in the
3 event that defects did manifest during the warranty period. *See Hoey v. Sony Elecs. Inc.*, 515 F.
4 Supp. 2d 1099, 1104 (N.D. Cal. 2007) (rejecting the plaintiffs’ attempt to “bootstrap” Sony’s
5 express warranty into a misleading representation for purposes of the CLRA).

6 Relying heavily upon *McAdams v. Monier, Inc.*, 182 Cal. App. 4th 174 (Cal. App. 3d
7 Dist. 2010), Plaintiffs contend that a warranty of freedom from defects can create liability under
8 the CLRA where the seller knows of a defect that will surface during the warranty period and
9 does not disclose it. In *McAdams*, the class action plaintiffs alleged that the defendant warranted
10 that, for fifty years, its roof tiles would be free of defects, maintain a permanent color glaze, and
11 require no maintenance, despite knowing that the tiles would deteriorate within fifty years. *Id.* at
12 179. The court focused on whether the class members could show common reliance and whether
13 the named plaintiff was typical of the class, determinations that are not relevant here. The court
14 allowed the CLRA class action to proceed based on the plaintiffs’ exposure to the fifty-year
15 warranty coupled with the defendant’s failure to disclose the defect despite his knowledge of the
16 defect.

17 In the instant case, Plaintiffs have not alleged sufficiently that HP knew that defects
18 would manifest during the warranty period. Because the allegation of a misrepresentation sounds
19 in fraud, it must meet the heightened pleading requirements of Fed. R. Civ. P. 9(b). *See*
20 *Ciba-Geigy*, 317 F.3d at 1103-04. Plaintiffs allege that HP failed to “adequately manufacture
21 and/or test” the computers in suit. (FAC ¶ 32.) However, they do not allege any specific facts to
22 support their claim: they do not explain how the computers in suit were inadequately
23 manufactured or what testing was done or should have been done instead. Plaintiffs do point to a
24 series of online postings that complain of failures of the computers in suit. (FAC ¶ 35.)
25 However, they do not allege that HP knew of these complaints at the time it sold the computers
26 to Plaintiffs. *See Oestreicher v. Alienware Corp.*, 544 F. Supp. 2d 964, 975 n.9 (N.D. Cal. 2008)
27 (concluding that “[r]andom anecdotal examples of disgruntled customers posting their views on
28 websites at an unknown time is not enough to impute knowledge upon defendants.”). Although

1 they contend that “HP had exclusive knowledge of material facts concerning the nature and
2 existence of the defective motherboards,” (FAC ¶ 34), Plaintiffs do not allege what that
3 knowledge is or how HP acquired it. Nor do Plaintiffs allege with particularity that HP had
4 knowledge of the defective motherboards at the time Plaintiffs purchased the computers in suit.
5 *Compare Marsikian v. Mercedes Benz USA, LLC*, No. CV 08-04876 AHM (JTLx), 2009 U.S.
6 Dist. LEXIS 117012 (C.D. Cal. May 4, 2009) (noting that the plaintiffs alleged that “[s]ince
7 2001, [d]efendant did know about the defective [part] as a result of its own internal testing,
8 customer complaints, dealership repair orders, as well as various other sources).

9 **b. Plaintiffs’ reliance**

10 Moreover, even assuming that HP’s warranty was misleading in and of itself, Plaintiffs do
11 not adequately plead reliance. *Cattie*, 504 F. Supp. 2d at 946 (citing *Caro*, 18 Cal. App. 4th at
12 668) (“California requires a plaintiff suing under the CLRA for misrepresentations in connection
13 with a sale to plead and prove she relied on a material misrepresentation.”). The allegedly
14 misleading statement – that the computers in suit would be free of defects during the warranty
15 period – is found in the express warranty itself. However, Plaintiffs do not allege pre-purchase
16 knowledge of the warranty.

