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** E-filed 8/26/2011**

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

JACOB BALTAZAR, CLAUDIA KELLER,
JOHN R. BROWNING, individually, and on behalf
of others similarly situated,

Plaintiffs,

v.

APPLE, INC.,

Defendant.

Case Number CV-10-3231-JF

ORDER¹ GRANTING MOTION TO
DISMISS WITH LEAVE TO AMEND

[Re: Docket No. 52, 55]

Plaintiffs in this consumer class action assert claims for breach of warranty, fraud, and false advertising. They allege that Defendant Apple has represents that its iPad tablet computers function outdoors without interruption, when in fact the devices overheat and shut down when used in sunny conditions. Apple moves to dismiss Plaintiffs’ second amended complaint (“SAC”) for failure to state a claim upon which relief may be granted. As was the case with the Plaintiff’s previous pleadings, the SAC fails to allege facts tending to show that Apple ever represented or claimed that the iPad would operate under such conditions, or that members of the putative class justifiably relied on such representations. Accordingly, the motion to dismiss will

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

1 be granted. However, because the Court concludes that Plaintiffs still may be able to state a
2 cognizable claim based upon the alleged defects, Plaintiffs will be granted a final opportunity to
3 amend.

4 I. BACKGROUND

5 Apple launched the iPad on January 27, 2010, claiming that the device was innovative
6 and revolutionary. (SAC ¶ 16.) The iPad also has proved to be popular, with more than four
7 million units having been sold. (*Id.*) Plaintiffs represent a putative class of iPad purchasers,
8 including both a California-only class and a nationwide class. Each of the named Plaintiffs
9 alleges that he or she chose to purchase an iPad based at least in part on what they characterize
10 as representations by Apple that the iPad could function outdoors as an e-reader and mobile
11 internet device. (*Id.* at ¶¶ 34-46.) Plaintiffs allege that the iPad does not function outdoors as
12 represented by Apple. (*Id.*) Instead, they claim that the device overheats when it is used
13 outdoors under sunny conditions even within the acceptable ambient temperature range, causing
14 it to shut down until it has time to cool. The temperature range for normal use, as defined by
15 Apple in the product specifications available on the packaging and online, ranges from thirty-two
16 to ninety-five degrees Fahrenheit. (*Id.* at ¶ 23.)

17 Plaintiffs claim that Apple produced a television commercial showing depictions of the
18 iPad being used outdoors, at least some of the time on sunny days, and posted on its website a
19 video showing scenes of the iPad being used outdoors and in the sun.² They also base their
20 claims on a statement made on Apple's website that "[r]eading the iPad is just like reading a
21 book." (*Id.* at ¶ 28.) Finally, they assert that Apple represented expressly, both on the iPad's
22 packaging and on its website, that the iPad would function normally within the specified ambient
23

24
25 ² Apple asks the Court to take judicial notice of what it claims is a copy of the television
26 commercial and web video referenced in the SAC, as well as a screen shot of the Apple page that
27 linked to the web video. In considering a motion to dismiss, the Court may take judicial notice
28 of "documents whose contents are alleged in a complaint and whose authenticity no party
questions, but which are not physically attached to the pleadings." *Branch v. Tunnell*, 14 F.3d
449, 454 (9th Cir. 1994). Plaintiffs have raised no objections to the authenticity of the
documents in question.

1 temperature range. (*Id.* at 23.)

2 Plaintiffs contend that the iPad fails to meet “reasonable consumer expectations” because
3 it “overheats so quickly under common weather conditions that it does not function for
4 prolonged use either outdoors, or in many warm conditions, for a variety of common uses.” (*Id.*
5 at ¶ 22.) They assert that Apple never informed consumers of the iPad’s limitations and that
6 Apple knew or should have known of such limitations through its product testing efforts. (Pl.’s
7 Opp. at 1:12-15.) They allege that Apple, “like many large corporations,” has an “internal
8 marketing information system which tracks customer demographics, competing products and
9 technology, customer complaints and product returns” (FAC at ¶ 35), as a result of which it
10 “reasonably should have known of the customer complaints regarding the iPad.” (*Id.*)

