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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

IN RE SONY GRAND WEGA KDF-E  
A10/A20 SERIES REAR PROJECTION  
HDTV TELEVISION LITIGATION

**LEAD CASE NO: 08-CV-2276-IEG  
(WVG)**

MEMBER CASE NOS:

- 09-CV-0620-IEG (WVG)
- 09-CV-0736-IEG (WVG)
- 09-CV-2703-IEG (WVG)

**ORDER GRANTING  
DEFENDANTS' MOTION TO  
DISMISS PLAINTIFFS FIRST  
AMENDED CONSOLIDATED  
COMPLAINT**

[Doc. No. 52]

Presently before the Court is Defendants' motion to dismiss Plaintiffs' First Amended Consolidated Complaint ("FACC") pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(6), and 9(b), brought by Defendants Sony Corporation of America ("SCA"), Sony Electronics Inc. ("SEI"), and Sony Corporation ("SC," and collectively, "Sony" or "Defendants"). Doc. No. 52. Plaintiffs have opposed the motion, Doc. No. 55, and Defendants have replied to that opposition. Doc.

1 No. 56. Both parties appeared before the Court for oral argument on November 8, 2010. For the  
2 reasons stated herein, the Court **GRANTS WITH PREJUDICE** Defendants’ motion to dismiss.

3 **FACTUAL BACKGROUND**

4 This case is a putative class action. Plaintiffs are a group of individuals who purchased and  
5 used Sony Grand WEGA KDF-E A10 and A20 Series televisions that were manufactured by  
6 Defendants and offered for sale beginning in the second half of 2005 (“2005 Models” or “televisions”).  
7 Sony marketed the televisions as offering superior picture quality to that of standard televisions and  
8 being capable of taking full advantage of High-Definition Television (“HDTV”) programming.<sup>1</sup>  
9 Plaintiffs paid \$2,500 or more for the televisions.

10 Sony expressly warranted the televisions for one year. The express, limited warranty  
11 (“Express” or “Limited Warranty”) provided that, at the conclusion of the one-year Express Warranty  
12 period, all express and implied warranties would be waived.<sup>2</sup>

13 At sometime after the Express Warranty period ended, the televisions began to display  
14 anomalies, including bright blue, yellow, and green spots, stains, and haze. Those anomalies were  
15 allegedly caused by a defect inherent in the LCD rear-projection technology utilized in the televisions’

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17 <sup>1</sup> HDTV refers to a method of portraying television images with a high degree of detail and  
18 accuracy.

19 <sup>2</sup> The Limited Warranty provides, in relevant part:

20 Sony Electronics Inc. (“Sony”) warrants this Product (including any accessories)  
21 against defects in material or workmanship as follows:

22 1. LABOR: For a period of one (1) year from the date of purchase, if this Product  
23 is determined to be defective, Sony will repair or replace the Product, at its  
24 option, at no charge, or pay the labor charges to any Sony authorized service  
25 facility. After the Warranty Period, you must pay for all labor charges.

26 2. PARTS: In addition, Sony will supply, at no charge, new or rebuilt  
27 replacements in exchange for defective parts for a period of one (1) year . . . .  
28 After the warranty period, you must pay for all parts costs.

.....

To obtain warranty service, you must take the Product, or deliver the Product  
freight prepaid, in either its original packaging or packaging affording an equal  
degree of protection, to any authorized Sony service facility.

1 “optical block”—the component part of the televisions that causes the video signal to be displayed as a  
2 picture on the viewing screen. Replacing an optical block in the 2005 Model televisions costs  
3 approximately \$1,500, including labor. Plaintiffs claim they requested that Sony, free of charge, repair  
4 the optical blocks in the malfunctioning televisions. However, because the alleged defect did not  
5 manifest itself until after the warranty expired, Sony refused to repair the problem at no cost.

## 6 **PROCEDURAL HISTORY**

7 Nearly two years and four complaints after its inception, this matter lingers in the pleading  
8 stage.<sup>3</sup> Plaintiffs filed the original complaint on December 8, 2008, which was initially assigned to  
9 Judge Whelan.

10 Sony moved to dismiss the original complaint. Docket No. 4. The parties thereafter agreed that  
11 if Defendants withdrew that motion then Plaintiffs would file an amended complaint. Doc. No. 7.  
12 Plaintiffs filed their First Amended Complaint on February 18, 2009, Doc. No. 8, and Sony filed a  
13 second motion to dismiss on March 20, 2009. Doc. No. 12. Plaintiffs’ counsel filed two other related  
14 actions in this court: (1) Bolton et al. v. Sony Corp. of America, Inc., et al., No. 09-CV-0620, on  
15 March 25, 2009, and (2) Bashore, et al. v. Sony Corp. of America, Inc., et al., No. 09-CV-0736, on  
16 April 10, 2009. Soon thereafter, Plaintiffs moved to consolidate all three actions. Doc. No. 17. On  
17 July 30, 2009, the Court granted Plaintiffs motion to consolidate and denied Sony’s then-pending  
18 motion to dismiss as moot. Doc. No. 25.

19 On August 14, 2009, Plaintiffs filed a Consolidated Complaint alleging eight causes of action  
20 against Defendants. Doc. No. 26. In short, Plaintiffs allege that Sony knew about the defect in the  
21 optical block at the time the televisions were sold, making the televisions defective upon delivery.  
22 Defendants responded by filing a motion to dismiss on September 3, 2009. Doc. No. 27.

23 Judge Whelan stayed the case on October 28, 2010, pending the outcome of a referral to the  
24 Judicial Panel on Multidistrict Litigation. Doc. Nos. 32 & 37. Judge Whelan lifted the stay on  
25 November 17, 2010, Doc. No. 37. On February 2, 2010, Plaintiffs moved to consolidate a third related

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27 <sup>3</sup> The Court acknowledges that, though Plaintiffs have filed four separate complaints, this is  
28 only the second version to receive judicial attention on the merits. Nonetheless, the number of filings  
in this case, the collateral issues that have arisen with related cases in this and in other Courts, and the  
length of time that has passed since Plaintiffs initially filed their complaint, have been quite unusual.

1 case filed in this Court—Mayer v. Sony Corp. of America, Inc., et al., No. 09-CV-2703— with the  
2 previously consolidated cases and to appoint interim counsel. Doc. No. 38. Judge Whelan granted  
3 those motions. Doc. No. 48.

4 The parties later filed a joint motion to strike three paragraphs of the complaint regarding  
5 confidential sources at Sony, which Judge Whelan granted. Doc. Nos. 40 & 41.

6 On August 6, 2010, the Court granted-in-part and denied-in-part Defendants’ motion to  
7 dismiss, and dismissed, with leave to amend, seven of Plaintiffs’ eight causes of action. Judge Whelan  
8 denied the motion to dismiss the claim for breach of Express Warranty.

9 On August 12, 2010, the case was reassigned to Chief Judge Gonzalez.

10 Plaintiffs filed the FACC on August 30, 2010, which sets forth the same eight causes of action  
11 included in the first consolidated complaint: (1) Unlawful and Unfair Business Acts and Practices in  
12 Violation of California’s Unfair Competition Law (“UCL”), CAL. BUS. & PROF. CODE §§ 17200-  
13 17210; (2) Untrue and Misleading Advertising in Violation of California’s False Advertising Law  
14 (“FAL”) CAL. BUS. & PROF. CODE §§ 17500-17509; (3) Unlawful Practice in Sale of Consumer Goods  
15 in Violation of California Consumers Legal Remedies Act (“CLRA”), CAL. CIV. CODE § 1750-1784;  
16 (4) Unfair and Deceptive Acts and Practices Under the Various State Laws in Which Class Members  
17 Reside; (5) Violations of California Song-Beverly Consumer Warranty Act (“Song-Beverly Act” or  
18 “SBA”), CAL. CIV. CODE §§ 1790-1795.8; (6) Violations of the Magnuson-Moss Warranty Act  
19 (“Magnuson-Moss Act” or “MMWA”), 15 U.S.C. §§ 2301-2312; (7) Breach of Express Warranty; and  
20 (8) Breach of Implied Warranty. Defendants filed the current motion to dismiss all eight of the  
21 FACC’s claims on September 9, 2010.<sup>4</sup> Doc. No. 52. Plaintiffs timely filed an opposition to the  
22 motion, Doc. No. 55, to which Defendants timely replied. Doc. No. 56.

