

United States District Court
For the Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

JENNIFER BILODEAU, individually and on)
behalf of all others similarly situated)

Plaintiff,)

v.)

MCAFEE, INC., and CAPITAL INTELLECT,)
INC.,)

Defendants.)

Case No.: 12-CV-04589-LHK

ORDER GRANTING DEFENDANT’S
MOTION TO DISMISS

On August 31, 2010, Plaintiff Jennifer Bilodeau (“Plaintiff”), individually and on behalf of all others similarly situated, brought action against Defendants McAfee, Inc. (“McAfee”) and Capital Intellect, Inc. (“Capital Intellect”), (collectively, “Defendants”), regarding Plaintiff’s purchase of Registry Power Cleaner software (“RPC” or “the software”). Plaintiff alleges that McAfee falsely represents the capabilities of RPC, and that the software falsely reports errors on consumers’ computers in an attempt to scare them into using RPC. Plaintiff alleges violations of California’s Unfair Competition Law, California Business and Professions Code §§ 17200 *et seq.*, California Commercial Code § 2313, and California common law.

McAfee moves to dismiss Plaintiff’s complaint. ECF No. 22 (“Mot.”). Pursuant to Civil Local Rule 7–1(b), the Court concludes that the currently pending motion is appropriate for determination without oral argument. Having considered the parties’ submissions and the relevant

1 law, the Court hereby GRANTS McAfee’s motion, and DISMISSES the complaint as against both
2 Defendants.

3 **I. BACKGROUND**

4 **A. Factual Background**

5 McAfee, a Delaware corporation with its headquarters and principal place of business in
6 Santa Clara, California, is well-known for its antivirus and computer security software. Compl.
7 ¶¶ 10, 16. Additionally, McAfee markets and endorses software such as RPC. ¶ 17. RPC is
8 developed by Capital Intellect, a Delaware corporation with its headquarters and principal place of
9 business in Boston, Massachusetts. *Id.* ¶¶ 11.

10 Plaintiff alleges that in or around June of 2011, her computer experienced a “drastic[]”
11 decrease in speed and frequent freezing or shutting down without warning. *Id.* ¶ 36. After
12 conducting an Internet search for software to repair her computer, she encountered and clicked on
13 an advertisement by McAfee for RPC, which directed her to McAfee’s website. *Id.* ¶ 38. On the
14 website, she allegedly viewed representations about RPC, “namely, that Registry Power Cleaner
15 would accurately identify, report and repair a variety of computer errors and other problems,
16 enhance the performance, speed, and security of her computer, and perform other beneficial tasks .
17 . . .” *Id.* at ¶¶ 20-22; 39. Plaintiff alleges that, relying on these representations, she downloaded and
18 installed RPC, and performed a “scan” of her computer. *Id.* ¶ 39. RPC allegedly reported that
19 Plaintiff’s computer was afflicted by hundreds of “Critical Errors,” that her computer’s “PC Status”
20 was at “High Risk,” and that her computer needed to be “repaired.” *Id.* ¶ 40.

21 Plaintiff alleges that, relying on both (1) McAfee’s representations on its website about the
22 functionality of RPC, and (2) RPC’s report that her computer was in need of repair, Plaintiff
23 continued using the software beyond the free 30-day trial period, and was therefore charged \$29.95
24 by Defendant McAfee. *Id.* ¶ 41.

25 Plaintiff further alleges that both of these representations were inaccurate. First, Plaintiff
26 alleges that McAfee’s representation on its website that RPC would accurately report errors was
27 inaccurate, because the software is allegedly designed to invariably report errors, “without any
28 credible diagnosis.” *Id.* ¶ 42. Specifically, Plaintiff alleges that, through her attorneys, Plaintiff

1 engaged a computer forensics expert, who performed tests on “a brand new virtual computer
2 system” and found that RPC “still reported that numerous errors existed on the system.” *Id.* ¶ 30.
3 From this, the expert concluded that RPC was designed “to invariably report, in a uniform manner,
4 that hundreds of harmful computer errors exist on the user’s PC,” and therefore the software “does
5 not actually use any reliable metrics to diagnose the actual condition of the individual’s PC.” *Id.* ¶
6 31. Extrapolating from the expert’s conclusion, Plaintiff alleges that the errors “detected” by the
7 software on her own computer “did not exist and/or did not pose any actual risk” to her computer.
8 *Id.* ¶ 41.

9 Second, Plaintiff alleges that RPC’s allegedly false reports of errors on her computer were
10 not only defects, but also constituted misrepresentations that induced her to keep the software
11 beyond the free-trial period. *Id.* ¶ 43 (“[B]ut for misrepresentations made within [RPC] itself—
12 namely, that her computer was damaged by ‘Critical Errors’ and that her ‘PC Status’ was at ‘High
13 Risk’—Plaintiff would not have agreed to pay fees charged by McAfee for use of the software
14 beyond the trial period.”).

15 On behalf of herself and others who are similarly situated, Plaintiff seeks damages,
16 including statutory and punitive if applicable, and injunctive relief.

17 **B. Procedural History**

18 On August 31, 2012, Plaintiff filed the instant class action complaint against McAfee and
19 Capital Intellect. ECF No. 1. McAfee has filed a motion to dismiss Plaintiff’s complaint for: (1)
20 failure to state a claim upon which relief may be granted, pursuant to Federal Rules of Civil
21 Procedure 12(b)(6); (2) failure to plead claims grounded in fraud with sufficient particularity,
22 pursuant to Federal Rules of Civil Procedure 9(b); (3) lack of Article III standing; (4) lack of
23 applicability of California law to claims not based on California conduct; (5) failure to allege actual
24 breach or damages for warranty and contract claims; and (6) failure to plead a separate claim in
25 breach of the implied covenant of good faith and fair dealings. *See* Def.’s Mot. to Dismiss
26 (“Mot.”), ECF No. 22. McAfee also filed a Request for Judicial Notice. ECF No. 23. On January
27 8, 2013, Plaintiff filed an opposition to the motion to dismiss, *see* Pls.’ Opp. to Def.’s Mot. to
28 Dismiss (“Opp’n”), ECF No. 29, to which McAfee filed a reply on February 5, 2013, *see* Def.’s