17 Kent alleges that:

18 Prior to purchasing his computer, he visited Defendant HP’s online store . . . in order to
19 compare features and prices on the various computers offered for sale. In selecting the
20 HP Pavilion Elite series computers, Plaintiff Kent relied on HP’s representations that the
HP Pavilion Elite was reliable, was free from defects, and was of merchantable quality
and workmanship

21 (FAC ¶ 11.) Kent alleges that he visited HP’s website and that he relied on HP’s representations
22 contained within the warranty. However, while it is true that warranty can be found on HP’s
23 website, (FAC ¶ 5), Kent does not allege that he actually reviewed the warranty itself; he claims
24 only that he compared features and prices on HP’s computers. This allegation is insufficiently
25 particular for purposes of Fed. R. Civ. P. 9(b). Daugherty’s allegations similarly are insufficient:
26 while “he reviewed the e9150t’s specifications and product reviews” on HP’s website, (FAC ¶
27 12), Daugherty does not allege having reviewed the warranty itself. Cmiral and Johanning
28 provide entirely conclusory allegations of reliance, stating only that they “purchased the

1 [computers in suit] based, in large part, on HP’s representations that it was reliable, of
2 merchantable quality and workmanship and free from defects.” (FAC ¶¶ 13, 14.)

3 //

4 **2. CLRA claim for omissions**

5 “A claim under the CLRA may be based on a fraudulent omission if (1) the omission was
6 contrary to a representation actually made by the defendant, or (2) the omission was of a fact the
7 defendant was obliged to disclose.” *In re NVIDIA GPU Litig.*, NO. C 08-04312 JW, 2009 WL
8 4020104, at *10 (N.D. Cal. Nov. 19, 2009) (citing *Daugherty v. American Honda Motor Co.,*
9 *Inc.*, 144 Cal. App. 4th 824, 835 (Cal. App. 2d Dist. 2006). With respect to a claim based on an
10 omission contrary to a representation actually made by HP, Plaintiffs’ claim fails because the
11 only representation by HP identified by Plaintiffs is found in the express warranty. As discussed
12 above, HP did not represent that the operation of the computers in suit would be “uninterrupted
13 or error-free.” (Loose Decl. Ex. A at 5.) Thus, an omission relating to defects that might occur
14 during the warranty period is not contrary to the representations within the warranty.

15 With respect to disclosure, “[t]he obligation to disclose can arise in four circumstances:
16 (1) when the defendant is in a fiduciary relationship with the plaintiff; (2) when the defendant
17 had exclusive knowledge of material facts not known to the plaintiff; (3) when the defendant
18 actively conceals a material fact from the plaintiff; and (4) when the defendant makes partial
19 representations but also suppresses some material fact.” *NVIDIA*, 2009 WL 4020104 at *10
20 (quoting *Falk v. General Motors Corp.*, 496 F. Supp. 2d 1088, 1094-95 (N.D. Cal. 2007)).

21 Plaintiffs contend that HP actively has concealed material facts concerning the computers
22 in suit, specifically that the motherboards are defective. (FAC ¶ 7.) Allegations of active
23 concealment sound in fraud, and thus must meet the heightened pleading requirements of Fed. R.
24 Civ. P. 9(b). *See Ciba-Geigy*, 317 F.3d at 1103-04. Plaintiffs do not allege the existence of a
25 fiduciary relationship, and their allegation with respect to HP’s exclusive knowledge is
26 insufficient, as discussed above. Plaintiffs do allege that HP has concealed or suppressed
27 material facts. Johanning alleges that after purchasing his computer, he called HP technical
28 support, seeking a solution to the lock-up issue. (FAC ¶ 13.) He asked HP if it knew of others

1 experiencing the same problem. (*Id.*) HP responded “no”, even though Johanning “could hear
2 another HP technical support person speaking with someone experiencing the exact same
3 problems.” (*Id.*) Read in the light most favorable to Plaintiffs, this allegation suggests that HP
4 was attempting to conceal the fact that the computers in suit suffer from a widespread lock-up
5 issue.

6 However, CLRA proscribes only “unfair methods of competition and unfair or deceptive
7 acts or practices undertaken by any person *in a transaction intended to result or which results in*
8 *the sale or lease* of goods or services to any consumer.” Cal. Civ. Code § 1770(a) (emphasis
9 added). Johanning’s discussion with HP technical support occurred *after* he already had
10 purchased his computer. Even if that conversation could support an allegation of concealment, it
11 cannot support an allegation of unfair practices undertaken with the intent to result in a sale.
12 Thus, the conversation above cannot support an alleged CLRA violation. Plaintiffs have not
13 alleged with specificity any other facts that could support a claim that HP knew the computers in
14 suit were defective at the time of sale or that HP actively concealed a defect at the time of sale.