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25 <sup>4</sup> Defendants have also requested that the Court take judicial notice of various documents, Doc.  
26 No. 53, and Plaintiffs have not opposed that request. Moreover, Plaintiffs’ FACC references each of  
27 the documents in question. Good cause appearing, the Court **GRANTS** Defendants’ request and,  
pursuant to Federal Rule of Evidence 201, takes judicial notice of the following seven documents:

- 28 1. Sony Electronics Inc.’s Limited Warranty Statement for the Sony Grand WEGA KDF-E  
A10 and A20 Series LCD Rear Projection HDTV Televisions (the “Limited Warranty”);

1 Plaintiffs' FACC added two named plaintiffs. One of them is a California resident, bringing  
2 the number of named plaintiffs from California to two. Doc. No. 51. Plaintiffs also attempted to  
3 strengthen their allegations that Sony was aware of the defect based on (1) certain patent applications  
4 filed by Sony and (2) Sony's experience with earlier-model televisions that Sony began selling in 2003  
5 ("Predecessor Models" or "2003 Models"), which "utilize[d] the same core technology in the design of  
6 their Optical Blocks" and experienced problems due to the same defect. Id. ¶¶ 64-66. The remainder  
7 of the FACC is identical to the First Consolidated Complaint.

## 8 **DISCUSSION**

### 9 **I. Legal Standard**

10 A complaint must contain "a short and plain statement of the claim showing that the pleader is  
11 entitled to relief." Fed. R. Civ. P. 8(a) (2009). A motion to dismiss pursuant to Rule 12(b)(6) of the  
12 Federal Rules of Civil Procedure tests the legal sufficiency of the claims asserted in the complaint.  
13 Fed. R. Civ. P. 12(b)(6); Navarro v. Block, 250 F.3d 729, 731 (9th Cir. 2001). The court must accept  
14 all factual allegations pleaded in the complaint as true, and must construe them and draw all reasonable  
15 inferences from them in favor of the nonmoving party. Cahill v. Liberty Mutual Ins. Co., 80 F.3d 336,  
16 337-38 (9th Cir.1996). The Court is not bound, however, to accept "legal conclusions" as true.  
17 Ashcroft v. Iqbal, -- U.S. --, 129 S. Ct. 1937, 1949-50 (2009).

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  - 19 2. United States Patent Number 6,132,049, "Picture display apparatus and cooling  
20 apparatus for optical apparatus," filed September 11, 1998, and issued October 17,  
21 2000;
  - 22 3. United States Patent Number 7,123,33 B2, "Liquid Crystal Display Device and Liquid  
23 Crystal Projector Device," filed December 4, 2001, and issued October 17, 2006;
  - 24 4. United States Patent Number 5,757,443, "Transmission-Type Display Device With a  
25 Heat-Dissipating Glass Plate External To At Least One Liquid Crystal Substrate," filed  
26 October 11, 1996, and issued May 26, 1998;
  - 27 5. United States Patent Number 7,535,543 B2, "Liquid Crystal Display Apparatus and  
28 Cooling Device," filed November 29, 2005, and issued May 19, 2009;
  6. Sony Electronic Inc.'s Operating Instructions for the Sony Grand WEGA KDF-E A10  
and A20 Series LCD Rear Projection HDTV Televisions (the "Operating Instructions");  
and
  7. Complaint in the action entitled Omerod, et al. v. Sony Electronics Inc., et al., Superior  
Court of California, County of San Diego, Case No. 37-2009-00085333-CU-BT-CTL,  
filed on March 16, 2009.

1 To avoid a Rule 12(b)(6) dismissal, a complaint need not contain detailed factual allegations;  
2 rather, it must plead “enough facts to state a claim to relief that is plausible on its face.” Bell Atl.  
3 Corp. v. Twombly, 550 U.S. 544, 570 (2007). However, “a plaintiff’s obligation to provide the  
4 ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic  
5 recitation of the elements of a cause of action will not do.” Id. at 555 (citation omitted). “Factual  
6 allegations must be enough to raise a right to relief above the speculative level, on the assumption that  
7 all the allegations in the complaint are true (even if doubtful in fact).” Id. (citation omitted). In spite  
8 of the deference the court is bound to pay to the plaintiff’s allegations, it is not proper for the court to  
9 assume that “the [plaintiff] can prove facts that [he or she] has not alleged or that defendants have  
10 violated the . . . laws in ways that have not been alleged.” Associated Gen. Contractors of Cal., Inc. v.  
11 Cal. State Council of Carpenters, 459 U.S. 519, 526 (1983).

12 But “[w]hen there are well-pleaded factual allegations, a court should assume their veracity and  
13 then determine whether they plausibly give rise to an entitlement to relief.” Id. at 1950. A claim has  
14 “facial plausibility when the plaintiff pleads factual content that allows the court to draw the  
15 reasonable inference that the defendant is liable for the misconduct alleged.” Id. at 1949 (citing  
16 Twombly, 550 U.S. at 556). “The plausibility standard is not akin to a ‘probability requirement,’ but it  
17 asks for more than a sheer possibility that a defendant has acted unlawfully.” Id. “Where a complaint  
18 pleads facts that are ‘merely consistent with’ a defendant’s liability, it ‘stops short of the line between  
19 possibility and plausibility of entitlement to relief.’” Id. (quoting Twombly, 550 U.S. at 557).

20 Complaints alleging fraud must satisfy the heightened pleading requirements of Federal Rule of  
21 Civil Procedure 9(b). Rule 9(b) requires that in all averments of fraud or mistake, the circumstances  
22 constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other  
23 conditions of a person’s mind may be alleged generally. A pleading is sufficient under Rule 9(b) if it  
24 “state[s] the time, place and specific content of the false representations as well as the identities of the  
25 parties to the misrepresentation.” Misc. Serv. Workers, Drivers & Helpers v. Philco-Ford Corp., 661  
26 F.2d 776, 782 (9th Cir.1981) (citations omitted); see also Vess v. Ciba-Geigy Corp. USA, 317 F.3d  
27 1097, 1106 (9th Cir. 2003) (quoting Cooper v. Pickett, 137 F.3d 616, 627 (9th Cir. 1997)) (“Averments  
28 of fraud must be accompanied by ‘the who, what, when, where, and how’ of the misconduct  
charged.”). Additionally, “the plaintiff must plead facts explaining why the statement was false when

1 it was made.” Smith v. Allstate Ins. Co., 160 F. Supp. 2d 1150, 1152 (S.D. Cal. 2001) (citation  
2 omitted); see In re GlenFed, Inc. Sec. Litig., 42 F.3d 1541, 1549 (9th Cir. 1994) (en banc) (superseded  
3 by statute on other grounds).

4       Regardless of the title given to a particular claim, allegations grounded in fraud are subject to  
5 Rule 9(b)’s pleading requirements. See Vess, 317 F.3d at 1103-04. Even where fraud is not an  
6 essential element of a consumer protection claim, Rule 9(b) applies where a complaint “rel[ies]  
7 entirely on [a fraudulent course of conduct] as the bases of that claim . . . the claim is said to be  
8 ‘grounded in fraud’ or to ‘sound in fraud,’ and the pleading . . . as a whole must satisfy the particularity  
9 requirement of Rule 9(b).” Kearns v. Ford Motor Co., 567 F.3d 1120, 1125 (9th Cir. 2009) (quoting  
10 Vess, 317 F.3d at 1103-04); Brothers v. Hewlett-Packard Co., No. C-06-02254 RMW, 2006 WL  
11 3093685, at \*7 (N.D. Cal. 2006).

### 12 **III. Analysis**

13       The Court addresses the sufficiency of each of Plaintiffs’ eight claims below, largely in the  
14 order that they were pleaded in the FACC. Because Plaintiffs’ first four causes of action arise under  
15 various consumer protection statutes with similar pleading requirements—California’s UCL, FAL, and  
16 CLRA, as well as alternative claims under various other states’ consumer protection statutes—the  
17 Court will first address the issues common to those four claims, and will next discuss issues specific to  
18 each individual claim. The Court then addresses Plaintiffs’ fifth through eighth causes of action in the  
19 order they were pleaded, except that the court addresses Plaintiffs’ sixth cause action, for violations of  
20 the Magnuson-Moss Act, last.

21       For the reasons stated below, the Court **GRANTS** Defendants’ motion to dismiss each of  
22 Plaintiffs’ eight causes of action under Federal Rules of Civil Procedure 12(b)(6) and 9(b).<sup>5</sup> Because it  
23 appears to the Court that Plaintiffs cannot amend their complaint to sufficiently state any of their  
24 claims, the Court **DISMISSES** Plaintiffs’ claims **WITH PREJUDICE**.

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27 <sup>5</sup> Because the Court, pursuant to Rules 12(b)(6) and 9(b), finds that Plaintiffs have failed to  
28 state any valid claims, it is unnecessary for the Court to address the issues of (1) whether Plaintiffs  
have standing under Rule 12(b)(1) to seek injunctive relief, or (2) whether Sony Corporation of  
America, Inc. and Sony Corporation are proper defendants.

