

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

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

SAM WILLIAMSON, individually and on )  
behalf of all others similarly situated, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
MCAFEE, INC., )  
 )  
Defendant. )

Case No.: 5:14-CV-00158-EJD  
**ORDER GRANTING IN PART AND  
DENYING IN PART DEFENDANT’S  
MOTION TO DISMISS**  
**[Re: Docket No. 21]**

Presently before the court in this purported consumer class action is Defendant McAfee, Inc.’s (“Defendant”) Motion to Dismiss Plaintiff Sam Williamson’s (“Plaintiff”) Complaint. Def. Mot. to Dismiss (“Mot. to Dismiss”), Docket Item No. 21. The court previously found this matter suitable for decision without oral argument and vacated the hearing pursuant to Civil Local Rule 7-1(b). Having reviewed the parties’ submissions, and for the following reasons, the court GRANTS in part and DENIES in part Defendant’s motion.

**I. Background**  
**a. Factual Background**

This action concerns the alleged disparity between Defendant’s auto-renewal and off-the-rack pricing for its popular anti-virus software: McAfee AntiVirus Plus, McAfee Internet Security,

1 and McAfee Total Protection (collectively, “Software”). See Compl. ¶ 13, Docket Item No. 1.  
2 Customers can purchase a one-year license to the Software either directly from Defendant’s  
3 website or from an authorized retailer, such as Target or Best Buy. Id. ¶¶ 15, 17. According to  
4 Plaintiff, when customers purchase this initial one-year subscription, Defendant aggressively  
5 pushes them into an auto-renewal program, whereby, upon a customer’s subscription expiration,  
6 Defendant automatically renews the subscription for another one-year period by charging the  
7 customer’s credit card on file. Id. ¶ 17. Once in the auto-renewal program, these customers are  
8 allegedly charged a higher price for their renewed subscriptions than Defendant charges any of its  
9 other customers for a one-year subscription.

10 Customers arrive at Defendant’s auto-renewal program in one of three ways. First, when  
11 customers purchase a one-year subscription on Defendant’s website, or when customers manually  
12 renew their subscription on the website, Defendant automatically enrolls them in its auto-renewal  
13 program. Id. ¶¶ 17, 33. Customers must take affirmative steps to un-enroll from the program. Id.  
14 ¶ 33. Second, when customers purchase the Software elsewhere, they may manually enroll in the  
15 auto-renewal program through their account on Defendant’s website. Id. ¶ 38. Defendant  
16 encourages customers to do so by including prompts in the software installation process. Id.  
17 Third, for customers who purchase the Software elsewhere but do not manually enroll in the auto-  
18 renewal program, the Software urges them to manually renew their subscriptions via a purchase  
19 path built into the Software itself. Id. ¶ 36. Upon manually renewing their subscriptions in this  
20 manner, customers are automatically enrolled in the auto-renewal program going forward. Id.  
21 Similar to the website customers, these in-Software renewal customers must take affirmative steps  
22 to un-enroll themselves from the auto-renewal program. Id.

23 A key selling point of the auto-renewal program, according to Plaintiff, is Defendant’s  
24 repeated assurances that customers will not suffer any cost disadvantage by joining it. See id. ¶¶  
25 21, 30. For example, Defendant makes the following representation in its Consumer Products End  
26 User License Agreement (“Agreement”), which customers must agree to in order to use the  
27 Software:

1 If You have provided McAfee with a valid credit card number or an alternative payment  
2 method, Your subscription will be automatically renewed (and charged to the Account You  
3 have provided) for another term at the expiration of Your current term, whenever Your  
4 local regulations will allow, for a fee no greater than McAfee’s then-current price,  
5 excluding promotional and discount pricing.

6 Compl. Ex. A ¶ 14, Docket Item No. 1-1; see Compl. ¶¶ 24-26, Dkt. No. 1. This statement that  
7 auto-renewal customers’ subscriptions will be renewed at the “then-current price, excluding  
8 promotional and discount pricing” also appears on Defendant’s website, in the Software itself,  
9 before and during the checkout path, and on the un-enroll page. Compl. ¶¶ 21, 29, 34-35, 37, 39,  
10 Dkt. No. 1.