1 Reply Supp. Mot. to Dismiss (“Reply”), ECF No. 30.

2 As of May 14, 2013, Defendant Capital Intellect had not been served. On that date, the
3 Court ordered Plaintiff to show cause why Defendant Capital Intellect should not be dismissed
4 pursuant to Federal Rule of Civil Procedure 4(m), which required Plaintiff to serve Capital Intellect
5 within 120 days after Plaintiff’s August 31, 2012 filing of the complaint. ECF No. 35. Plaintiff
6 was required to file a response by May 31, 2013, and appear at an Order to Show Cause hearing on
7 June 13, 2013. *Id.* On May 31, 2013, Plaintiff filed a response stating that Plaintiff’s counsel
8 discovered that Plaintiff’s process server had never attempted service on Capital Intellect through
9 its registered agent and requested that the Court grant her leave to attempt service on Capital
10 Intellect via its registered agent on an expedited basis. ECF No. 36. The Court granted leave to
11 attempt service of process and required Plaintiff to file proof of service no later than June 6, 2013.
12 ECF No. 37. On June 6, 2013, Plaintiff filed a proof of service, indicating that Capital Intellect had
13 been served on June 4, 2013. ECF No. 38. Because Plaintiff served Capital Intellect, the Order to
14 Show Cause hearing was vacated.

15 **II. LEGAL STANDARDS**

16 **A. Standing**

17 A defendant may move to dismiss an action for lack of subject matter jurisdiction pursuant
18 to Federal Rule of Civil Procedure 12(b)(1). A Rule 12(b)(1) motion to dismiss tests whether a
19 complaint alleges grounds for federal subject matter jurisdiction. A motion to dismiss for lack of
20 subject matter jurisdiction will be granted if the complaint on its face fails to allege facts sufficient
21 to establish subject matter jurisdiction. *See Savage v. Glendale Union High Sch.*, 343 F.3d 1036,
22 1039 n.2 (9th Cir. 2003). In considering a Rule 12(b)(1) motion, the Court “is not restricted to the
23 face of the pleadings, but may review any evidence, such as affidavits and testimony, to resolve
24 factual disputes concerning the existence of jurisdiction.” *McCarthy v. United States*, 850 F.2d
25 558, 560 (9th Cir. 1988). If the plaintiff lacks standing under Article III of the U.S. Constitution,
26 then the court lacks subject matter jurisdiction, and the case must be dismissed. *See Steel Co. v.*
27 *Citizens for a Better Env’t*, 523 U.S. 83, 101-02 (1998). Once a party has moved to dismiss for
28 lack of subject matter jurisdiction under Rule 12(b)(1), the opposing party bears the burden of

1 establishing the court’s jurisdiction. *See Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d
2 1115, 1122 (9th Cir. 2010).

3 **B. Rule 12(b)(6)**

4 Pursuant to Federal Rule of Civil Procedure 12(b)(6), a defendant may move to dismiss an
5 action for failure to allege “enough facts to state a claim to relief that is plausible on its face.” *Bell*
6 *Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “A claim has facial plausibility when the
7 plaintiff pleads factual content that allows the court to draw the reasonable inference that the
8 defendant is liable for the misconduct alleged. The plausibility standard is not akin to a
9 ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted
10 unlawfully.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal citation omitted). For purposes
11 of ruling on a Rule 12(b)(6) motion, “all allegations of material fact are taken as true and construed
12 in the light most favorable to the nonmoving party.” *Johnson v. Lucent Technologies Inc.*, 653
13 F.3d 1000, 1010 (9th Cir. 2011) (amended Aug. 19, 2011); *see also Knieval v. ESPN*, 393 F.3d
14 1068, 1072 (9th Cir. 2005). Mere “conclusory allegations of law and unwarranted inferences are
15 insufficient to defeat a motion to dismiss.” *Adams v. Johnson*, 355 F.3d 1179, 1183 (9th Cir.
16 2004); *accord Iqbal*, 556 U.S. at 678. Furthermore, “a plaintiff may plead [him]self out of court” if
17 he “plead[s] facts which establish that he cannot prevail on his . . . claim.” *Weisbuch v. Cnty. of*
18 *L.A.*, 119 F.3d 778, 783 n.1 (9th Cir. 1997) (internal quotation marks and citation omitted)

19 **C. Rule 9(b)**

20 Fraud or mistake claims are subject to the heightened pleading requirements of Federal
21 Rule of Civil Procedure 9(b), which mandates that a plaintiff alleging fraud must “state with
22 particularity the circumstances constituting fraud.” Fed. R. Civ. P. 9(b). *See also Vess v. Ciba-*
23 *Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003); *Kearns v. Ford Motor Co.*, 567 F.3d 1120,
24 1124 (9th Cir. 2009). To fulfill the heightened standard under Rule 9(b), the allegations must be
25 “specific enough to give defendants notice of the particular misconduct which is alleged to
26 constitute the fraud charged so that they can defend against the charge and not just deny that they
27 have done anything wrong.” *Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1985). Thus, fraud
28 claims must allege “an account of the ‘time, place, and specific content of the false representations

1 as well as the identities of the parties to the misrepresentations.” *Swartz v. KPMG LLP*, 476 F.3d
2 756, 764 (9th Cir. 2007) (per curiam). The plaintiff must set forth what is false or misleading
3 about a statement, and why it is false.” *In re GlenFed, Inc. Securities Litig.*, 42 F.3d 1541, 1548
4 (9th Cir. 1994) (en banc), *superseded by statute on other grounds as stated in Marksman Partners,*
5 *L.P. v. Chantal Pharmaceutical Corp.*, 927 F. Supp. 1297, 1309 (C.D. Cal. 1996).

6 **D. Leave to Amend**

7 If the Court decides that the complaint should be dismissed, it must then determine whether
8 to grant leave to amend the complaint. Under Rule 15(a) of the Federal Rules of Civil Procedure,
9 leave to amend “shall be freely given when justice so requires,” bearing in mind “the underlying
10 purpose of Rule 15 . . . [is] to facilitate decision on the merits, rather than on the pleadings or
11 technicalities.” *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc) (internal quotation
12 marks and citation omitted). Nonetheless, a court “may exercise its discretion to deny leave to
13 amend due to ‘undue delay, bad faith or dilatory motive on part of the movant, repeated failure to
14 cure deficiencies by amendments previously allowed, undue prejudice to the opposing party. . . ,
15 [and] futility of amendment.” *Carvalho v. Equifax Info. Servs., LLC*, 629 F.3d 876, 892–93 (9th
16 Cir. 2010) (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)) (alterations in original).