1           **A. Plaintiffs' First Four Causes of Action: Claims Under Various Consumer Protection**  
2           **Statutes.**

3           Plaintiffs' first four causes of action arise under three California consumer protection statutes—  
4 the UCL, the FAL, and the CLRA—as well as consumer protection statutes from approximately forty  
5 other states (“Consumer Protection Statutes”). Plaintiffs’ claims under each of those statutes stem  
6 from the same basic allegations: (1) at the time Plaintiffs purchased the televisions, Sony was aware  
7 that the televisions’ optical block suffered from a latent defect that would negatively affect the quality  
8 of the images displayed by the televisions; (2) despite its awareness of the defect, Sony, in  
9 advertisements and other marketing materials, misrepresented the quality of the televisions by claiming  
10 they were of “high,” “superior,” and “excellent” quality; that the televisions offered a picture quality  
11 far superior to that offered by standard televisions; and that the televisions were able to take full  
12 advantage of HDTV programming and to reproduce video programs with a clear picture and accurate  
13 color reproduction; (3) Sony omitted any mention of the defect to consumers; (4) Sony’s claims about  
14 the televisions’ quality induced consumers to pay \$2,500 or more for the televisions; and (5) rather  
15 than function as Sony advertised, the televisions eventually displayed colorful spots and other  
16 blemishes that interfered with the picture. Such claims are rooted in theories of fraudulent  
17 concealment and fraudulent misrepresentation and therefore must satisfy Rule 9(b)’s heightened  
18 pleading requirements. See Meinhold v. Sprint Spectrum, 2007 WL 1456141, at \*6 (E.D. Cal. 2007)  
19 (California consumer protection claims that manufacturer knowingly made false statements concerning  
20 products were subject to Rule 9(b)); Brothers, 2006 WL 3093685, at \*6-7 (applying Rule 9(b) where  
21 allegations that manufacturer was aware of defect and made misrepresentations about products); see  
22 also Meserole v. Sony Corp. of Am., Inc., No. 08 Cv. 8987 (RPP), 2009 WL 1403933, at \*3 (S.D.N.Y.  
23 May 19, 2009) (finding, in a nearly identical case involving the Plaintiffs’ counsel and the same  
24 Defendants as in this matter, that Rule 9(b) applies because “the crux of Plaintiffs’ claim is that Sony  
25 was aware of the design defect inherent in the Optical Block but intentionally failed to disclose its  
26 existence to consumers”).

26           Plaintiffs have failed to plead their Consumer Protection claims with sufficient particularity to  
27 satisfy Rule 9(b). *First*, in addition to failures particular to each of the specific statutes, the claims  
28 under the Consumer Protection Statutes fail because the alleged misrepresentations are nothing more



1 than mere puffery. “Generalized, vague, and unspecified assertions constitute ‘mere puffery’ upon  
2 which a reasonable consumer could not rely, and hence are not actionable.” Oestreicher v. Alienware  
3 Corp., 544 F. Supp. 2d 964, 973 (N.D. Cal. 2008) (internal quotation marks and citations omitted),  
4 *aff’d* by 322 Fed. Appx. 489 (9th Cir. Apr. 2, 2009). Vague or highly subjective claims about product  
5 superiority amount to non-actionable puffery; only “misdemeanors of specific or absolute  
6 characteristics of a product are actionable.” *Id.* (quoting Southland Sod Farms v. Stover Seed Co., 108  
7 F.3d 1134, 1145 (9th Cir. 1997)). Thus, “generalized and vague statements of product superiority such  
8 as ‘superb, uncompromising quality’ . . . are non-actionable puffery.” *Id.* (citations omitted).

9 Plaintiffs in this case have not alleged that Sony made any misstatements about absolute  
10 characteristics of the televisions. Instead, Plaintiffs rest their claims on alleged representations that the  
11 televisions were of “high” or “superior” quality. See FACC ¶¶ 56-58, 71, 74. Such statements are  
12 mere puffery and cannot support a claim under the UCL, FAL, or CLRA. See Oestreicher, 544 F.  
13 Supp. 2d at 973-74 (dismissing UCL and FAL claims based on “generalized and vague statements of  
14 product superiority”); Tietsworth v. Sears, --F. Supp. 2d--, 2010 WL 1268093, at \*10-12 (N.D. Cal.  
15 Mar. 31, 2010) (dismissing UCL and CLRA claims because the defendant’s representations “that the  
16 [product in question was] ‘designed, manufactured and tested for years of dependable  
17 operations’ . . . are mere puffery, . . . and they as a matter of law could not deceive a reasonable  
18 consumer”); see also Anunziato v. eMachines, Inc., 402 F. Supp. 2d 1133, 1139-41 (C.D. Cal. 2005)  
19 (finding representations that a notebook computer was of “high quality,” was “reliable,” offered “high  
20 performance,” and employed the “latest technology” amounted to non-actionable puffery, while  
21 representations that the computers included “brand-name components” and were subject to the “most  
22 stringent quality control test” were actionable because they were specific factual allegations which  
23 could be proved or disproved through discovery).

24 *Second*, even to the extent that one might construe any of Sony’s representations as relating to  
25 absolute characteristics, Plaintiffs have not sufficiently alleged that those representations were untrue  
26 or misleading at the time they were made. Plaintiffs have only alleged that the televisions stopped  
27 rendering a quality image after some unspecified period of time—but, in any event, not until after the  
28 warranty period expired. A manufacturer’s failure to disclose a fact that it has no affirmative duty to  
disclose cannot be “likely to deceive” reasonable consumers. See Daugherty v. Am. Honda Motor Co.,

1 Inc., 144 Cal. App. 4th 824, 833-38 (2006) (discussing the UCL and the CLRA). For a statement to be  
2 deceptive or misleading, consumers must have held expectations about the matter in question. Id.  
3 Where a manufacturer has expressly warranted a product, consumers can only expect that product to  
4 function properly for the length of the manufacturer’s express warranty. See id. Plaintiffs have not  
5 alleged that the televisions failed to live up to Sony’s representations during the term of the Express  
6 Warranty. Thus, even if the Court were to construe any of Sony’s representations about the televisions  
7 as more than mere puffery, Plaintiffs still have not sufficiently alleged that Sony engaged in conduct  
8 that was likely to deceive consumers.

9 Furthermore, Plaintiffs have failed to offer sufficiently particularized allegations showing that  
10 Sony was aware of the defect when Plaintiffs purchased the televisions. Such allegations would have  
11 offered at least some support to the notion that Sony’s representations about the quality of the  
12 televisions were false at the time they were made.

13 Relatedly, it is worth noting that, in dismissing the consumer protection allegations raised  
14 under California law in Plaintiffs’ Consolidated Complaint, Judge Whelan highlighted the need for  
15 Plaintiffs to specifically allege what Sony knew about the defect at the time that it made the alleged  
16 misrepresentations. Doc. No. 48, at 11 (noting the need for specific allegations about Sony’s  
17 knowledge of the defect at the time it made the alleged misrepresentations for Plaintiffs’ claims under  
18 California consumer protection laws, generally, and then noting the same need for claims under the  
19 UCL and FAL, specifically). Plaintiffs’ attempts in the FACC to bolster their claims that Sony was  
20 aware of the defect are not sufficient.

21 Plaintiffs rely heavily on several patent applications filed by Sony between 1998 and 2006.  
22 Plaintiffs do not link any of the patent filings to the 2005 Models; nor do the patent filings themselves  
23 evince any knowledge of the defect on Sony’s part. Plaintiffs quote language from the patent  
24 applications that discusses certain “disadvantages” of LCD technology, but that language describes the  
25 then-current state of LCD technology, generally; it does not show that Sony was aware of any defects  
26 specific to any of its televisions, let alone to the 2005 Models.

27 Moreover, even if the Court were to infer from the patent filings that Sony was aware of a  
28 problem with the televisions’ optical blocks, nothing in Plaintiffs’ complaint or in the proffered patent  
filings indicates the time it takes that problem to cause any deterioration in the images produced by the

1 televisions. In other words, Plaintiffs’ claims suggest that Sony represented that the televisions were  
2 of high quality but knew the defect would cause the televisions to falter shortly after the one-year  
3 Express Warranty term expired. But Plaintiffs do not specifically allege as much, and nothing in the  
4 proffered patent filings indicates whether Sony’s engineers believed the “disadvantages” mentioned  
5 would negatively affect the images rendered by the televisions in, for example, one, two, ten, or more  
6 years.