11 Plaintiff alleges that these repeated representations are designed to persuade customers that  
12 it is in their best interest to enroll and remain enrolled in the auto-renewal program. But this design  
13 is a false and misleading one, according to Plaintiff, because in reality, Defendant consistently  
14 charges its auto-renewal customers higher prices than the normal, “then-current price” it offers to  
15 all other customers, whether they are purchasing a subscription to the Software for the first time or  
16 manually-renewing their existing subscription. Id. ¶¶ 30-31. Defendant achieves this pricing  
17 disparity by advertising the price offered to all other customers as a discounted price, typically by  
18 displaying a slashed-through list price next to a new, promotional, price. See, e.g., id. ¶¶ 56, 156,  
19 160. Plaintiff contends that this price cannot be a promotional or discounted price because it is the  
20 price paid by nearly all of Defendant’s customers; only the auto-renewal customers pay the  
21 purported list price, which in addition to exceeding the price charged to all others even exceeds the  
22 Manufacturer’s Suggested Retail Price (“MSRP”). See id. ¶¶ 46-51. In other words, Defendant  
23 charges a special, premium price to its auto-renewal customers.

24 Plaintiff claims to be one of a class of customers who were deceived by Defendant’s pricing  
25 scheme. He states that his new desktop computer came pre-installed with a 60-day free trial  
26 subscription to McAfee AntiVirus Plus, which he activated on October 8, 2011. Id. ¶ 54. During  
27 the activation process, the software displayed prompts and advertising encouraging him to  
28

1 purchase a one-year paid subscription to the software and offering him a discount from the  
2 purported list price. Id. ¶ 55. Plaintiff purchased the one-year subscription at the ostensibly  
3 discounted price and was automatically enrolled in the auto-renewal program. Id. ¶¶ 56, 58. In  
4 doing so, Plaintiff entered into the Agreement with Defendant. Id. ¶ 59. Defendant automatically  
5 renewed Plaintiff's subscription on November 7, 2012, charging him the purported list price of  
6 \$49.99. Id. ¶ 60. That same day, Defendant offered the same subscription for \$34.95 to all non-  
7 auto-renewal customers, whether those customers were subscribing for the first time or manually  
8 renewing their existing subscriptions. Id.

9 **b. Procedural Background**

10 On January 10, 2014, Plaintiff filed this purported class action regarding Defendant's  
11 allegedly misleading pricing scheme, raising claims of (1) breach of contract, (2) breach of the  
12 covenant of good faith and fair dealing, (3) unjust enrichment, (4) violation of California Business  
13 & Professions Code § 17200, et seq., (5) violation of California Business & Professions Code §  
14 17500, et seq., (6) violation of California Business & Professions Code § 17600, et seq., (7)  
15 violation of California Civil Code § 1750 et seq., and, in the alternative (8) violation of New York  
16 General Business Law § 349, and (9) violation of New York General Business Law § 350.  
17 Compl., Dkt. No. 1. In addition, Plaintiff includes a tenth claim focused on Defendant's  
18 misleading price advertisements. Id. Plaintiff purports to represent a class defined as:

19 All persons in the United States who have incurred charges from McAfee for the automatic  
20 renewal of a subscription to the following McAfee-branded products during the following  
21 time periods:

Product	Time Periods
McAfee AntiVirus Plus	Applicable statute of limitation through 9/4/2012; 9/18/2012 through the present
McAfee Internet Security	Applicable statute of limitation through 9/4/2012; 9/18/2012 through the present

McAfee Total Protection	Applicable statute of limitation through 9/5/2012; 9/18/2012 through 9/3/2013
-------------------------	--

Id. ¶ 63. In addition, Plaintiff seeks to represent a “Reference Price Class” defined as:

All persons in the United States who purchased or manually renewed, on McAfee’s website or via their McAfee Software, McAfee-branded software advertised as discounted from a represented former sales price as indicated and set forth in the chart immediately below:

<b>Product</b>	<b>Time Periods</b>
McAfee AntiVirus Plus	Applicable statute of limitation through the present
McAfee Internet Security	Applicable statute of limitation through the present
McAfee Total Protection	Applicable statute of limitation through 9/3/2013

Id. ¶ 64. Defendant filed the instant Motion to Dismiss on March 7, 2014. Dkt. No. 21. The court now turns to the substance of that motion.