11 **II. MOTION TO DISMISS**

12 “Dismissal under Rule 12(b)(6) is appropriate only where the complaint lacks a
13 cognizable legal theory or sufficient facts to support a cognizable legal theory.” *Mendiondo v.*
14 *Centinela Hosp. Center*, 521 F.3d 1097, 1104 (9th Cir. 2008). For purposes of a motion to
15 dismiss, “all allegations of material fact are taken as true and construed in the light most
16 favorable to the nonmoving party.” *Cahill v. Liberty Mutual Ins. Co.*, 80 F.3d 336, 337-338 (9th
17 Cir. 1996). However, “[w]hile a complaint attacked by Rule 12(b)(6) motion to dismiss does not
18 need detailed factual allegations, a plaintiff’s obligation to provide the ‘grounds’ of his
19 ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of
20 the elements of a cause of action will not do.” *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955
21 (2007) (internal citations omitted). Leave to amend must be granted unless it is clear that the
22 complaint’s deficiencies cannot be cured by amendment. *Lucas v. Department of Corrections*, 66
23 F.3d 245, 248 (9th Cir. 1995).

24 **III. DISCUSSION**

25 **A. Breach of Warranty**

26 **1. Express Warranty**

27 To plead an action for breach of express warranty under California law, a plaintiff must
28 allege: (1) the exact terms of the warranty; (2) reasonable reliance thereon; and (3) a breach of

1 warranty which proximately caused plaintiff's injury. *Williams v. Beechnut Nutrition Corp.*, 185
2 Cal.App.3d 135, 142 (1986). In its order dismissing the FAC, the Court concluded that
3 Plaintiffs' general allegations that they relied on representations made in Apple commercials and
4 web content were insufficient to allege the terms of the warranty. The Court stated that "[a]t the
5 least, Plaintiffs must identify the particular commercial or advertisement upon which they relied
6 and must describe with the requisite specificity the content of that particular commercial or
7 advertisement." Order of Feb. 10, 2011 at 3.

8 The SAC alleges that Apple expressly warranted that the iPad "would operate properly
9 and without defects, and would, therefore, operate under normal environmental conditions, *as*
10 *advertised*," SAC ¶ 127, and that Apple's "representations regarding use of the iPad outdoors
11 and within the specified temperature range . . . constitute a description of the goods that became
12 part of the basis of the bargain with purchasers of the iPad," (SAC ¶ 129.) The SAC describes
13 the content of the images in an Apple commercial and web video available from the Apple
14 website, and quotes Apple's advertising materials as stating that "[r]eading on iPad is just like
15 reading a book."³ (SAC ¶ 28.) Finally, the complaint states that Apple expressly warranted the
16 iPad

17 against defects in materials and workmanship under normal use for a period of
18 ONE (1) YEAR from the date of retail purchase by the original end-user
19 purchaser ("Warranty Period"), and that Apple defined normal use as operating
the iPad "in a place where the temperature is between 0° and 35° C. (32° and 95°
F.).

20 (SAC ¶ 102.)

21 While Plaintiffs observe correctly that a warranty can be created by statements in
22 advertisements, *see e.g., Thomas v. Olin Mathieson Chem. Corp.*, 255 Cal. App. 2d 806, 811
23 (1967), they do not point to any cases in which a court found that advertising images alone are
24 sufficient to created an express warranty. On the other hand, Apple relies on *Maneely v. GM*,
25 108 F.3d 1176 (9th Cir. 1997), in which the court rejected warranty claims based on advertising
26

27 ³ In its order dismissing the FAC, the Court concluded that this statement appears to be
28 non-actionable puffery. Order of Feb. 10, 2011.

1 images. The court concluded that “[u]nlike a specific and unequivocal written statement,”
2 images of people in the beds of pickup trucks only “present[ed] visual images of the product set
3 in certain surrounds[,] making no explicit guarantees” that riding in the back of a moving truck
4 was safe. *Id.* at 1180.