7 Plaintiffs’ allegation that Sony’s experience with predecessor models made Sony aware of the  
8 defect is similarly unconvincing. Plaintiffs do not allege that the 2005 Models used optical blocks  
9 identical to those in predecessor models. They also fail to identify any specific similarities between  
10 the optical blocks used in the 2003 and 2005 Models. Nor do Plaintiffs attempt to show that Sony was  
11 or should have been aware that any technological advances applied to the 2005 Models would have  
12 been insufficient to cure the defect that allegedly plagued the 2003 Models.

13 In short, for each of their Consumer Protection claims, and despite Judge Whelan’s explicit  
14 admonishment on this very issue, Plaintiffs fail provide anything more than conclusory allegations to  
15 show that any of Sony’s alleged representations were false or misleading at the time they were made.  
16 Those claims fail as a result, and the Court accordingly **DISMISSES WITH PREJUDICE** Plaintiffs’  
17 first four causes of action. In addition to the flaws common to all of Plaintiffs’ Consumer Protection  
18 Claims described above, those claims also fail for reasons specific to each. The Court discusses those  
19 failures in the subsections below.

20 a. **Plaintiffs’ First Cause of Action: Violations of California’s Unfair Competition**

21 **Law.**

22 California’s UCL, CAL. BUS. & PROF. CODE §§ 17200-17210, prohibits “any unlawful, unfair  
23 or fraudulent business act or practice.” *Id.*, § 17200. Because Section 17200 is written in the  
24 disjunctive, it prohibits three separate types of unfair competition: (1) unlawful acts or practices,  
25 (2) unfair acts or practices, and (3) fraudulent acts or practices. *Cel-Tech Commc’ns, Inc. v. Los*  
*Angeles Cellular Tel. Co.*, 83 Cal. Rptr. 2d 548, 561 (Cal. 1999).

26 i. **The Unlawful Prong of the UCL**

1 By proscribing “unlawful” acts or practices, “Section 17200 ‘borrows’ violations of other laws  
2 and treats them as unlawful practices independently actionable.” Id. at 560-61. Practices may,  
3 however, be unfair or fraudulent under the UCL even if not proscribed by another law. Morgan v.  
4 Harmonix Music Sys, Inc., 2009 WL 2031765, at \*4 (N.D. Cal. July 7, 2009) (citing Farmers Ins.  
5 Exchange v. Superior Court, 2 Cal. 4th 377, 383 (1992)).

6 Throughout the FACC, Plaintiffs allege that Sony violated several laws, but they do not link  
7 those claims to the UCL except by stating that “Sony’s unlawful and unfair business acts and practices  
8 present a continuing threat to plaintiffs . . . .” FACC ¶ 94. In their Opposition, however, Plaintiffs  
9 expressly claim that Sony violated the “unlawful” prong of the UCL because it violated the CLRA, the  
10 Song-Beverly Act, and the Magnuson-Moss Warranty Act. Pls.’ Opp’n, at 20. As discussed in more  
11 detail below, Plaintiffs have failed to state claims under any of those three statutes. Moreover, though  
12 Plaintiffs have not linked any of their claims that Defendants violated other laws to the UCL’s  
13 unlawful prong, it is worth noting that Plaintiffs have not sufficiently pleaded that Defendants have  
14 violated any law. Consequently, Plaintiffs have failed to state a claim under the unlawful prong of the  
15 UCL.

#### 16 **ii. The Unfair Prong of the UCL**

17 An act or practice is “unfair” under the UCL “if the consumer injury is substantial, is not  
18 outweighed by any countervailing benefits to consumers or to competition, and is not an injury the  
19 consumers themselves could reasonably have avoided.” Tietsworth, 2010 WL 1268093, at \*9 (quoting  
20 Daugherty, 144 Cal. App. 4th at 839). To sufficiently plead a claim under the UCL’s “unfair” prong,  
21 plaintiffs must allege facts supporting all three elements. Id.; see Daugherty, 144 Cal. App. 4th at 838-  
22 39 (finding that a claim did not constitute an unfair practice under the UCL because one of the  
23 elements was insufficiently pleaded).

24 Failure to disclose a defect that might shorten the effective life span of a component part to a  
25 consumer product does not constitute a “substantial injury” under the unfair practices prong of the  
26 UCL where the product functions as warranted throughout the term of its Express Warranty. See  
27 Clemens v. DaimlerChrysler Corp., 534 F.3d 1017, 1026-27 (9th Cir.2008) (quoting Daugherty, 144  
28 Cal. App. 4th at 838-39). Plaintiffs have not alleged that the televisions failed to function as warranted

1 throughout the term of the Express Warranty. As a result, Plaintiffs' claim under the UCL's unfair  
2 prong fails because they have not alleged a substantial injury.

3 **iii. The Fraudulent Practices Prong of the UCL**

4 The FACC does not explicitly allege violations under the UCL's fraud prong, but Plaintiffs  
5 argue in their opposition that they have sufficiently pleaded fraudulent practices under the UCL. See  
6 FACC at ¶¶ 88-95 (stating a cause of action for "unlawful and unfair business acts and practices," but  
7 only actually alleging "unfair" acts); Pls.' Opp'n at 19-20 (discussing the UCL's "fraud" prong).

8 Unlike common law fraud, a party can show a violation of the UCL's "fraudulent practices"  
9 prong without allegations of actual deception. See Morgan, 2009 WL 2031765, at \*5 (citations  
10 omitted). The term "fraudulent" as used in Section 17200 "does not refer to the common law tort of  
11 fraud" but only requires a showing members of the public "are likely to be deceived." Puentes v.  
12 Wells Fargo Home Mortg., Inc., 72 Cal. Rptr. 3d 903, 909 (Ct. App. 2008) (quoting Saunders v.  
13 Superior Court, 33 Cal. Rptr. 2d 438, 441 (Ct. App. 1994). "Unless the challenged conduct 'targets a  
14 particular disadvantaged or vulnerable group, it is judged by the effect it would have on a reasonable  
15 consumer.'" Puentes, 72 Cal. Rptr. 3d at 909 (quoting Aron v. U-Haul Co. of Cal., 49 Cal. Rptr. 3d  
16 555, 562 (Ct. App. 2006)). But claims under the UCL's fraudulent practices prong still require a  
17 plaintiff to plead that the alleged misrepresentation was directly related to the plaintiff's injurious  
18 conduct, and that the plaintiff actually relied on the alleged misrepresentation. In re Tobacco II Cases,  
19 46 Cal. 4th 298, 326-27 (2009). A plaintiff need not, however, allege that the misrepresentation was  
20 the "sole or even the predominant" cause of the plaintiff's injury. Id.

21 Nevertheless, claims under Section 17200 that are grounded in fraud still must be pleaded with  
22 particularity under Rule 9(b). See Kearns, 567 F.3d at 1125 (citing Vess, 317 F.3d at 1102-05) ("We  
23 have specifically ruled that Rule 9(b)'s heightened pleading standards apply to claims for violations of  
24 the . . . UCL."). A plaintiff therefore "must include a description of the 'time, place, and specific  
25 content of the false representations as well as the parties to the misrepresentations.'" In re Facebook  
26 PPC Advertising Litigation, 2010 WL 3341062, at \*9 (N.D. Cal. Aug. 25, 2010) (quoting Swartz v.  
27 KPMG LLP, 476 F.3d 756, 764 (9th Cir. 2007)). But where a plaintiff alleges fraud based on  
28 omissions and "exposure to a long-term advertising campaign, the plaintiff is not required to plead

1 with an unrealistic degree of specificity that the plaintiff relied on particular advertisements or  
2 statements.” Tobacco II, 46 Cal. 4th at 328; see also In re Facebook, 2010 WL 3341062, at \*9 (citing  
3 Washington v. Baenziger, 673 F. Supp. 1478, 1482 (N.D. Cal. 1987)) (“[I]n the context of a fraudulent  
4 omission claim, a plaintiff cannot plead a specific time or place of a failure to act . . . [and therefore]  
5 may plead fraud in alternative ways.”). A plaintiff alleging that the defendant failed to disclose  
6 material facts must, however, establish that the defendant had a duty to disclose those facts. Berryman  
7 v. Merit Prop. Mgmt., Inc., 152 Cal. App. 4th 1544, 1557 (2007) (“Absent a duty to disclose, the  
8 failure to do so does not support a claim under the fraudulent prong of the UCL.”).

9 As discussed above, Plaintiffs cannot sufficiently plead reliance because (1) Plaintiffs have not  
10 sufficiently pleaded that the alleged representations were false at the time they were made, and (2) the  
11 allegedly false or misleading statements were nothing more than non-actionable puffery.