**II. Legal Standard**

Federal Rule of Civil Procedure 8(a) requires a plaintiff to plead each claim in the complaint with sufficient specificity to “give the defendant fair notice of what the ... claim is and the grounds upon which it rests.” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (internal quotations omitted). A complaint which falls short of the Rule 8(a) standard may be dismissed if it fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). Dismissal under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim is “proper only where there is no cognizable legal theory or an absence of sufficient facts alleged to support a cognizable legal theory.” Shroyer v. New Cingular Wireless Servs., Inc., 606 F.3d 658, 664 (9th Cir. 2010) (quoting Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001)). In considering whether the complaint is sufficient to state a claim, the court must accept as true all of the factual allegations

1 contained in the complaint. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). While a complaint need  
2 not contain detailed factual allegations, it “must contain sufficient factual matter, accepted as true,  
3 to ‘state a claim to relief that is plausible on its face.’” Id. (quoting Twombly, 550 U.S. at 570).

4 Fraud-based claims are subject to further heightened pleading requirements under Federal  
5 Rule of Civil Procedure 9(b). A party alleging fraud “must state with particularity the  
6 circumstances constituting fraud.” Fed. R. Civ. P. 9(b). The allegations must be “specific enough  
7 to give defendants notice ... so that they can defend against the charge and not just deny that they  
8 have done anything wrong.” Semegen v. Weidner, 780 F.2d 727, 731 (9th Cir. 1985). To that end,  
9 the allegations must contain “‘the who, what, when, where, and how’ of the misconduct charged.”  
10 Vess v. Ciba–Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir. 2003) (quoting Cooper v. Pickett,  
11 137 F.3d 616, 627 (9th Cir. 1997)). Allegations of fraud must also contain an account of the “time,  
12 place, and specific content of the false representations as well as the identities of the parties to the  
13 misrepresentations.” Swartz v. KPMG LLP, 476 F.3d 756, 764 (9th Cir. 2007) (quoting Edwards  
14 v. Marin Park, Inc., 356 F.3d 1058, 1066 (9th Cir. 2004)).

### 15 **III. Discussion**

#### 16 **a. Auto-Renewal Class Claims**

##### 17 **i. Breach of Contract**

18 Plaintiff contends that Defendant has breached its contract with him by charging him a higher  
19 price for his auto-renewal than the normal, then-current price offered to other customers for the same  
20 product. See Compl. ¶ 82, Dkt. No. 1. To state a claim for breach of contract in California, a plaintiff  
21 must allege: “(1) existence of the contract; (2) plaintiff’s performance or excuse of non-performance;  
22 (3) defendant’s breach; and (4) damages to plaintiff as a result of the breach.” CDF Firefighters v.  
23 Maldonado, 158 Cal. App. 4th 1226, 1239 (2008).<sup>1</sup> Here, the parties dispute only whether Plaintiff  
24 has adequately pled the element of breach.

25  
26  
27 <sup>1</sup> The parties dispute the enforceability of the Agreement’s choice-of-law provision, which selects New York law. See  
28 Compl. Ex. A ¶ 25, Dkt. No. 1-1. For purposes of this motion, however, the parties agree to assume California law  
applies. See Mot to Dismiss at 6, n. 1, Dkt. No. 21.

1           The Agreement specifies that, upon expiration of Plaintiff’s subscription, Defendant will  
2 auto-renew the subscription “for a fee no greater than McAfee’s then-current price, excluding  
3 promotional and discount pricing.” Compl. Ex. A ¶ 14, Dkt. No. 1-1. Defendant contends that  
4 Plaintiff’s breach of contract claim must be dismissed because this section of the Agreement  
5 expressly permits the exact behavior Plaintiff considers to be a breach, i.e. “renewal at a price  
6 higher than Plaintiff paid at the outset.” Moreover Defendant contends that this provision does not  
7 require it to offer Plaintiff the same price for auto-renewal that it offers to new subscribers. Mot. to  
8 Dismiss at 1, 6, Dkt. No. 21.

9           While Defendant’s arguments are technically correct, they miss the nuance of Plaintiff’s  
10 theory. Plaintiff alleges that Defendant breached the Agreement not by failing to offer him a  
11 discounted renewal price or by requiring him to pay a higher price than he paid the previous year,  
12 but rather by charging him a premium above the then-current, non-discounted price offered to all  
13 other customers who were not enrolled in the auto-renewal program. Defendant implicitly relies  
14 on the fact that the price it charges all non-auto-renewal customers is presented as a bargain: for  
15 instance, in many circumstances, the former, higher, selling price of the Software is set forth in a  
16 slashed-through manner and the new, lower, promotional price that a customer will actually pay is  
17 displayed next to it. See, e.g. Compl. ¶¶ 55, 156, Dkt. No. 1. On the surface, it thus appears that  
18 all non-auto-renewal customers are simply being offered a discounted price, a price which  
19 Defendant is under no obligation to offer to its auto-renewal customers under the Agreement. But  
20 the heart of Plaintiff’s argument is his assertion that the price offered to all customers other than  
21 the auto-renewal customers is not a “discounted” or “promotional” price at all, but in fact is the  
22 true, non-discounted price of the Software. See Compl. ¶ 49, Dkt. No. 1. Plaintiff pleads a direct  
23 challenge to Defendant’s characterization of its pricing scheme with particularity, offering  
24 historical price data and MSRPs. See id. ¶¶ 46-50. As such, the court does not agree that  
25 Plaintiff’s allegations amount to a blatant misstatement of the language of the Agreement as  
26 Defendant suggests. Nor is the court compelled by Defendant’s remaining arguments regarding  
27 contract interpretation, which the court finds to be more appropriate for a later stage in the  
28