5 Moreover, even if the Court were to conclude that Apple’s advertisement could be
6 construed as an express warranty that the iPad would work in the *exact* situations depicted, such a
7 warranty would not apply to *other* situations. Plaintiffs describe seven brief scenes in a thirty-
8 second commercial depicting the iPad in use in “outdoor locations,” some of which uses
9 allegedly occurred on a “sunny day.” SAC ¶ 24. Several of the images are on the screen for less
10 than a second, and none show the iPad being used in direct sunlight or for an extended period in
11 any environment. Declaration of Eric A. Long, Ex. A. Even under the most liberal pleading
12 standard, these brief clips of iPad use in some outdoor locations cannot be construed as an
13 express warranty that the device will operate without interruption in direct sunlight or in outdoor
14 conditions generally.

15 Plaintiff’s allegations based on the web video linked to Apple’s website are similarly
16 deficient. The Apple web page containing the link to the video clearly describes the video as
17 having been created by “iPad owner Jesse Rosten,” and it quotes Rosten’s statement that, “This
18 is an exploration of what is possible, not necessarily what is practical.” Apple also adds a
19 footnote to Rosten’s statement, warning “Do not attempt.” Again, the video includes only brief
20 depictions of outdoor use.

21 The SAC alleges that the iPad is packaged with an express warranty against defects in
22 materials or workmanship under normal use, and that Apple itself defines normal use to include
23 operation in a place where the ambient temperature is between thirty-two and ninety-five degrees
24 Fahrenheit. However, the SAC does not allege that the product’s overheating and temporarily
25 shutting down under certain conditions constitutes a defect in materials or workmanship. *See*
26 SAC ¶ 128. While the warranty covers defects that arise if the iPad is used normally, there is no
27 warrantee that the device will operate without interruption under all conditions within a specified
28 range.

2. Implied Warranty of Merchantability

Cal. Civ. Code § 1792 provides that “every sale of consumer goods that are sold at retail in this state shall be accompanied by the manufacturer’s and the retail seller’s implied warranty that the goods be merchantable.” The implied warranty of merchantability “does not impose a general requirement that goods precisely fulfill the expectation of the buyer. Instead, it provides for a minimum level of quality.” *Am. Suzuki Motor Corp. v. Superior Court*, 37 Cal. App. 4th 1291, 1296 (Cal. Ct. App. 1995). Goods in conformity with the implied warranty of merchantability: “(1) Pass without objection in the trade under the contract description[;] (2) Are fit for the ordinary purposes for which such goods are used[;] (3) Are adequately contained, packaged, and labeled[;] and (4) Conform to the promises or affirmations of fact made on the container or label.” Cal. Civil Code § 1791.1(a). In *Kent v. Hewlett-Packard Co.*, 72 U.C.C. Rep. Serv. 2d (Callaghan) 628 (N.D. Cal. 2010), this Court concluded that the plaintiffs had to show more than that the alleged defect was “inconvenient,” rather, they had to show that the defect renders the defendant’s computers unfit for their ordinary purpose.

In its order dismissing the FAC, the Court noted that, “Plaintiffs must identify with greater specificity which of these functions are the ‘ordinary purpose’ of the iPad and how the device was unfit for that purpose.” Order of Feb. 10, 2011, at 4. The SAC alleges that the iPad is marketed as a mobile tablet computer that can be used “*anywhere*, whether it be while sitting in a park, at an outdoor café, or on one’s own front stoop.” SAC ¶ 2-3 (emphasis in original). However, the SAC alleges not that the iPad is unfit for use *anywhere*, but that it is unfit for use *everywhere* and under all conditions. While the SAC alleges that the iPad does not fulfill the expectation of the named Plaintiffs, it does not plead facts tending to show that the device fails to meet “a minimum level of quality” for a tablet computer.