15 **D. UCL Claim**

16 The UCL prohibits “any unlawful, unfair or fraudulent business act or practice and unfair,
17 deceptive, untrue or misleading advertising.” Cal. Civ. Code § 17200. Accordingly, “[a]n act
18 can be alleged to violate any or all of the three prongs of the UCL – unlawful, unfair, or
19 fraudulent.” *Berryman v. Merit Prop. Mgmt., Inc.*, 152 Cal. App. 4th 1544, 1554 (2007).
20 Plaintiffs allege that HP has violated all three prongs. Their allegations at least as to the UCL’s
21 fraud prong must meet the heightened pleading requirements of Fed. R. Civ. P. 9(b). *See*
22 *Ciba-Geigy*, 317 F.3d at 1103-04.

23 **1. Unlawful conduct**

24 For an action based upon an allegedly unlawful business practice, the UCL “borrows
25 violations of other laws and treats them as unlawful practices that the unfair competition law
26 makes independently actionable.” *Cel-Tech Commc’ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20
27 Cal. 4th 163, 180 (1999). In their opposition papers, Plaintiffs rely exclusively upon their CLRA
28 claim. (Plaintiffs’ Opp’n at 13:20-22.) As discussed above, Plaintiffs’ CLRA claim is

1 insufficient because the FAC does not plead with specificity any misrepresentation or a duty to
2 disclose a specific alleged defect. The Court need not accept the FAC’s conclusory allegation
3 that HP has violated the California False Advertising Law. (FAC ¶ 48); *see Sprewell*, 266 F.3d
4 at 988. Plaintiffs also allege that HP’s breach of its express warranty is unlawful conduct under
5 the UCL. (FAC ¶ 48.) This allegation is better analyzed under the “unfairness” prong. *See*
6 *Smith v. Wells Fargo Bank, N.A.*, 135 Cal. App. 4th 1463, 1483 (Cal. App. 4th Dist. 2005) (citing
7 a series of California appellate court decisions and concluding that “it appears that a systematic
8 breach of certain types of contracts (e.g., breaches of standard consumer or producer contracts
9 involved in a class action) can constitute an unfair business practice under the UCL.”).

10 2. **Unfair conduct**

11 What constitutes unfair conduct in consumer actions under the UCL is unclear. *Camacho*
12 *v. Automobile Club of Southern California*, 142 Cal. App. 4th 1394, 1400 (Cal. Ct. App. 2006).
13 *Camacho* holds that “unfairness” under the UCL should be judged by the same standard used by
14 the Federal Trade Commission under 15 U.S.C. § 45(n). *Id.* at 1403. 15 U.S.C. § 45(n) provides
15 three elements for what constitutes “unfair”: 1) substantial injury, 2) the complained-of practice
16 is not outweighed by any countervailing benefits to consumers or competition, and 3) the injury
17 must be one that consumers themselves could not reasonably have avoided. *See also Davis v.*
18 *Ford Motor Credit Co.*, 179 Cal. App. 4th 581, 584 (Cal. App. 2d Dist. 2009) (applying the
19 unfairness test from *Camacho*).

20 Plaintiffs assert two separate theories of unfair conduct. First, they focus on HP’s alleged
21 misrepresentation and omission regarding the defects of the computers in suit. (FAC ¶ 42.) This
22 theory is inadequate for the reasons discussed above: Plaintiffs have not alleged with specificity
23 any misrepresentation or a duty that could render HP liable for an omission. Because Plaintiffs
24 have failed to allege cognizable injury resulting from the alleged misrepresentation and omission,
25 they also have failed to allege substantial injury. Second, Plaintiffs assert that HP’s failure
26 adequately to repair the computers in suit in response to consumers’ complaints is unfair. (FAC
27 ¶ 44.) Essentially, this theory mirrors Plaintiffs’ breach of the express warranty claim.