17 **III. Request for Judicial Notice**

18 Defendant has submitted a Request for Judicial Notice, ECF No. 23 (“RJN”) for the Court’s
19 consideration in ruling on this motion. Generally, a district court may not consider any material
20 beyond the pleadings in ruling on a 12(b)(6) motion to dismiss for failure to state a claim. *Lee v.*
21 *City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001) (*overruled on other grounds by Galbraith v.*
22 *County of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002). However, there are two exceptions to the
23 general rule forbidding consideration of extrinsic evidence on a 12(b)(6) motion. *Lee*, 250 F.3d at
24 688. First, a court may take judicial notice of matters of public record outside the pleadings. *Id.* at
25 689. Second, a court may consider “material which is properly submitted as part of the complaint.”
26 *Id.* at 688 (internal quotation marks omitted). Such consideration may extend to documents
27 “whose contents are alleged in a complaint and whose authenticity no party questions, but which
28 are not physically attached to the [plaintiff’s] pleading.” *Parrino v. FHP, Inc.*, 146 F.3d 699, 706

1 (9th Cir. 1998) (internal quotation marks omitted), *superseded by statute on other grounds as*
2 *recognized in Abrego Abrego v. Dow Chem. Co.*, 443 F.3d 676, 681 (9th Cir. 2006).

3 McAfee states that the screen shots of McAfee’s website that constitute the sole exhibit of
4 the Request for Judicial Notice are the web pages referenced by the Plaintiff. *See* RJN, ECF No.
5 23, Ex. A. However, there is no indication that these are indeed the pages Plaintiff saw; nor is
6 there reason to believe that McAfee had not changed the appearance of the web pages since
7 Plaintiff’s visit in question. These screen shots may be subject to reasonable dispute and are not
8 proper subjects of judicial notice. *See Lee*, 250 F.3d at 688; *Parrino*, 146 F.3d at 706. Moreover,
9 the Court does not find the screen shots necessary to grant McAfee’s motion. Similarly, the Court
10 need not rely on the authenticating declaration of Cindia De La Torre attached to the Request for
11 Judicial Notice in granting the instant motion.

12 **III. ANALYSIS**

13 Below, the Court first addresses McAfee’s two objections to Plaintiff’s complaint as a
14 whole: (1) the sufficiency of Plaintiff’s standing to bring the instant action pursuant to Rule
15 12(b)(1), and (2) the particularity of Plaintiff’s allegations pursuant to Rule (9)(b). For the reasons
16 discussed below, the Court GRANTS, as to all Defendants, McAfee’s motion to dismiss under
17 Rule (9)(b), with leave to amend, and provides further guidance regarding Defendant McAfee’s
18 objections to Plaintiff’s specific causes of action.

19 **A. Plaintiff Has Alleged Particularized Injury Sufficient For Article III Standing**

20 McAfee disputes whether this Court has jurisdiction over the instant case, contending that
21 Plaintiff lacks Article III standing because she has failed to allege particularized injury. Mot. at 8-
22 9. Although McAfee purports to bring its motion to dismiss only under Rule 12(b)(6) and Rule
23 9(b), the Court construes McAfee’s objection to Plaintiff’s Article III standing as a challenge to the
24 Court’s subject matter jurisdiction under Rule 12(b)(1). *See Maya v. Centex Corp.*, 658 F.3d 1060,
25 1067 (9th Cir. 2011) (reversing as error a district court’s Article III standing analysis under Rule
26 12(b)(6) rather than Rule 12(b)(1)). The Court finds that Plaintiff has satisfied the Article III
27 standing requirements as interpreted by the Ninth Circuit, and that McAfee’s objections to
28 Plaintiff’s allegations are more properly addressed as challenges to the merits of the case under

1 Rule 12(b)(6) and Rule 9(b). *See infra* Part III.B.

2 An Article III federal court must ask whether a plaintiff has standing to sue for the purpose
3 of the “case or controversy” requirement of Article III of the U.S. Constitution. *See Clapper v.*
4 *Amnesty Int’l*, ---U.S.---, 133 S.Ct. 1138, 1146 (2013) (“One element of the case-or-controversy
5 requirement’ is that plaintiffs ‘must establish that they have standing to sue.’”) (quoting *Raines v.*
6 *Byrd*, 521 U.S. 811, 818 (1997)). To satisfy Article III standing, a plaintiff must allege: (1) injury-
7 in-fact that is concrete and particularized, as well as actual and imminent; (2) wherein injury is
8 fairly traceable to the challenged action of the defendant; and (3) injury is likely (not merely
9 speculative) to be redressed by a favorable decision. *Friends of the Earth, Inc. v. Laidlaw Envtl.*
10 *Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000); *Lujan v. Defenders of Wildlife*, 504 U.S. 555,
11 561–62 (1992). “The party invoking federal jurisdiction bears the burden of establishing these
12 elements.” *Lujan*, 504 U.S. at 561. However, the Ninth Circuit has emphasized that “[t]he
13 jurisdictional question of standing precedes, and does not require, analysis of the merits.” *Maya v.*
14 *Centex Corp.*, 658 F.3d 1060, 1068 (9th Cir. 2011).

15 McAfee maintains that Plaintiff has failed to satisfy Article III’s requirement of
16 “particularized injury” because: (i) Plaintiff does not allege that RPC failed to fix her computer, (ii)
17 Plaintiff does not allege how she knows the errors RPC found did not in fact exist with regards to
18 her computer, and (iii) Plaintiff does not allege that McAfee’s misrepresentations had anything to
19 do with RPC’s “reporting function” of finding errors. Mot. 8–9. Plaintiff responds that the
20 complaint sufficiently alleges that the software failed to perform the beneficial tasks advertised by
21 both McAfee and RPC, and that she suffered economic injury, “in the amount of the software’s
22 purchase price, or at least a portion of it.” Opp’n at 9 (citing Compl. ¶¶ 44, 74, 98).