1 litigation. Accordingly, the court finds that Plaintiff has sufficiently pled his breach of contract  
2 claim.

3 **ii. Breach of the Covenant of Good Faith and Fair Dealing**

4 “The obligations imposed by the covenant of good faith and fair dealing are not those set  
5 out in the term of the contract itself, but rather are obligations imposed by law governing the  
6 manner in which the contractual obligations must be discharged—fairly and in good faith.”  
7 Koehrer v. Super. Ct., 181 Cal. App. 3d 1155, 1169 (Cal. Ct. App. 1986). The contours of any  
8 party’s duty under the covenant, as well as any conduct prohibited by the covenant, are determined  
9 by the purpose and terms of the contract at issue. See Inter-Mark USA, Inc. v. Intuit, Inc., No. 07-  
10 CV-04178, 2008 WL 552482, at \*7 (N.D. Cal. Feb. 27, 2008) (quoting Commercial Union  
11 Assurance Cos. v. Safeway Stores, Inc., 26 Cal. 3d 912, 918 (1980) and Carma Developers, Inc. v.  
12 Marathon Dev. Cal., Inc., 2 Cal. 4th 342, 373 (1992)). However, a claim for breach of the implied  
13 covenant must present a separate basis for relief than a breach of the contract itself. “If the  
14 allegations in a breach of implied covenant claim do not go beyond the statement of a mere  
15 contract breach and, relying on the same alleged acts, simply seek the same damages or other relief  
16 already claimed in a companion contract cause of action, they may be disregarded as superfluous as  
17 no additional claim is actually stated .” Malcolm v. JP Morgan Chase Bank, N.A., No. 09-CV-  
18 4496, 2010 WL 934252, \*6 (N.D. Cal. Mar. 15, 2010) (quoting Schulken v. Wash. Mut. Bank, No.  
19 09-CV-02708, 2009 WL 4173525 (N.D. Cal. Nov. 19, 2009)).

20 Plaintiff bases his claim for breach of the implied covenant on his assertion that the  
21 Agreement vests Defendant with a certain amount of discretion to set prices for its auto-renewal  
22 customers, discretion which Defendant abused in charging Plaintiff a premium over the regular  
23 price it offered to all other non-auto-renewal customers. See Compl. ¶¶ 88-89, Dkt. No. 1. Though  
24 artfully pled, the court finds that this claim ultimately depends on the same conduct at issue in the  
25 breach of contract claim: Defendant’s charging its auto-renewal customers a higher price than all  
26 other customers. As such, this claim is duplicative of Plaintiff’s breach of contract claim and will  
27 be dismissed without leave to amend.







1 Plaintiff's claims under the UCL's fraudulent prong and the FAL fail for a simple reason:  
2 Plaintiff does not allege reliance on Defendant's representation that his subscription would be  
3 automatically renewed at the "then-current" price charged to other consumers. While Plaintiff goes  
4 to great lengths to allege reliance on Defendant's representation that the price it offered Plaintiff  
5 for his initial purchase was a discounted one, he is silent as to his reliance on any representations  
6 made particularly to him regarding future purchases pursuant to Defendant's auto-renewal pricing  
7 policy. Compare Compl. ¶¶ 55-57 with ¶¶ 58-59, Dkt. No. 1. As such, Plaintiff has not satisfied  
8 the heightened pleading standard of Rule 9(b) and the court will dismiss his fraud-based claims  
9 with leave to amend.