12 Furthermore, because the alleged misrepresentations in this case do not relate to the claimed  
13 defect, Plaintiffs cannot sufficiently plead reliance. See Daugherty, 144 Cal. App. 4th at 835, 838-39  
14 (citing Bardin v. Daimlerchrysler Corp., 136 Cal. App. 4th 1255, 1275-76 (2006)) (alleged  
15 misrepresentations were not actionable under the CLRA and UCL because they did not relate to  
16 alleged defect); see also Tobacco II, 46 Cal. 4th at 327-28 (outlining the standard for pleading reliance  
17 under the UCL and highlighting cases in which plaintiffs had alleged (1) that their decisions to begin  
18 and to continue smoking caused detrimental health effects, and (2) those decisions were influenced by  
19 the tobacco industry’s repeated assurances over the course of decades that no definitive connection  
20 existed between smoking and various diseases).

21 Thus, because Plaintiffs have not sufficiently alleged Sony engaged in conduct likely to deceive  
22 consumers, they have failed to state a claim under the fraud prong of the UCL.

23 **b. Plaintiffs’ Second Cause of Action: Violations of California’s False Advertising**  
24 **Law.**

25 Plaintiff’s second cause of action is for false advertising in violation of California’s FAL, CAL.  
26 BUS. & PROF. CODE §§ 17500-17509. The FAL proscribes the dissemination of statements that are  
27 “untrue, misleading, and which is known, or which by the exercise of reasonable care should be  
28 known, to be untrue or misleading.” CAL. BUS. & PROF. CODE § 17500. “This provision has been

1 ‘interpreted broadly to embrace not only advertising which is false, but also advertising which  
2 although true, is either actually misleading or which has a capacity, likelihood or tendency to deceive  
3 or confuse the public.’” Inter-Mark USA, Inc. v. Intuit, Inc., No. C-07-04178 JCS, 2008 WL 552482,  
4 at \*9 (N.D. Cal. Feb. 27, 2008) (quoting Leoni v. State Bar, 39 Cal. 3d 609, 626 (1985)).

5 “The degree of particularity required in pleading a Section 17500 claim depends on the nature  
6 of the allegations in the claim. In particular, although fraud is not an essential element of a Section  
7 17500 claim, where a plaintiff alleges fraud as the basis for a violation of that provision, the  
8 particularity requirement of Rule 9(b) of the Federal Rules of Civil Procedure applies to the fraud  
9 allegations.” Inter-Mark, 2008 WL 552482, at \*9-10 (citing Vess, 317 F.3d at 1105). “If that  
10 requirement is not met, the court must disregard the fraud allegations to determine whether a claim has  
11 been stated under the notice pleading standards of Rule 8(a). Under that standard, a Section 17500  
12 claim need be alleged only with ‘reasonable particularity.’” Id. (citing Khoury v. Maly’s of Cal., Inc.,  
13 14 Cal. App. 4th 612, 619 (1993)). In either case, a plaintiff alleging violations of the FAL must allege  
14 actual reliance. See Oestreicher, 544 F. Supp. 2d at 973-74 & n.7.

15 Plaintiffs have failed to identify specific advertisements, when and where they were shown, or  
16 why they were untrue or misleading. Whether governed by Rule 9(b) or Rule 8’s more lax pleading  
17 standards, Plaintiffs’ failure to identify specific advertisements does not provide Sony with adequate  
18 notice of its alleged violations of the FAL. Inter-Mark, 2008 WL 552482, at \*10; see VP Racing  
19 Fuels, Inc. v. Gen. Petroleum, 673 F. Supp. 2d 1073, 1088 (E.D. Cal. 2009) (citation omitted) (“The  
20 underlying element of a false advertising claim is some type of advertising statement.”); see also Tayag  
21 v. Nat’l City Bank, No. C 09-667 SBA, 2009 WL 943897, at \*2 (N.D. Cal. Apr. 7, 2009) (for FAL or  
22 UCL claims rooted in fraud, “[t]he content of the alleged misrepresentation is necessary to state a  
23 claim”). Moreover, as discussed above, even if Plaintiffs had identified particular advertisements  
24 making the representations on which Plaintiffs have based their claims, (1) the statements on which  
25 Plaintiffs have rested their claims are mere puffery and are thus not actionable under the FAL, and  
26 (2) Plaintiffs have not sufficiently shown that the statements were false or misleading when made. See  
27 Oestreicher, 544 F. Supp. 2d at 973-74. Plaintiffs’ FAL claims fail as a result, and the Court  
28 accordingly **DISMISSES WITH PREJUDICE** Plaintiffs’ second cause of action.

1                   c. **Plaintiffs’ Third Cause of Action: Violations of California’s Consumer Legal**  
2                   **Remedies Act.**

3                   Plaintiff’s third cause of action alleges that, in violation of California’s CLRA, CAL. CIV. CODE  
4 §§ 1750-1784, Sony failed to disclose information about the defect in the televisions and falsely  
5 advertised that the televisions provided high-quality video playback.

6                   As an initial matter, the CLRA requires that, “[i]n any action [under the CLRA], concurrently  
7 with the filing of the complaint, the plaintiff shall file an affidavit stating facts showing that the action  
8 has been commenced in a county described in this section as a proper place for the trial of the action.”  
9 CAL. CIV. CODE § 1780(d). If “a plaintiff fails to file the affidavit required by this section, the court  
10 shall, upon its own motion or upon motion of any party, dismiss the action without prejudice.” Id.  
11 Judge Whalen previously dismissed Plaintiffs’ CLRA claims because of Plaintiffs’ failure to file the  
12 statutorily required affidavits with their consolidated complaint. Doc. No. 48, at 12. Yet Plaintiffs  
13 have not remedied this issue: of the forty-seven plaintiffs named in the FACC, only one, Mr. Julio  
14 Real, has filed the required affidavit. See Declaration of Julio Real Pursuant to Civil Code Section  
15 1780(d), Doc. No. 50; FACC ¶¶ 5-51 (naming the individual plaintiffs). Accordingly, the Court  
16 dismisses the third cause of action filed by all plaintiffs except Mr. Real for their failure to file the  
17 required affidavit. CAL. CIV. CODE § 1780(d).

18                   Even setting aside the issue of the required affidavits, all Plaintiffs have failed state a claim  
19 under the CLRA. Where a manufacturer of consumer goods has expressly warranted a product, the  
20 manufacturer cannot be liable under the CLRA for failing to disclose information about a defect that  
21 manifests itself outside of the Express Warranty period, unless (1) the omitted fact runs counter to a  
22 representation made by the defendant, or (2) the defendant had a duty to disclose the omitted  
23 information. Oestreicher, 544 F. Supp. 2d at 969 (citing Daugherty, 136 Cal. App. 4th at 835).  
24 Plaintiffs’ allegations do not fit either exception.

25                   Plaintiffs have not alleged that Sony has made any representations contrary to omitted  
26 information about the defect. First, as discussed above, the alleged misrepresentations on which  
27 Plaintiffs’ claims rest are non-actionable puffery. Second, Plaintiffs have not claimed that Sony made  
28 any representations that run counter to the allegedly omitted fact: that the televisions’ optical block  
wore out over time. Plaintiffs have not alleged that the televisions failed to perform as warranted; they



1 instead take issue with—but point to no representations regarding—the televisions’ performance after  
2 the expiration of the Express Warranty period.<sup>6</sup>

3 Nor did Sony have a duty to disclose information about the alleged defect. First, and again,  
4 Plaintiffs have not sufficiently alleged that Sony was aware of the defect at the time that Plaintiffs  
5 purchased; Sony had no duty to disclose facts of which it was unaware. Second, even assuming that  
6 Sony was aware of the defect, under the CLRA, a manufacturer’s duty to disclose information related  
7 to defect that manifests itself after the expiration of an Express Warranty is limited to issues related to  
8 product safety.<sup>7</sup> Oestreicher, 544 F. Supp. 2d at 969 (citing Daugherty, 136 Cal. App. 4th at 835).  
9 Plaintiffs have not alleged that the defect related to product safety. Thus, Sony had no duty under the  
10 CLRA to disclose information about the alleged defect. See id. at 970.

11 Plaintiffs, relying on Falk v. General Motors Corp., 496 F. Supp. 2d 1088 (N.D. Cal. 2007),  
12 argue that “Daugherty does not impose a ‘safety’ limitation on a duty to disclose.” Pls.’ Opp’n at 18.  
13 Even under Falk, however, a manufacturer’s duty to disclose under the CLRA is limited to safety-  
14 related issues.