23 Courts considering nearly identical claims brought by Plaintiff’s counsel have arrived at
24 varying conclusions with respect to Article III standing. For example, in *Gross v. Symantec Corp.*,
25 neither party challenged the plaintiff’s standing, and the Court did not address the issue *sua sponte*,
26 but rather implicitly affirmed its own jurisdiction by ruling on a motion to dismiss. No. 12-00154,
27 2012 WL 3116158 (N.D. Cal. July 31, 2012). In another case brought by Plaintiff’s counsel,
28 *Parker v. Iolo Technologies, LLC*, the Court granted the defendant’s 12(b)(1) motion to dismiss,

1 finding the plaintiff in that case lacked standing because he did not “plausibly allege that *he*
2 suffered from [the] deficiencies of the software. That is, he does not allege facts supporting a
3 plausible claim that the software erroneously diagnosed the condition of his computer . . .” No. 12-
4 00984, 2012 WL 4168837, at *4 (C.D. Cal. Aug. 20, 2012) (citing both *Birdsong v. Apple, Inc.*,
5 590 F.3d 955, 960-61 (9th Cir. 2009), and *In re iPhone Application Litig.*, No. 11-02250, 2011 WL
6 4403963, at *3-5 (N.D. Cal. Sept. 20, 2011)). By contrast, in *Kulesa v. PC Cleaner, Inc.*, also
7 brought by current Plaintiff’s counsel in this case, the Court found that, although “concerned about
8 the sparse nature of Plaintiff’s claims,” the plaintiff’s allegation that “she overpaid for a product
9 that did not work as advertised and thus was deprived of the benefit of the bargain suffices to
10 establish standing.” No. 12-00725, ECF No. 49, at 6-7 (citing both *In re Toyota Motor Corp.*
11 *Unintended Acceleration Mktgs., Sales Practices, and Prods. Liab. Litig.*, 754 F. Supp. 2d 1145,
12 1164 (C.D. Cal. 2010) (“As long as plaintiffs allege a legally cognizable loss under the ‘benefit of
13 the bargain’ or some other legal theory, they have standing.”), and *Mazza v. Am. Honda Motor Co.,*
14 *Inc.*, 666 F.3d 581, 595 (9th Cir. 2012)).

15 In this case, Plaintiff’s complaint does allege the following injuries caused by Defendants:

16 But for McAfee’s misrepresentations on its website regarding the utility of [RPC],
17 Plaintiff would not have downloaded, installed, and ran [sic] the software on her
18 computer. Similarly, but for the misrepresentations made within [RPC] itself—
19 namely, that her computer was damaged by “Critical Errors” and that her “PC
20 Status” was at “High Risk”—Bilodeau would not have agreed to pay the fees
21 charged by McAfee for use of the software.

22 Additionally, because the full, registered version of [RPC] cannot actually perform
23 the level of utility described by McAfee (i.e. it did not perform any credible
24 assessment of her PC, nor truthfully categorize and report “errors”), she purchased a
25 software product that is worth much less than what was reflected in the purchase
26 price she paid.

23 Compl. at ¶¶ 43-44. In light of the Ninth Circuit’s admonition that the standing inquiry must
24 precede an inquiry into the merits of the case, the Court joins the *Kulesa* Court, and finds that
25 Plaintiff’s allegation of a lost “benefit of the bargain” is sufficient to establish a concrete injury for
26 the purposes of Article III standing. Specifically, because Plaintiff alleges that she “purchased a
27 software product that is worth much less than what was reflected in the purchase price she paid” as
28 a result of Defendants’ respective misrepresentations, on its face, the complaint sufficiently alleges

1 a concrete and particularized injury. *C.f.*, *Brazil v. Dole Food Co., Inc.*, No. 12-01831, 2013 WL
2 1209955, at *13 (N.D. Cal. Mar. 25, 2013) (“Assuming all of the factual allegations alleged in the
3 FAC to be true, the Court must accept that [Plaintiff] suffered a concrete and particularized injury
4 based on the fact that he allegedly was deceived, and then paid money that he would not otherwise
5 have paid had he known about the true nature of Defendants’ products.”). Accordingly, McAfee’s
6 motion to dismiss for lack of standing is DENIED.

7 **B. Plaintiff’s Complaint Fails to Satisfy the Heightened Pleading Requirements of**
8 **Federal Rule of Civil Procedure 9(b)**

9 Plaintiff does not dispute McAfee’s contention that all of Plaintiff’s claims sound in fraud
10 and are thus subject to Rule 9(b). *See* Reply at 5. Because each of Plaintiff’s causes of action is
11 based on RPC’s alleged misrepresentations of registry errors, each of Plaintiff’s allegations against
12 McAfee “rely on a unified fraudulent course of conduct,” and thus all the claims are “grounded in
13 fraud . . . [and] as a whole must satisfy the particularity requirement of Rule 9(b).” *Vess*, 317 F.3d
14 at 1006; *Kearns*, 567 F.3d at 1125. *See also* *Janney v. Mills*, No. 12-3919, 2013 WL 1962360
15 (N.D. Cal. May 10, 2013) (“[W]here the claim is that the defendant made false statements for
16 financial gain, the complaint is grounded in fraud.”) (citing *Kearns*, 567 F.3d at 1125).

17 “Averments of fraud must be accompanied by ‘the who, what, when, where, and how’ of
18 the misconduct charged,” *Kearns*, 567 F.3d at 1124, as well as the circumstances indicating
19 fraudulent conduct, *Vess*, 317 F.3d at 1106; *Mazur v. eBay, Inc.*, 2008 WL 618988, *13 (N.D. Cal.
20 Mar. 4, 2008). To satisfy the Rule 9(b) standard, the allegations must be “specific enough to give
21 defendants notice of the particular misconduct which is alleged to constitute the fraud charged so
22 that they can defend against the charge and not just deny that they have done anything wrong.”
23 *Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1985). Below, the Court applies this standard
24 both to Plaintiff’s allegations regarding the representations on McAfee’s website, and to Plaintiff’s
25 allegations regarding RPC’s false reporting on Plaintiff’s own computer.

26 **1. McAfee’s Website’s Alleged Representations of RPC’s Capacity**

27 Plaintiff’s first theory of liability alleges that McAfee’s website misrepresented the
28 capacities of RPC. However, the complaint fails to provide the Court with sufficient information

1 about the “who,” or the “what” of these allegations.

2 First, the complaint fails to distinguish between representations made by McAfee and
3 representations made by Capital Intellect. Specifically, the complaint alleges that Plaintiff
4 downloaded the software “[r]elying upon the representations made by Defendants,” Compl. ¶ 40,
5 without making explicit which Defendant made which representations. The identification of
6 “who” allegedly made the various representations is essential to determining the respective liability
7 of the two defendants. *See Kearns*, 567 F.3d at 1124.