10 **vi. UCL "Unfair" Prong Claim**

11 While a plaintiff may raise a claim independently under the UCL's unfair prong, the  
12 standard for deciding that claim is not settled. California courts have held that such an unfair  
13 business practice for purposes of this prong is "one that either offends an established public policy  
14 or is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers."  
15 McDonald v. Coldwell Banker, 543 F.3d 498, 506 (9th Cir. 2008) (internal citations omitted).  
16 Under this standard, a court considering an unfair prong claim must weigh the utility of the  
17 defendant's conduct against the gravity of the harm to the alleged victim. See Bardin v.  
18 Daimlerchrysler Corp., 136 Cal. App. 4th 1255, 1268 (2006). The California Supreme Court,  
19 however, considers this standard "too amorphous," at least as it applies to claims for unfair  
20 competition brought by a business competitor. Cel-Tech, 20 Cal. 4th at 185. Under those  
21 circumstances, the court is required to consider whether the alleged unfairness is "tethered to a  
22 constitutional or statutory provision or a regulation carrying out statutory policy." Id. at 185, 187  
23 (internal citations omitted). As a result of this disagreement, "California courts are currently  
24 divided on whether the tethering or balancing test applies in consumer actions." Ferrington v.  
25 McAfee, Inc., No. 10-CV-01455-LHK, 2010 WL 3910169, at \*12 (N.D. Cal. Oct. 5, 2010)  
26 (collecting cases). The Ninth Circuit has not resolved this issue for the federal district courts;  
27 instead, it approves the use of either test until the California Supreme Court issues guidance. See

1 Lozano v. AT&T Wireless Servs., Inc., 504 F.3d 718, 735 (9th Cir. 2007) (holding that both the  
2 balancing and tethering tests were viable and not mutually exclusive in consumer harm actions).

3 Here, Plaintiff has failed to state a claim under both the balancing and the tethering tests.  
4 As to the balancing test, Plaintiff has sufficiently described Defendant’s practices but has not  
5 provided sufficient factual allegations to plausibly and plainly allege that those practices are  
6 “immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers,” nor has  
7 Plaintiff included allegations that go towards comparing the harm to consumers against the utility  
8 of Defendant’s conduct. As to the tethering test, Plaintiff argues that its claims could be tethered to  
9 the policy and spirit of the Auto-Renewal Statute and the principles underlying the covenant of  
10 good faith and fair dealing. As the court dismisses both of these claims in this Order, Plaintiff  
11 cannot properly base its unfair prong claim on them. Accordingly, the court dismisses the unfair  
12 prong claim with leave to amend.

13 **vii. Consumer Legal Remedies Act Claim, California Civil Code § 1750 et**  
14 **seq.**

15 The California Consumer Legal Remedies Act (“CLRA”) prohibits certain “unfair methods  
16 of competition and unfair or deceptive acts or practices undertaken by any person in a transaction  
17 intended to result or which results in the sale or lease of goods or services to any consumer.” Cal.  
18 Civ. Code § 1770(a). Defendant argues that Plaintiff cannot state a CLRA claim because neither  
19 software nor licenses to software constitute “goods” or “services” under that statute. While neither  
20 the Ninth Circuit nor the California Court of Appeal have yet provided guidance on this issue,  
21 courts in this district have found that, at this time, California law supports a finding that software,  
22 along with licenses to it, is not included in the CLRA’s scope; moreover, a court in this district  
23 determined that Defendant’s product in particular does not constitute a good or service for purposes  
24 of the CLRA. See Ferrington, 2010 WL 3910169 at \*18-19 (collecting cases and finding that the  
25 CLRA does not cover McAfee software). While the answer to this issue remains a close call, this  
26 court follows its sister courts and finds that the CLRA does not cover software licenses.  
27 Accordingly, the court will dismiss Plaintiff’s CLRA claim without leave to amend.

1 **viii. California’s Auto-Renewal Statute Claim, California Business &**  
2 **Professions Code §§17600-17606**

3 The California Auto-Renewal Statute requires a business making automatic renewal offers  
4 to, inter alia, provide consumers “clear and conspicuous notice” of any “material change in the  
5 terms of the automatic renewal...service.” Cal. Bus. & Prof. Code § 17602(c). Plaintiff alleges  
6 that Defendant violated this statute because its decision to charge its auto-renewal customers a  
7 price higher than the price charged to all other customers represented a material change to the  
8 terms of the Agreement and customers were not provided notice of this change. See Compl. ¶ 15,  
9 Dkt. No. 1. The court is not convinced that the facts, as alleged, suffice to state a claim under this  
10 statute. The behavior Plaintiff complains of occurred throughout the life of the Agreement;  
11 therefore, Plaintiff cannot plausibly allege that Defendant materially changed the terms of the  
12 Agreement at any particular point in time. That the parties may have differed in their  
13 understanding of the terms from the outset does not form a basis for a violation under this statute.  
14 Accordingly, this claim will be dismissed with leave to amend.