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17 <sup>6</sup> Plaintiffs have attempted present one sentence taken from the over eighty pages of operating  
18 instructions that accompanied the televisions—“[t]o enjoy your TV for years to come and maintain its  
19 original picture quality, you should perform periodic maintenance”—as a representation that runs  
20 contrary to the omitted facts about the optical block. FACCC ¶ 70. Again, such a statement is mere  
21 puffery. Tietzworth, 2010 WL 1268093, at \*10-12 (dismissing UCL and CLRA claims because the  
22 defendant’s representations, found in the product’s instruction manual, that the product was “designed,  
23 manufactured and tested for years of dependable operations” were non-actionable puffery). Even if the  
24 Court were to construe the sentence highlighted by Plaintiffs as both more than mere puffery and as a  
25 statement contrary to the allegedly omitted facts about the defect, Plaintiffs’ CLRA claim still fails. As  
26 discussed above, Plaintiffs have not sufficiently pleaded that Sony knew of the defect prior to the sale  
27 of the televisions. Sony cannot be liable for failing to disclose a fact of which it was not aware. See  
28 Smith, 160 F. Supp. 2d at 1152 (citation omitted) (“[T]he plaintiff must plead facts explaining why the  
statement was false when it was made.”).

<sup>7</sup> To impose on manufacturers a broad duty to disclose such that a plaintiff need only allege  
disappointed expectations to survive a motion to dismiss claims under the CLRA would render  
meaningless time and other limitations that manufacturers are permitted to place on Express Warranty  
periods. See Hovsepian v. Apple, Inc., Nos. 08-5788 JF (PVT), 09-1064 JF (PVT), 2009 WL 2591445,  
at \*3 n.4 (N.D. Cal. Aug. 21, 2009) (quoting Oestreicher, 544 F. Supp. 2d at 972). “[K]nowledge that a  
product is likely to fail at some point cannot give rise by itself to an actionable claim because ‘[s]uch  
knowledge is easily demonstrated by the fact that manufacturers must predict rates of failure of  
particular parts in order to price warranties and thus can always be said to ‘know’ that many parts will  
fail after the warranty period has expired.” Id. (quoting Oestreicher, 544 F. Supp. 2d at 972)  
(alteration in original).

1           The Falk court found that a failure to disclose can constitute actionable fraud under the CLRA  
2 in four circumstances: “(1) when the defendant is in a fiduciary relationship with the plaintiff; (2) when  
3 the defendant had exclusive knowledge of material facts not known to the plaintiff; (3) when the  
4 defendant actively conceals a material fact from the plaintiff; and (4) when the defendant makes partial  
5 representations but also suppresses some material fact.” 496 F. Supp. 2d at 1095 (internal citations  
6 omitted). Plaintiffs argue that their CLRA claims satisfy the second and third Falk scenarios, both of  
7 which turn on the “materiality” of the information omitted.

8           Materiality under the CLRA “is judged by the effect on a ‘reasonable consumer’”; that is,  
9 information is material if its disclosure would have caused a reasonable consumer to behave  
10 differently. Falk, 496 F. Supp. 2d at 1095. In Falk, however, the defect at issue related to an  
11 automobile’s speedometer, which certainly relates to consumers’ safe use of the product in question—  
12 an automobile. As the Falk court itself noted:

13           Common experience supports plaintiffs’ claim that a potential car buyer would  
14 view as material a defective speedometer. That a speedometer is prone to fail and  
15 to read a different speed than the vehicle’s actual speed, even a difference of ten  
16 miles per hour, would be material to the reasonable consumer, driver and  
17 passenger. Such a faulty speedometer easily would lead to traveling at unsafe  
18 speeds and moving-violation penalties.

19           Id. at 1096. Thus, in the context of the CLRA, materiality is also linked to safety  
20 considerations.<sup>8</sup> Oestreicher, 544 F. Supp. 2d at 971. Because the defect Plaintiffs allege in this case  
21 had no impact on the safe use of the televisions, information about it was immaterial for the purpose of  
22 stating a CLRA claim. Sony had no duty to disclose information about a defect that would not  
23 manifest itself until after the Express Warranty expired. Plaintiffs have therefore failed to state a claim  
24 under the CLRA. Accordingly, Plaintiffs’ claim under the CLRA is **DISMISSED WITH**  
25 **PREJUDICE.**

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26           <sup>8</sup> Plaintiffs also rely on Tietsworth v. Sears, in which the court found omitted information about  
27 an electronic defect in washing machines that caused consumers to have to initiate multiple cycles to  
28 complete a load of laundry or to pay costly repair bills to be material under the CLRA. 2010 WL  
1268093, at \*10-11. Tietsworth, however, is distinguishable from this case because the plaintiffs in  
that case alleged that they began experiencing problems “within the first months of purchasing the  
Machine”—i.e., *within* the express warranty period. Id. at \*3-4. The Tietsworth plaintiffs also sought  
repairs *within* the warranty period. Id. The Court limits its analysis here to a manufacturer’s duty  
under the CLRA to disclose information related to a defect that manifests itself *after* the expiration of a  
product’s express warranty.

1                   d. **Plaintiffs' Fourth Cause of Action: Violations of Various Other States' Consumer**  
2                   **Protection Laws.**

3                   Plaintiffs allege violations of the laws of approximately forty states in which various class  
4 members reside, stated in the alternative in the event that the Court upholds Plaintiffs' claims but  
5 decides that the laws of one of the states other than California in which Plaintiffs' reside should apply.  
6 Plaintiffs' claims under these various states' laws are factually identical, and they are grounded in  
7 theories of fraudulent representation and concealment: "By selling the televisions to consumers while  
8 concealing and failing to disclose the defect and, without revealing that the televisions were defective  
9 when sold and that their screens would eventually be obscured, in whole or in part, by the defect, and  
10 due to defendants' improper warranty practices and false and misleading statements to consumers  
11 about the existence of, and fix for, the defect, defendants violated [various states' consumer protection  
12 laws]." FACCC ¶¶ 109-159.

13                   In a putative class action, the Court will not conduct a detailed choice-of-law analysis during  
14 the pleading stage. See Speyer v. Avis Rent a Car Sys., Inc., 415 F. Supp. 2d 1090, 1094 (S.D. Cal.  
15 2005) (citing Barth v. Firestone Tire and Rubber Co., 661 F. Supp. 193, 203 (N.D. Cal. 1987)) (in  
16 ruling on a motion to dismiss a class action complaint prior to class certification, courts generally  
17 consider only the claims of the named plaintiffs). But "Plaintiffs cannot use class actions to escape  
18 pleading requirements." In re Bayer Corp. Combination Aspirin Products Marketing and Sales  
19 Practices Litig., 701 F. Supp. 2d 356, 378 (E.D.N.Y. 2010). Merely listing another state's consumer  
20 fraud statutes is insufficient to state a claim; "labels and conclusions, and a formulaic recitation of the  
21 elements of a cause of action will not do." Twombly, 127 S. Ct. at 1964-65; see Wright v. Gen. Mills,  
22 Inc., 08-CV-1532 L(NLS), 2009 WL 3247148, at \*5 (S.D. Cal. Sept. 30, 2009). Moreover, for state  
23 law claims grounded in fraud, "the *circumstances* of the fraud must be stated with particularity" under  
24 Rule 9(b). Vess, 317 F.3d at 1103-04 (emphasis in original); Nordberg v. Trilegiant Corp., 445 F.  
25 Supp. 2d 1082, 1097 (N.D. Cal. 2006).

26                   Again, Plaintiffs' claims under alternative state laws fail because (1) the representations on  
27 which Plaintiffs' claims rely are non-actionable puffery, and (2) Plaintiffs have failed to sufficiently  
28 allege that the statements on which the alternative state law claims stand were false when they were  
made. Moreover, Plaintiffs have failed to state with any particularity "the who, what, when, where,

1 and how' of the misconduct charged," and have thus failed to satisfactorily state a claim under Rule  
2 9(b). Vess, 317 F.3d at 1103-04 (quoting Cooper, 137 F.3d at 627). Accordingly, Plaintiffs' fourth  
3 cause of action is **DISMISSED WITH PREJUDICE**.

4 **B. Plaintiffs' Fifth Cause of Action: Claims Under the Song-Beverly Consumer Warranty**  
5 **Act.**

6 Plaintiffs claim that Sony breached the implied warranty of merchantability under Sections  
7 1791.1, 1792, and 1792.1 of the Song-Beverly Act by selling televisions containing a latent defect.  
8 FACC ¶¶ 161-162. They also claim that Sony violated Sections 1793.2(a)(3) and 1793.2(b) of the SBA  
9 by failing to repair or replace the defective televisions within thirty days. Id. ¶¶ 163-164.