3. California Song-Beverly Consumer Warranty Act

To state a viable claim under California’s Song-Beverly Consumer Warranty Act, a plaintiff must plead sufficiently a breach of warranty under California law. *Birdsong v. Apple, Inc.*, 590 F.3d 955, 958 n.2 (9th Cir. 2009). As discussed above, Plaintiffs have failed to state a

1 claim for breach of an express or an implied warranty.

2 **B. Fraud Based Claims**

3 **1. Rule 9(b) Pleading Standard**

4 Under Fed. R. Civ. P. 9(b), “[i]n all averments of fraud or mistake, the circumstances
5 constituting fraud or mistake shall be stated with particularity.” A plaintiff must set forth more
6 than the neutral facts necessary to identify the transaction; he or she also must explain why the
7 statement or omission complained of was false or misleading. *In re GlenFed, Inc. Securities*
8 *Litigation*, 42 F.3d 1541, 1548 (9th Cir. 1994).

9 **2. Common-Law Claims**

10 To state a claim for fraud or intentional misrepresentation under California law, a
11 plaintiff must allege: (1) misrepresentation (false representation, concealment, or nondisclosure);
12 (2) knowledge of falsity (or scienter); (3) intent to defraud, i.e., to induce reliance; (4) justifiable
13 reliance; and (5) resulting damage. *Lazar v. Superior Ct.*, 12 Cal.4th 631, 638 (1996) (fraud);
14 *Anderson v. Deloitte & Touche*, 56 Cal.App.4th 1486, 1474 (1997) (intentional
15 misrepresentation). “The same elements comprise a cause of action for negligent
16 misrepresentation, except there is no requirement of intent to induce reliance.” *Cadlo v. Owens-*
17 *Illinois, Inc.*, 125 Cal.App.4th 513, 519 (2004).

18 As discussed above, Plaintiffs have failed to allege adequately that Apple misrepresented
19 the conditions under which the iPad would operate or that they justifiably could rely on those
20 representations in believing that the iPad would operate as they expected. The SAC alleges that
21 Apple made knowing misrepresentations in its thirty-second commercial, the web video
22 available from its website, its statement that the iPad can be used “just like a book,” and the
23 temperature restrictions listed in the product specifications. However, none of the named
24 plaintiffs claims to have relied on Apple’s statement that the iPad can be used “just like a book,”
25 which, as noted above, is mere puffery. In addition, in light of the clear disclaimers associated
26 with the web video, Plaintiffs have not alleged sufficient facts to support a conclusion that
27 reliance upon any representations made in that video was reasonable.

28 Although the SAC provides greater specificity with respect to the images used in Apple’s

1 television advertisement, the advertisement itself contains only brief depictions of the iPad being
2 used outdoors, and none of these appear to be in direct sunlight. Plaintiffs do not explain how
3 they reasonably could rely on the images in the advertisement as a basis for believing that the
4 iPad could be used for an extended period in the sun. Plaintiffs claim that they relied on the
5 advertisement to conclude that the device would operate “outdoors,” SAC ¶ 35, or “under the
6 conditions in the advertisement,” SAC ¶ 35, but they allege only that the device fails to operate
7 in a limited subset of outdoor conditions that are not depicted in the advertisement.

8 In addition, as Apple and this Court have observed, Plaintiffs do not assert a product
9 liability claim. Unlike a design defect case, in which where the inquiry is whether a product is
10 manufactured in accordance with its intended specifications, *Brothers v. Hewlett-Packard Co.*,
11 No. C-06-02254 RMW, 2007 WL 485979, at *4 (N.D. Cal. Feb. 12, 2007), Plaintiffs’ legal
12 theories require that they make “a bona fide claim of actual reliance,” *Cadlo v. Owens-Illinois,*
13 *Inc.*, 125 Cal. App. 4th 513, 519 (2004). The SAC does not explain how Plaintiffs reasonably
14 could rely on the temperature specifications to conclude that the iPad would never shut down
15 within the specified temperature range. The temperature specifications do not purport to
16 describe fully the environmental conditions under which the device would operate. To use an
17 obvious example, one could not conclude from the specifications that the iPad would be
18 expected to operate in a rain or snow storm simply because it is designed to operate at certain
19 ambient temperatures.