8 Second, and more importantly, the complaint paraphrases the allegedly false representations
9 made by Defendants without citation, failing to provide the specificity that would be required to
10 put Defendants on notice, or to permit the Court to evaluate the validity of Plaintiff’s fraud claim.
11 The complaint does provide direct quotations from McAfee’s Registry Power Cleaner website, as
12 viewed on August 15, 2012, representing that RPC will “[r]epair[] PC registry errors”; “[i]mprove
13 [PC] speed”; “[s]can[] for hidden threats”; and “[p]revent[] frequent crashes,” *id.* ¶ 21, and
14 “[s]afely repair harmful registry errors that make your PC unstable,” *id.* ¶ 22. However, Plaintiff
15 also alleges that Defendants represented that RPC would “accurately identify, report and repair a
16 variety of computer errors,” Compl. ¶ 40, without attributing these representations to any specific
17 Defendant at any specific time. Plaintiff further makes the concededly general allegation that,
18 “[r]egardless of the form that they took, the representations Defendant McAfee made to Plaintiff
19 and the proposed Class regarding [RPC]’s utility were essentially the same: the software will scan
20 the user’s PC, accurately report harmful errors and other threats, and ultimately repair such
21 problems.” Compl. ¶ 24.

22 Under Rule 9(b), the Court cannot evaluate Defendants’ representations “[r]egardless of the
23 form they took.” Compl. ¶ 40. McAfee contends that it only represented that the software would
24 repair, improve speed, scan for hidden threats, and prevent frequent crashes, and did not represent
25 that RPC would accurately report errors. Mot. at 2. McAfee notes that none of the specific
26 marketing statements quoted in the complaint from McAfee’s website concern the reporting
27 function of the software. Mot. at 2. Although McAfee and Plaintiff dispute the distinction
28 between the software’s scanning and reporting functions, *see* Mot. at 7-8, Opp’n at 7-8, neither

1 Defendants nor the Court can sufficiently evaluate Plaintiff's claims without clarity in the
2 complaint as to what exactly was represented by whom. *See Kearns*, 567 F.3d at 1126 (finding a
3 complaint failed to satisfy Rule 9(b) in part because it failed to "specify what [allegedly
4 misleading] television advertisements or other sales material specifically stated.").

5 The generalized nature of Plaintiff's allegations parallel the complaints filed in a number of
6 lawsuits brought by Plaintiff's counsel around the same time against various manufacturers of
7 computer scan software. Each suit alleges that Plaintiff's counsel "hired a computer forensic
8 expert who determined that the software falsely reports problems with the user's computer; that the
9 marketing materials for the software promise that it accurately scans the computer and fixes
10 various problems, but instead the software misrepresents the health of the computer and does not
11 improve its performance; and that the class members purchased the software in reliance on the
12 defendant's false advertising." *Parker v. Iolo Technologies LLC*, 12-00984, 2012 WL 4168837, at
13 *2 (C.D. Cal. Aug. 20, 2012) (noting that many allegations had been "copied and pasted" between
14 the complaint in that action and the complaints in *Batchelor v. Aol Inc.*, No. 12-00963 (S.D.N.Y.
15 Feb. 6, 2012); *LaGarde v. Support.com, Inc.*, No. 12-0609 JSC (N.D. Cal. Feb. 7, 2012); *Gross v.*
16 *Symantec Corp.*, No. 12-00154 (N.D. Cal. Jan. 10, 2012)). *See also Kulesa v. PC Cleaners, Inc.*,
17 12-00725, ECF. No. 1 (C.D. Cal. October 12, 2012) (complaint filed with nearly identical
18 language).¹

19 Other courts have dismissed Plaintiff's counsel's similar complaints on analogous Rule 9(b)
20 grounds. Specifically, in another parallel case within this district, *Gross v. Symantec Corp.*, the
21 complaint alleged representations by Symantec that directly parallel those in the instant case. No.
22 12-00154, 2012 WL 3116158, at *4 (N.D. Cal. July 31, 2012) (citing language from the first
23 amended complaint in that action that "Symantec represents to the consumer that [the software at
24

25 ¹ The plausibility and specificity failings addressed in this Order are only magnified by the fact
26 that the complaint is substantially similar to those filed by Plaintiff's counsel in several other cases.
27 This Court joins others that have cautioned Plaintiff's counsel that "the copying and pasting of
28 claims from one complaint to another is disfavored and undermines the claims for relief." *Parker*
v. Iolo Technologies LLC, 12-00984, 2012 WL 4168837, at *2 n.1 (C.D. Cal. Aug. 20, 2012)
(citing *Camillo v. City of Maywood*, No. 07-3469, 2008 WL 4056994, at *8 (C.D. Cal. Aug. 27,
2008)).

1 issue] is capable of identifying and fixing a wide range of PC errors, privacy threats and other
2 computer problems,” and that “Symantec affirmatively represented to Plaintiff that [the software]
3 would honestly and accurately scan his computer for harmful problems, repair those problems,
4 increase the speed and stability of his computer, and protect his privacy”) (internal quotations
5 omitted). The *Gross* Court found that these allegations were “too vague to be actionable in federal
6 court.” *Id.* at * 5. The *Gross* Court relied on *Wenger v. Lumisys, Inc.*, another Northern District
7 case that applied Rule 9(b) in the context of alleged false and misleading statements that allegedly
8 were intended to artificially inflate the post-IPO price of Lumisys stock. 2 F. Supp. 2d 1231, 1246
9 (N.D. Cal. 1998)). The *Lumisys* Court demanded direct quotations, finding that “vague,”
10 “impressionistic” and “repackage[d]” statements did not provide sufficient information as to what
11 defendants “actually said.” 2 F. Supp. 2d at 1246-47.

12 As noted in *Gross*, this Court has found that Rule 9(b) can be satisfied without direct
13 quotations, provided that the complaint’s allegations are sufficiently specific. *See Gross*, 2012 WL
14 3116158, at * 4 n.6 (citing *Kowalsky v. Hewlett-Packard Co.*, 771 F. Supp. 2d 1138, *order vacated*
15 *in part on other grounds*, 771 F. Supp. 2d 1156 (N.D. Cal. 2011)). Indeed, this Court in *Kowalsky*
16 found a complaint sufficiently precise and specific which alleged, without quotation, that defendant
17 HP had represented that “the HP 8500 Printer was able to scan and copy at speeds of up to 34
18 pages per minute in color, and 35 pages per minute in black and white via the 50–page capacity
19 ADF.” *Kowalsky*, 771 F. Supp. 2d at 1143. However, in the instant case, Plaintiff’s general,
20 uncited allegations that Defendants represented that RPC would “accurately report harmful errors,”
21 Compl. ¶ 24, or “accurately identify, report and repair a variety of computer errors and other
22 problems,” Compl. ¶ 40, are a far cry from the level of concrete, technical specificity in *Kowalsky*.
23 In the instant case, as in *Gross*, “Plaintiff’s entire suit turns on how [Defendants’] representations
24 compare to the actual functionality of [the] software,” and the lack of specificity regarding what
25 representations each Defendant actually made is therefore “fatal to all Plaintiff’s claims because the
26 same allegations of fraudulent conduct support each claim.” *Gross*, 2012 WL 3116158, at * 5.
27 Accordingly, the Court finds that Plaintiff’s allegations regarding misrepresentations on McAfee’s
28 website fail to satisfy the requirements of Rule 9(b).