10 The Song-Beverly Act is limited to actions involving "consumer goods that are sold at retail in  
11 [California]". CAL. CIV. CODE CAL. CIV. CODE § 1792. Courts have routinely dismissed SBA claims  
12 against manufacturers where none of the named class members could plead that they purchased the  
13 goods "at retail" in California. See, e.g., In re NVIDIA GPU Litig., 2009 WL 4020104, at \*5 (N.D.  
14 Cal. Nov. 19, 2009) (dismissing an SBA claim where it was not restricted to class members who  
15 purchased goods in California); Morgan, 2009 WL 2031765, at \*2 (dismissing SBA claim because  
16 plaintiffs failed to identify where and from whom they purchased the goods); Anunziato, 402 F. Supp.  
17 2d at 1142 (dismissing SBA claims because class representatives purchased the disputed goods outside  
18 of California).

19 Judge Whelan previously dismissed this claim for Plaintiffs' failure to assert that any of the  
20 named plaintiffs purchased their televisions in California. Doc. No. 48, at 14; accord, e.g., Morgan,  
21 2009 WL 2031765, at \*2; see also Anunziato, 402 F. Supp. 2d at 1142 (finding that a plaintiff's SBA  
22 claim failed as a matter of law where the plaintiff had purchased the product over the internet from his  
23 home in Massachusetts). Judge Whelan also correctly noted that Plaintiffs' "vague assertion that  
24 'countless' unnamed class members purchased televisions in California through Defendants' website is  
25 not sufficient." Doc. No. 48, at 14; see also Morgan, 2009 WL 2031765, at \*2 n.4 ("Whether absent  
26 class members have standing to sue under California Consumer Protection Laws is better addressed in  
27 connection with class certification."). Yet Plaintiffs still fail to assert where any named class member  
28 purchased her television, and they have therefore failed to plead the California "at retail" requirement.

1           Additionally, the SBA places an affirmative duty on consumers to deliver a product a  
2 malfunctioning product to the manufacturer for repair *within* the Express Warranty period. CAL. CIV.  
3 CODE CAL. CIV. CODE § 1793.02(c) (stating that a seller shall repair or replace a malfunctioning  
4 product “[i]f the buyer returns the device *within the period specified in the written warranty*”)  
5 (emphasis added); see also, e.g., Robertson v. Fleetwood Travel Trailers of Cal., Inc., 144 Cal. App.  
6 4th 785, 807-08 (2006) (noting that the consumer bears the burden of delivering the product to the  
7 seller for replacement or repair). Plaintiffs have not alleged that the televisions malfunctioned or that  
8 they requested that Sony repair the televisions within the warranty period.

9           Accordingly, Plaintiffs’ claims under the Song-Beverly Act are **DISMISSED WITH**  
10 **PREJUDICE.**

11       **C. Plaintiffs’ Seventh Cause of Action: Breach of Express Warranty.**

12           Plaintiffs claim that Sony expressly warranted that the televisions were free from defects and  
13 that Sony breached its Express Warranty of the televisions at the point of sale, even though the defect  
14 did not manifest until after the one-year Express Warranty period expired. FACC ¶¶ 171-180.

15           As an initial matter, Plaintiffs contend that the law of the case doctrine bars the Court from  
16 considering Sony’s motion to dismiss their Express Warranty claim because (1) Judge Whelan found  
17 Plaintiffs’ pleading sufficient when he ruled on Sony’s motion to dismiss this claim in Plaintiffs’  
18 consolidated complaint, and (2) this claim remains substantively unchanged in the FACC. See Pls.’  
19 Opp’n at 6-7. The Court disagrees, and will consider Sony’s motion to dismiss Plaintiffs’ claim for  
20 breach of an Express Warranty.

21           Judge Whalen maintained Plaintiffs’ breach of Express Warranty claim but dismissed all other  
22 claims. Rather than proceed with only the claim for breach of Express Warranty, Plaintiffs chose to  
23 file an amended complaint. When Plaintiffs filed the FACC, it superseded their previous complaint,  
24 and Sony was therefore free to move again for dismissal. See, e.g., Ferdik v. Bonzelet, 963 F.2d 1258,  
25 1262 (9th Cir. 1992) (“[A]fter amendment the original pleading no longer performs any function and is  
26 treated thereafter as non-existent.”); Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542,  
27 1546 (9th Cir. 1989) (“ [A]n amended pleading supersedes the original.”); Stamas v. County of  
28 Madera, No. CV F 09-0753 LJO SMS, 2010 WL 289310, at \*4 (E.D. Cal. 2010 Jan. 15, 2010) (“[A]n

1 amended pleading is a new round of pleadings . . . and is subject to the same challenges as the original  
2 (i.e., motion to dismiss, to strike, for more definite statement).”).

3 Moreover, the law of the case doctrine is discretionary, and “is in no way a limit on a court’s  
4 power to revisit, revise, or rescind an interlocutory order prior to entry of final judgment in the case.  
5 City of Los Angeles v. Santa Monica Baykeeper, 254 F.3d 882, 888 (9th Cir. 2001) (internal quotation  
6 marks and citations omitted). Thus, the law of the case doctrine does not bar the Court from  
7 considering Sony’s motion to dismiss Plaintiffs claim for breach of Express Warranty.

8 “The general rule is that an Express Warranty does not cover repairs made after the applicable  
9 time or [other limitations] have elapsed.” Daugherty 144 Cal.App.4th at 830 (quoting Abraham v.  
10 Volkswagen of Am., Inc., 795 F.2d 238, 250 (2d Cir. 1986)). The Ninth Circuit explains the  
11 justification for this rule in Clemens v. DaimlerChrysler Corp.:

12 Every manufactured item is defective at the time of sale in the sense that it  
13 will not last forever; the flip-side of this original sin is the product’s useful life. If  
14 a manufacturer determines that useful life and warrants the product for a lesser  
15 period of time, we can hardly say that the warranty is implicated when the item  
16 fails after the warranty period expires. The product has performed as expressly  
17 warranted. Claims regarding other buyer expectations and the manufacturer’s state  
18 of mind properly sound in fraud and implied warranty.  
19 534 F.3d 1017, 1022-23 (9th Cir. 2008); see also Oestreicher, 544 F. Supp. 2d at 969-74 (applying  
20 Daugherty and dismissing UCL, FAL, and CLRA claims based on failure to disclose alleged defect in  
21 computers that manifested after warranty expired).

22 Plaintiffs argue that Hicks v. Kaufman & Broad Home Corp. establishes an exception to that  
23 general rule for products that, at the point of sale, were “substantially certain to result in malfunction  
24 during the useful life of the product.” See 89 Cal. App. 4th 908, 923 (2001); see also Long v. Hewlett-  
25 Packard Co., 316 Fed. Appx. 585, 586 (9th Cir. 2009) (citing Hicks and noting that there “*may* be an  
26 exception to [the general rule under Daugherty] for products that are truly ‘substantially likely to fail,’  
27 during their useful lives,” but affirming the district court’s dismissal of the plaintiffs’ claims for breach  
28 of Express Warranty where the product in question did not malfunction until after the warranty period  
expired) (emphasis added). If Hicks does in fact create such an exception to the general rule that an  
Express Warranty does not make a manufacturer responsible for repairs required after the warranty

1 expires, however, it does not apply to consumer goods such as televisions.<sup>9</sup> Hicks dealt with  
2 complaints that the foundations built for new homes suffered from a serious defect that caused the  
3 foundation to split into pieces and to, among other things, “permit moisture, dirt and insects to intrude  
4 into the house, [and] cause bumps in the flooring.”<sup>10</sup> 89 Cal. App. 4th at 911. While the Hicks  
5 exception may make sense for goods—such as the foundation of a home—that consumers may  
6 reasonably expect to last for decades, applying such an exception to consumer goods—such as  
7 televisions or other electronics—about which customer-expectations will be highly subjective and will  
8 vary widely “would eliminate term limits on warranties, effectively making them perpetual or at least  
9 for the ‘useful life’ of the product.” Oestreicher, 544 F. Supp. 2d at 972 (refusing to extend an Express  
10 Warranty at issue in a CLRA claim and stating that the rationale from Abraham and Daugherty  
11 “applies with even greater force to the component parts of [consumer goods such as] laptop computers  
12 where consumer expectations are even more subjective and likely unreliable, and where usage will  
13 greatly vary from consumer to consumer”); Daugherty, 144 Cal. App. 4th at 830-32 (rejecting the  
14 notion that a latent defect, discovered outside the limits of a written warranty, may form the basis for a  
15 valid express warranty claim, even if the warrantor was aware of the defect at the time of sale).