28 “An injury may be sufficiently substantial . . . if it does a small harm to a large number of

1 people.” *American Financial Services Asso. v. FTC*, 767 F.2d 957, 972 (D.C. Cir. 1985)
2 (quotation omitted) (discussing substantial injury under 15 U.S.C. § 45(n)). HP allegedly failed
3 to repair under warranty the Plaintiffs’ computers, which cost between \$1,199.00 and \$1,378.99.
4 (FAC ¶ 12-14.) As discussed above, the alleged defect does not render the computers in suit
5 unusable, but it certainly reduces their value. Read in the light most favorable to Plaintiffs, the
6 FAC alleges that HP sold many computers that exhibit the complained-of defect and have not
7 been repaired. Accordingly, Plaintiffs sufficiently allege a substantial injury. Likewise, the
8 FAC, as a whole, sufficiently alleges that the failure to repair under the express warranty is not
9 outweighed by any countervailing benefits to consumers or competition.

10 Finally, Plaintiffs must show that the injury is one that consumers themselves could not
11 reasonably have avoided. “[C]onsumers cannot have reasonably avoided the injury if they could
12 not have reasonably anticipated the injury, if they did not have the means to avoid the injury, or if
13 their free market decisions were unjustifiably hampered by the conduct of the seller.” *Camacho*,
14 142 Cal. App. 4th at 1405. The internet postings, which discuss the issues with the computers in
15 suit, are publicly available. However, it is not clear that Plaintiffs easily could have found the
16 postings before purchasing their computers because they did not know specifically what the
17 problems with the computers might be. Though it could be argued that Cmiral had the means to
18 avoid injury by updating the BIOS on his computer, the FAC sufficiently alleges that the BIOS
19 update would not have resolved the issues in any event. (FAC ¶ 11 (Kent installed the updated
20 BIOS and continued to experience problems).)

21 3. **Fraudulent conduct**

22 “Unlike a common law fraud claim, a UCL fraud claim requires no proof that the plaintiff
23 was actually deceived.” *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1025-26 (9th Cir.
24 2008) (citing *Daugherty*, 144 Cal. App. 4th at 838). “Instead, the plaintiff must produce
25 evidence showing ‘a likelihood of confounding an appreciable number of reasonably prudent
26 purchasers exercising ordinary care.’” *Id.* at 1026, citing *Brockey v. Moore*, 107 Cal. App. 4th
27 86, 99 (2003). Accordingly, Plaintiffs must allege with specificity that HP’s alleged
28 misrepresentations: 1) were relied upon by the named plaintiffs; 2) were material; 3) influenced

1 the named plaintiffs' decisions to purchase the defective computers in suit; and 4) were likely to
2 deceive members of the public. *See In re Tobacco II Cases*, 46 Cal.4th 298, 326-28 (2009).

3 Plaintiffs' UCL fraud claim is founded on the same basic allegations as their CLRA
4 claim: that HP made misrepresentations and omissions regarding the computers in suit. As with
5 their CLRA claim, the UCL fraud claim is deficient because Plaintiffs insufficiently plead a
6 misrepresentation or a duty that obligated HP to disclose the defect. The statements within the
7 warranty are not misleading because (1) HP only warranted to repair, replace, or refund in the
8 event of a defect, not that the computers in suit would operate uninterrupted or error-free and (2)
9 Plaintiffs insufficiently plead that HP knew that the computers in suit were defective at the time
10 Plaintiffs purchased them. Further, as discussed above, Plaintiffs plead reliance inadequately for
11 purposes of Fed. R. Civ. R. 9(b). Claims sounding in fraud must be pled with particularity. *See*
12 *Ciba-Geigy*, 317 F.3d at 1103-04. Though Kent and Daugherty allege that they have visited
13 HP's website which displays the warranty, they do not allege having reviewed the actual
14 warranty before purchasing their computers. Cmiral and Johanning make entirely conclusory
15 allegations of reliance.

16 IV. ORDER

17 Good cause therefor appearing, the motion to dismiss is GRANTED with leave to amend
18 with respect to Plaintiffs' claims for breach of implied warranties, violation of the CLRA, and
19 violation of the illegal and fraudulent conduct prongs of the UCL. The motion otherwise is
20 DENIED. Any amended complaint shall be filed within thirty (30) days of the date of this order.

21
22 DATED: 7/6/2010

23 
24 JEREMY FOGEL
25 United States District Judge