1 misconduct that constitutes the fraud charged, inhibiting [defendant’s] ability to prepare and [sic]
2 adequate response.” *Kulesa*, No. 8:12-CV-00725, ECF. No. 49, at 11 (citing *Moore v. Kayport*
3 *Package Express, Inc.*, 885 F.2d 531, 540 (9th Cir. 1989)). Similarly, in this case, Plaintiff has not
4 alleged what errors were reported, or whether the reported errors were non-existent or merely
5 harmless. Rather, she makes the logical leap that because RPC allegedly reported false positives
6 on a new virtual computer, the reported errors on her computer either did not exist or did not pose a
7 risk. However, by her own admission, Plaintiff’s computer malfunctioned prior to seeing
8 McAfee’s ad or using RPC, *id.* ¶36, undermining the proposition that Plaintiff’s computer was
9 error free. Plaintiff does not indicate that any expert ever examined *her* computer to determine
10 whether the reported errors were in fact false. Nor does she indicate whether RPC fixed the
11 reported errors on her computer, or whether RPC continued to provide false reports of errors after
12 RPC performed its purported cleaning and repairing functions. In light of this cumulative lack of
13 specificity, the Court finds that Plaintiff’s allegations fail to “give defendants notice of the
14 particular misconduct which is alleged to constitute the fraud charge[s].” *Semegen*, 780 F.2d at
15 731.

16 The Court notes that the lack of specificity in the complaint also raises concerns under the
17 plausibility requirements of Rule 12(b)(6). *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (“A
18 claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw
19 the reasonable inference that the defendant is liable for the misconduct alleged.”) (internal citation
20 omitted). Indeed, at least one other court considering a parallel pleading in another similar case
21 brought by Plaintiff’s counsel analyzed the deficiency as a lack of plausibility, rather than a lack of
22 particularity. In *Parker*, the court dismissed the claim on standing grounds because the plaintiff in
23 that case did not “plausibly allege that *he* suffered from . . . deficiencies of the software,” given that
24 Plaintiff had conceded that “his computer indeed functioned poorly.” *Parker*, 2012 WL 4168837,
25 at *4. However, because this Court finds Plaintiff has failed to satisfy Rule 9(b), it does not reach
26 the plausibility determination under Rule 12(b)(6).³

27
28 ³ The Court further expresses doubts as to the plausibility of Plaintiff’s theory that RPC’s false reports of errors on Plaintiff’s computer induced her to purchase the software. The complaint alleges that RPC’s “error detection and reporting procedures are simply a façade to frighten

1 In sum, the Court GRANTS McAfee’s motion to dismiss because neither Plaintiff’s
2 allegations regarding the alleged representations on McAfee’s website, nor Plaintiff’s allegations of
3 RPC’s alleged false reporting have satisfied the particularity requirement of Rule 9(b). Moreover,
4 the Court finds that these deficiencies are not specific to Defendant McAfee. Rather, the lack of
5 particularity applies equally to Plaintiff’s claims against Defendant Capital Intellect. Accordingly,
6 the Court dismisses this action in its entirety. *See Silvertown v. Dep’t of the Treasury*, 644 F.2d
7 1341, 1345 (9th Cir. 1981) (A court “may properly on its own motion dismiss an action as to
8 defendants who have not moved to dismiss where such defendants are in a position similar to that
9 of moving defendants or where claims against such defendants are integrally related.”); *Abaghinin*
10 *v. Amvac Chem. Corp.*, 545 F.3d 733, 742–743 (9th Cir. 2008) (“[W]e have upheld dismissal with
11 prejudice in favor of a party which had not appeared, on the basis of facts presented by other
12 defendants which had appeared.”).

13 However, because the Court’s dismissal is based on insufficiently particular pleading as
14 discussed above, rather than on the inherent futility of Plaintiff’s claims, the Court grants leave to
15 amend within 30 days. *See Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (noting that leave
16 to amend under Rule 15(a) “shall be freely given when justice so requires.”).

17 C. McAfee’s Objections to Plaintiff’s Specific Causes of Action

18 McAfee has also raised a series of specific objections to Plaintiff’s individual claims: (1)
19 the inapplicability of California statutes; (2) failure to allege breach of express warranty; (3) failure
20 to allege breach of contract claims; and (4) failure to cite a separate claim in breach of the implied
21 covenant of good faith and fair dealing.⁴ The Court addresses each in turn.

22 consumers into purchasing the full version of the software.” Compl. ¶ 29. However, in this case,
23 Plaintiff had 30 days to test the full repair software prior to purchase. *See id.* ¶ 41. This case is
24 unlike other cases brought by Plaintiff’s counsel, in which a plaintiff was only offered the allegedly
25 misleading free diagnostic scan prior to purchase. *Cf. Parker*, 2012 WL 4168837, at *2 (noting
26 that case’s complaint referenced a “diagnostic ‘initial scan,’ performed prior to purchase,” which
27 did not apply to plaintiff, and appeared to have been mistakenly copied and pasted from another
28 complaint). An amended complaint that seeks to pursue a theory of liability based on the
software’s representations on Plaintiff’s computer must allege facts explaining why an anti-virus
computer repair software that continuously reported critical errors would induce Plaintiff to keep
the program beyond the 30-day trial period.