16 To expand the scope of any exception that may exist under Hicks to the extent that Plaintiffs  
17 request would swallow the general rule that an Express Warranty does not cover repairs that become  
18 necessary after the applicable time period has elapsed. The Court declines to do so. Because Plaintiffs  
19 have not alleged that the defect presented itself during the Express Warranty period, Plaintiffs’ have  
20 failed to sufficiently plead that Sony breached the Express Warranty provided with the televisions.  
21 Accordingly, the Court **DISMISSES WITH PREJUDICE** Plaintiffs’ Express Warranty claim.

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22  
23 <sup>9</sup> While the Court does not reach the issue of whether Hicks in fact establishes an exception the  
24 general rule under Daugherty in any context outside of consumer goods, the Court does note that  
25 (1) Daugherty was decided five years after Hicks, and (2) Hicks, unlike Daugherty, did not address a  
26 motion to dismiss or demurrer, but the very different procedural question of class certification.

27 <sup>10</sup> Moreover, the Hicks plaintiffs brought their action *before* the relevant express warranty  
28 period—ten years in that case—had actually expired; the issue of whether a manufacturer might face  
liability for a defect that manifests itself outside of the express warranty period arose because some  
members of the putative class had not yet suffered actual property damage but sought immediate  
repairs to prevent damage to the foundation of their homes. See Hicks, 89 Cal. App. 4th at 917  
(discussing the ten-year warranty and plaintiffs’ expert’s opinion that immediate repairs were necessary  
regardless of the foundation’s then-current condition).

1       **D. Plaintiffs' Eighth Cause of Action: Breach of Implied Warranty.**

2           Plaintiffs allege that, because the televisions were allegedly defective when sold, Sony violated  
3 both the implied warranty of merchantability and the implied warranty of fitness for a particular  
4 purpose. FACC ¶¶ 181-188.

5           Notably, Judge Whelan previously dismissed Plaintiffs' claim for breach of implied warranties  
6 for Plaintiffs' failure to sufficiently plead vertical privity. Plaintiffs argue that the Song-Beverly Act  
7 eliminated the privity requirement under California law. Pls.' Opp'n at 12-13. While some authority  
8 may support Plaintiffs' argument in the context of a Song-Beverly Act claim, see Gusse v. Damon  
9 Corp., 470 F. Supp. 2d 1110, 1116 n.9 (C.D. Cal. 2007), as discussed above, Plaintiffs' did not  
10 sufficiently plead their Song-Beverly Act claim. Thus, the vertical privity inquiry remains relevant in  
11 this case. See Doc. No. 48 at 16; Tietsworth, 2010 WL 1268093, at \*14

12           To state a claim for breach of an implied warranty, plaintiffs must establish vertical privity with  
13 the warrantor. Arabian v. Sony Elecs., Inc., 2007 WL 627977, at \*10 (S.D. Cal. 2007); Anunziato, 402  
14 F. Supp. 2d at 1141-42. As Judge Whelan previously held, Plaintiffs' suggestion that some class  
15 members may be able to establish privity through internet sales because Sony is a large internet retailer  
16 is insufficient. Doc. No. 48 at 16-17. "To survive a motion to dismiss, Plaintiffs must state the  
17 requirements for all named class members." Id. at 16. Plaintiffs have not alleged vertical privity.  
18 Therefore, they have not sufficiently pleaded their implied warranty claim.

19           Even setting aside the privity requirement, Plaintiffs' implied warranty claim fails. By limiting  
20 the duration of an Express Warranty, manufacturers may impose limits on implied warranties.  
21 Hovsepian v. Apple, 2009 WL 2591445, at \*8 (N.D. Cal. Aug. 21, 2009) (citing CAL. COM. CODE  
22 § 2316); Atkinson v. Elk Corp. of Tex., 142 Cal. App. 4th 212, 231 (2006) ("[T]he duration of the  
23 implied warranty is the length of the Express Warranty."). "The duration of the implied warranty of  
24 merchantability and where present the implied warranty of fitness shall be coextensive in duration with  
25 an express warranty which accompanies the consumer goods, provided the duration of the express  
26 warranty is reasonable; but in no event shall such implied warranty have a duration of less than 60 days  
27 nor more than one year following the sale of new consumer goods to a retail buyer." CAL. CIV. CODE §  
28 1791.1(c); see Tietsworth, 2010 WL 1268093, at \*14 (citations omitted) ("The duration of an implied



1 warranty of merchantability is one year if the express warranty is one year or more.”). Accordingly,  
2 Plaintiffs have failed to state a claim for breach of implied warranties because they have not  
3 sufficiently alleged that Sony breached the implied warranties within the one-year Express Warranty  
4 period.

5         Instead, Plaintiffs argue that Sony’s knowledge of the defect rendered the one-year limitation  
6 on the implied warranties unconscionable, and therefore unenforceable, and that Plaintiffs’ implied  
7 warranty claim should survive as a result. Pls.’ Opp’n at 9-11. That argument is unavailing.

8         First, California law expressly limits, by statute, implied warranties to one year or less (though  
9 no less than sixty days). CAL. CIV. CODE § 1791.1(c). Thus, because the temporal limit imposed on  
10 the implied warranties corresponds to the *longest* permitted under California law, they are reasonable.

11         Second, even ignoring that fact, Plaintiffs have not alleged circumstances demonstrating  
12 unconscionability. Where plaintiffs allege facts establishing unequal bargaining power such that the  
13 weaker party had no meaningful alternative to accepting the powerful party’s terms, an express  
14 warranty’s limitation of the duration of implied warranties may be deemed unconscionable. Carlson v.  
15 Gen. Motors Corp., 883 F.2d 287, 294 (4th Cir. 1989); see Aron, 143 Cal. App. 4th at 808.

16         Plaintiffs claim that the limitation on the implied warranties is unconscionable because Sony  
17 knew of but failed to disclose information about the defect when Plaintiffs purchased the televisions.  
18 Pls.’ Opp’n at 9-11. But, as discussed above, Plaintiffs have not sufficiently alleged that Sony knew of  
19 the defect before the point of sale. As a result, Plaintiffs cannot establish that Sony enjoyed superior  
20 bargaining power.

21         Additionally, any claim of unconscionability—like Plaintiffs’—based on the notion that one  
22 party did not enjoy a meaningful alternative to accepting the powerful party’s terms “may be defeated  
23 if the complaining party had reasonably available alternative sources of supply from which to obtain  
24 the desired goods or services free of the terms claimed to be unconscionable.” Tietsworth, 2010 WL  
25 1268093, at \*11 (quoting Dean Witter Reynolds, Inc. v. Superior Court, 211 Cal. App. 3d 758, 768  
26 (1989)). Plaintiffs have not alleged that they could not have easily purchased another brand of  
27 television.

28         Accordingly, Plaintiffs’ claim for breach of implied warranty is **DISMISSED WITH  
PREJUDICE.**

1  
2 **E. Plaintiffs' Sixth Cause of Action: Violation of the Magnuson-Moss Warranty Act.**

3 Plaintiffs allege that by breaching the express and implied warranties, Sony has violated the  
4 Magnuson-Moss Act, 15 U.S.C. §§ 2301-2312. FACCC ¶¶ 166-170. The Magnuson-Moss Act  
5 provides a federal cause of action for state law express and implied warranty claims. See 15 U.S.C.  
6 § 2301(7); Stearns v. Select Comfort Retail Corp., No. 08-2746 JF, 2009 WL 1635931, at \*9 (N.D.  
7 Cal. June 5, 2009). “However, [the Magnuson-Moss Act] does not expand the rights under those  
8 claims, and dismissal of the state law claims requires the same disposition with respect to an associated  
9 MMWA claim.” Stearns, 2009 WL 1635931, at \*9; see also Clemens, 534 F.3d at 1022 (“[C]laims  
10 under the Magnuson-Moss Act stand or fall with [the plaintiff’s] express and implied warranty claims  
11 under state law.”).


12 Because Plaintiffs have failed to state any valid claims under state law for breach of express or  
13 implied warranties, their MMWA claim must also fail. Accordingly, the Court **DISMISSES WITH**  
14 **PREJUDICE** Plaintiffs’ claim under the Magnuson-Moss Act.

15  
16 **CONCLUSION**

17 Defendants’ motion to dismiss the First Amended Consolidated Complaint is **GRANTED**, and  
18 the First Amended Consolidated Complaint is **DISMISSED WITH PREJUDICE**.

19 **IT IS SO ORDERED.**

20  
21  
22 **DATED:** 11/30/2010

23   
24 **IRMA E. GONZALEZ, Chief Judge**  
25 **United States District Court**