15 **ix. New York Claims**

16 Plaintiff brings a number of New York statutory claims in the alternative due to the parties’  
17 dispute over choice-of-law. Without reaching the choice-of-law issue or the merits of the New  
18 York law claims, the court notes that Plaintiff is a resident of California and, by his own admission,  
19 suffered harm in California only. See Compl. ¶¶ 6-7, 75, Dkt. No. 1. Under these circumstances,  
20 Plaintiff has failed to allege any actionable deception he suffered in New York, and thus lacks  
21 standing to bring these claims. The court will therefore dismiss the New York statutory claims  
22 without leave to amend.

23 **b. Reference Price Class Claim**

24 Plaintiff’s final cause of action appears to be in truth at least three causes of action under  
25 the UCL, FAL, and CLRA, all based on the same conduct: Defendant’s advertising of false “slash-  
26 through” reference prices implying similarly false “savings.” See Compl. ¶¶ 153-183, Dkt. No. 1.  
27 These claims are separate from the auto-renewal claims and are brought on behalf of a different  
28

1 “Reference Price” class. At the outset, the court notes that the conflating of three distinct claims  
2 into a single cause of action fails to satisfy Rule 8’s basic pleading standard. See Milpitas Mobile  
3 Home Estates v. City of Milpitas, No. 12-CV-3386-EJD, 2013 WL 4504877 (N.D. Cal. Aug. 21,  
4 2013). This failure alone provides ample ground on which the court can and will dismiss this  
5 claim, yet the court cannot simply do so without further explanation because dismissing three  
6 causes of action as a single claim could yield to unwieldy results, especially considering some  
7 portions must be dismissed with leave to amend and others without. Therefore, the court will  
8 briefly provide guidance as to these three individual claims.

9 As to the CLRA portion of the claim, the court dismisses that claim without leave to amend,  
10 for the same reasons as set forth in Section III(a)(vii).

11 As to the FAL portion of the claim, the court dismisses that claim with leave to amend.  
12 Plaintiff’s allegations with respect to this claim are unclear given the current organization. The  
13 court does not, however, agree with Defendant that Plaintiff’s allegations, to the extent the court  
14 can ascertain them, suggest a lack of standing. Nor does the court agree that Plaintiff must include  
15 additional historical price data that is exclusively in Defendant’s control.

16 As to the UCL fraudulent prong portion of the claim, the court dismisses that claim with  
17 leave to amend. Again, the organization of the claim is confusing, but the court does not agree that  
18 the allegations suggest a lack of standing. Nor does the court agree with Defendant that Plaintiff  
19 has failed to allege a material false and misleading statement.

20 As to any intended UCL unfair prong portion of the claim, the court dismisses that claim  
21 with leave to amend for the same reasons as set forth in Section III(a)(vi).

#### 22 **IV. Conclusion**

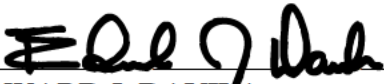
23 For the foregoing reasons, the court GRANTS Defendant’s Motion to Dismiss as to Claims  
24 2-10 and DENIES that motion as to Claims 1 and 4 (to the extent it is premised on the UCL’s  
25 unlawful prong). Claims 4 (to the extent it is premised on the UCL’s unfair and/or fraudulent  
26 prongs), 5, and 6 are DISMISSED with leave to amend. Because the court finds amendment would  
27 be futile, claims 2, 3, 7, 8, and 9 are DISMISSED without leave to amend. See Miller v. Rykoff-  
28

1 Sexton, 845 F.2d 209, 214 (9th Cir. 1988). Claim 10 is DISMISSED with leave to amend as  
2 governed by Section III(b) of this Order.

3 Any amended complaint must be filed within fifteen days of the date of this Order.  
4 Plaintiff is advised that he may not add new claims or parties without first obtaining Defendant's  
5 consent or leave of court pursuant to Federal Rule of Civil Procedure 15. Plaintiff is further  
6 advised that failure to amend the complaint in a manner consistent with this order may result in the  
7 dismissal of this action.

8 **IT IS SO ORDERED**

9 Dated: August 22, 2014

10   
11 \_\_\_\_\_  
12 EDWARD J. DAVILA  
13 United States District Judge  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28