⁴ McAfee does not explicitly challenge Plaintiff’s request for “damages, including statutory and
punitive damages where applicable.” Compl. at 19. However, the Court notes that non-
restitutionary damages are not available under California’s Unfair Competition Law. *See Korea*

1 **1. Applicability of California Statutes**

2 McAfee challenges Plaintiff’s ability to bring suit under Cal Bus. & Prof. Code § 17200,
3 California’s Unfair Competition Law (“UCL”), which prohibits “any unlawful, unfair, or
4 fraudulent business or practice.” Plaintiff alleges that McAfee violated § 17200 by (1)
5 misrepresenting the software to consumers, (2) misrepresenting the results of diagnostic scans to
6 consumers, (3) scaring consumers with false scan results for the purpose of tricking them into using
7 and purchasing their software, (4) breaching its express warranties in violation of California
8 Commercial Code § 2313, and (5) selling software that lacks advertised utility. *See* Compl. ¶ 58.
9 McAfee argues that Plaintiff’s California statutory claims should be dismissed because Plaintiff is
10 not a California resident and the conduct at issue, namely misrepresentations within RPC itself,
11 occurred outside of the State because RPC was developed in the Boston area. *See* Mot. 9–10
12 (citing Compl. ¶¶11, 18).

13 Neither party contests that “[s]tate statutory remedies under the . . . UCL may be available
14 to non-California residents if those persons are harmed by wrongful conduct occurring in
15 California. *In re Toyota Motor Corp.*, 785 F. Supp. 2d 883, 916 (C.D. Cal. 2011) (citing both
16 *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 242 (2001), and *Norwest Mortg., Inc. v.*
17 *Superior Court*, 72 Cal. App. 4th 214, 224–25 (1999)). *See also* *Parkinson v. Hyundai Motor Am.*,
18 258 F.R.D. 580, 598 (C.D. Cal. 2008) (“[E]xtraterritorial application of the UCL is not barred
19 where the alleged wrongful conduct occurred in California.”). In fact, McAfee concedes that “the
20 statements on its website could . . . be the source of California liability.” Reply at 9. Rather,
21 McAfee argues only that these statements cannot be the source of Plaintiff’s liability *in this case*,
22 because Plaintiff’s claims “are based on the supposedly inaccurate report produced by Capital’s

23 Supply Co. v. Lockheed Martin Corp., 29 Cal. 4th 1134, 1144-45 (2003). Furthermore, under Cal.
24 Civ. Code § 3294, a court may impose punitive damages only “in an action for the breach of an
25 obligation not arising from contract, where it is proven by clear and convincing evidence that the
26 defendant is guilty of oppression, fraud, or malice.” Absent an independent tort, punitive damages
27 “may not be awarded for breach of contract even if the defendant’s conduct in breach of the
28 contract was willful, fraudulent, or malicious.” *Brewer v. Premier Golf Prof., LP*, 168 Cal. 4th
1243, 1255–56 (1994). *See also* *20 Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal. 4th
503, 516 (1994) (discussing statutory rule that punitive damages are per se not recoverable in
ordinary actions for breach of contract). If Plaintiff seeks punitive damages in her amended
complaint, she must explain which of her causes of action purportedly provide for punitive
damages.

1 software, *not* anything McAfee said or did in California.” *Id.*

2 While the Court has dismissed Plaintiff’s complaint for failure to comply with Rule 9(b),
3 Plaintiff’s first theory of liability is premised on McAfee’s alleged misrepresentations on its
4 website, which McAfee concedes could be the source of California liability. If Plaintiff’s amended
5 complaint properly pleads these allegations pursuant to Rule 9(b), McAfee has presented no reason
6 that California statutes should not apply.⁵ The Court does not reach the applicability of California
7 statutes to Capital Intellect, who has not yet appeared in this action.

8 2. Breach of Express Warranties

9 McAfee alleges that Plaintiff’s breach of warranty claim fails because McAfee denies
10 making any warranties regarding the software’s ability to accurately report errors. Mot. at 11.
11 Under California law, in order to prevail on a breach of express warranty, Plaintiff must prove that
12 the seller: “(1) made an affirmation of fact or promise or provided a description of its goods; (2) the
13 promise or description formed the basis of the bargain; (3) the express warranty was breached; and
14 (4) the breach caused injury to the plaintiff.” *Keegan v. Am. Honda Motor Co., Inc.*, 838 F. Supp.
15 2d 929, 949 (C.D. Cal. 2012) (quoting *Alvarez v. Chevron Corp.*, 656 F.2d 925, 932 (9th Cir.
16 2011)). A buyer must also plead that notice of the alleged breach was provided to the seller within
17 a reasonable time after discovery of the breach. *See Alvarez*, 656 F.3d at 932 (quoting *Stearns v.*
18 *Select Comfort Retail Corp.*, 763 F.Supp.2d 1128, 1142 (N.D. Cal. 2010) (citations omitted). “The
19 buyer has the burden of showing that reasonable notice was provided.” *Stearns*, 763 F. Supp. 2d at
20 1142 (citing *Cardinal Health 301, Inc. v. Tyco Elecs. Corp.*, 169 Cal. App. 4th 116, 135 (Cal Ct.

21 ⁵ However, the Court notes that, addressing the applicability of California’s UCL in one of
22 Plaintiff’s counsel’s parallel suits, the Gross Court specifically required that a plaintiff’s amended
23 complaint should allege that the defendant’s sales and marketing departments operate out of its
24 California offices, because the complaint alleged fraud based on the sales and marketing of the
25 software at issue. *See Gross v. Symantec Corp.*, No. 12-00154, 2012 WL 3116158, at *8 (N.D. Cal.
26 July 31, 2012)(citing *Badella v. Deniro Mktg. LLC.*, No. 10-3908, 2011 WL 5358400, at *9, *11
27 (N.D. Cal. Nov. 4, 2011)). In this case, Plaintiff has represented to the Court that she has already
28 made such an allegation, stating that “Plaintiff alleges that McAfee’s headquarters and primary
sales and marketing operations are located in California.” Opp’n at 13 (citing Compl. ¶ 10).
Although McAfee did not challenge this characterization, in fact Paragraph 10 of the complaint
states only that McAfee’s headquarters and principal place of business are in California, and that
McAfee does business throughout the United States. Compl. ¶ 10. Plaintiff is advised that her
amended complaint should make explicit what conduct allegedly occurred in California.

1 App. 2008)).

2 The Court notes that Plaintiff provides no facts demonstrating that she gave any notice of
3 the alleged breach to the seller within a reasonable time after discovering the alleged breach or
4 complained to McAfee prior to filing suit. *See Alvarez*, 656 F.3d at 932. Plaintiff’s amended
5 complaint should address this deficiency.

6 **3. Breach of Contract**

7 Plaintiff’s fourth claim alleges breach of contract, alleging that “Defendants voluntarily
8 assumed [] contractual obligation to honestly and accurately inform [Plaintiff] about the true
9 condition of [her] computer,” and subsequently breached this obligation. *Id.* ¶¶ 85–87. Generally,
10 to state a claim for breach of contract, “a plaintiff must plead the existence of a contract, his
11 performance of the contract or excuse for nonperformance, the defendant’s breach and resulting
12 damages.” *Donohue v. Apple, Inc.*, 871 F. Supp. 2d 916, 930 (N.D. Cal. 2012) (citing *Otworth v.*
13 *Southern Pac. Transp. Co.*, 166 Cal. App. 3d 452, 458 (1985)). To properly plead these elements,
14 “[t]he complaint must identify the specific provision of the contract allegedly breached by the
15 defendant.” *Id.* (citing *Progressive West Ins. Co. v. Superior Court*, 135 Cal. App. 4th 263, 281
16 (2005)).

17 In this case, Plaintiff’s breach of contract claim fails to identify in what contract
18 “Defendants” assumed the obligation to “honestly and accurately inform [her] about the true
19 condition of [her] computer,” much less identify the specific provisions of this contract. Compl. ¶¶
20 85–87. *Cf. McAfee v. Francis*, No.11-00821, 2011 WL 3293759, at *2 (dismissing breach of
21 contract claims for failure to attach copies of the alleged contract to the Complaint, or plead the
22 essential terms of the agreement, or the date of the contract). Furthermore, Plaintiff fails to allege a
23 breach for the same reasons her claims fail to satisfy the Rule 9(b) standard: Plaintiff does not offer
24 sufficient factual allegations to establish either what representations were made on McAfee’s
25 website, or that RPC falsely reported errors on Plaintiff’s own computer. Any amended complaint
26 by Plaintiff alleging this cause of action must identify the essential terms of the agreement and
27 specific allegations of breach.

28 **4. Breach of the Implied Covenant of Good Faith and Fair Dealing**

1 Plaintiff's fifth claim alleges breach of the implied covenant of good faith and fair dealing.
2 The implied covenant of good faith and fair dealing "rests upon the existence of *some specific*
3 *contractual obligation* . . . [and] the implied covenant is limited to ensuring compliance with the
4 express terms in the contract, and cannot be extended to create obligations not contemplated in the
5 contract." *Racine & Laramie, Ltd. v. Cal. Dep't of Parks & Recreation*, 11 Cal. App. 4th 1026,
6 1031–32 (1992). As discussed above, Plaintiff has failed to identify the express terms of her
7 alleged contract, much less which specific provisions were the basis of Defendants' alleged breach
8 of the implied covenant. *See Edejer v. DHI Mortg. Co.*, No. 09-1302, 2009 WL 1684714, at *9
9 (N.D. Cal. June 12, 2009) ("To establish a breach of an implied covenant of good faith and fair
10 dealing, a plaintiff must establish the existence of a contractual obligation.").

11 Furthermore, Plaintiff's allegations of a breach of the implied covenant are identical to her
12 breach of contract allegations, relying on the same alleged acts, and may thus be "disregarded as
13 superfluous." *Zepeda v. PayPal, Inc.*, 777 F. Supp.2d 1215, 1221 (N.D. Cal. 2011) (citing
14 *Malcolm v. JPMorgan Chase Bank, N.A.*, No. 09–4496, 2010 WL 9434252, at *6 (N.D. Cal. Mar.
15 15, 2010)) (dismissing plaintiff's cause of action for breach of implied covenant because the
16 supporting allegations were the same as those alleged for their breach of contract claim, even
17 though the breach of contract claim was dismissed for failure to state a claim). Here, Plaintiff
18 alleges that Defendants breached both the contract and the implied covenant of good faith and fair
19 dealing by failing to "provide software that could honestly and accurately inform [consumers]
20 about the true condition of their computers" and otherwise "[failing] to offer the level of utility
21 promised by Defendants." *See* Compl. ¶¶87, 97. Because Plaintiff's allegations for the two causes
22 of action are entirely coincident, Plaintiff's breach of implied covenant claim is superfluous.

23 Plaintiff, noting that California state and federal courts recognize a "bad faith" exception to
24 this rule, contends that her distinct breach of implied covenant claim can survive because McAfee
25 "acted in bad faith to frustrate the contract's benefits." Opp'n 16-17 (citing *Guz v. Bechtel Nat'l,*
26 *Inc.*, 24 Cal. 4th 317, 353 n. 18 (2000); *Lamke v. Sunstate Equip. Co., LLC*, No. 03-4956, 2004 WL
27 2125869 (N.D. Cal. Sept. 22, 2004); *Shaterian v. Wells Fargo Bank, N.A.*, No. 11-00920, 2011 WL
28 5358751, at *8 (N.D. Cal. Nov. 7, 2011)). However, Plaintiff fails to recognize that this exception

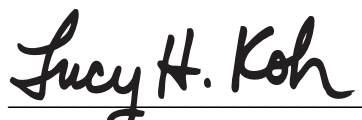
1 applies where a plaintiff acted in bad faith to frustrate the contract’s actual benefits, and does not
2 extend to allegations of a defendant’s bad faith in inducing a plaintiff to enter a contract. *See*
3 *Shaterian*, 829 F. Supp. 2d at 884 (distinguishing between “actions presumably taken to induce
4 [contract formation]” and those taken “to frustrate the benefits of the contract”); *see also Gross*,
5 2012 WL 3116158, at *12–13. Because the complaint only alleges representations made by
6 Defendants to induce keeping RPC beyond the 30-day free trial period, the only alleged bad faith
7 relates to inducement to enter into the contract, not frustration of the benefits of the contract.
8 Accordingly, any amended complaint seeking to pursue this cause of action must allege either facts
9 beyond those establishing breach of contract, or allegations of bad faith in frustrating the benefits
10 of the contract.

11 **IV. CONCLUSION**

12 For the foregoing reasons, the Court GRANTS McAfee’s motion to dismiss as against both
13 Defendants. All the claims are dismissed without prejudice. Should Plaintiff elect to file an
14 amended complaint curing the deficiencies discussed herein, she shall do so within 30 days of the
15 date of this Order. Failure to meet the 30-day deadline to file an amended complaint or failure to
16 cure the deficiencies identified in this Order will result in a dismissal with prejudice. Plaintiffs
17 may not add new causes of action or parties without leave of the Court or stipulation of the parties
18 pursuant to Federal Rule of Civil Procedure 15.

19 **IT IS SO ORDERED.**

20
21 Dated: June 24, 2013



22 LUCY H. KOH
23 United States District Judge
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27
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