20 Plaintiffs also allege that Apple had a duty to disclose the iPad’s functional limitations.
21 They argue that in choosing to disclose certain facts about the product, Apple had a
22 corresponding duty to disclose information inconsistent with those disclosures. They claim that
23 because it represented that the iPad would function outdoors without interruption and in warm
24 weather conditions, Apple was obligated to disclose the alleged problems with operating the
25 device in direct sunlight. However, as noted above, Plaintiffs have not alleged facts supporting
26 their claim that Apple ever represented that the iPad would function outdoors without
27 interruption under all conditions. To maintain a claim for fraudulent omission, Plaintiff must
28 allege specifically a representation actually made by the defendant that is contrary to the

1 omission, or an omission of a fact that the defendant was obliged to disclose. *See Daughtery v.*
2 *American Honda Motor Co.*, 144 Cal. App. 4th 824, 835 (2006). The SAC fails to do either.

3 **C. Consumer Protection Statutes**

4 Plaintiffs also seek relief under three California consumer protection statutes: the Unfair
5 Competition Law (UCL), which makes actionable any “unlawful, unfair or fraudulent business
6 act or practice,” Cal. Bus. & Prof. Code § 17200; the False Advertising Law (FAL), which
7 makes it unlawful to make or disseminate any statement concerning property or services that is
8 “untrue or misleading . . . ,” *Id.* § 17500; and the Consumer Legal Remedies Act, which prohibits
9 “unfair methods of competition and unfair or deceptive acts or practices” generally, Cal.
10 Civ.Code § 1770. Claims made under these statutes are governed by the “reasonable consumer”
11 test which focuses on whether “members of the public are likely to be deceived.” *Werberl v.*
12 *Pepsico, Inc.*, No. C 09-04456 SBA, 2010 WL 2673860, at *3 (N.D. Cal July 2, 2010) (quoting
13 *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 938 (9th Cir. 2008).

14 “Under the reasonable consumer standard, [a plaintiff] must show that members of the
15 public are likely to be deceived. The California Supreme Court has recognized that these laws
16 prohibit not only advertising which is false, but also advertising which, although true, is either
17 actually misleading or which has a capacity, likelihood or tendency to deceive or confuse the
18 public.” *Videtto v. Kellogg USA*, No. 2:08-cv-01324-MCE-DAD, 2009 WL 1439086, at *3
19 (E.D. Cal. May 21, 2009) (quoting *Freeman v. Time, Inc.*, 68 F.3d 285, 289 (9th Cir. 1995).
20 While whether a business practice is deceptive is usually a question of fact not appropriate for a
21 motion to dismiss, *see Williams*, 552 F.3d at 938, “[i]f an alleged misrepresentation would not
22 deceive a reasonable consumer or amounts to mere puffery, then any cause of action having
23 deception as an element may be addressed, as a matter of law, on a motion to dismiss, *McKinnis*
24 *v. Kellogg USA*, No. CV 07-2611 ABC (Rcx), 2007 WL 4766060, at *3 (C.D. Cal. Sept. 19,
25 2007).

26 As detailed above, the representations alleged cannot be understood to claim that the iPad
27 will operate under the specific environmental conditions under which it allegedly tends to shut
28 down. Plaintiffs have not shown why a reasonable consumer would be deceived by the alleged

1 misrepresentations.

2 **D. Motion to Strike Class Allegations**

3 The Court will defer consideration of Apple's motion to strike Plaintiffs' class allegations
4 until Plaintiffs have had a final opportunity to amend their pleading.

5 **III. ORDER**

6 Good cause therefore appearing, the motion to dismiss is GRANTED, WITH LEAVE TO
7 AMEND. Any amended complaint shall be filed within (30) days of the date of this order.

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10 IT IS SO ORDERED

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13 DATED: August 26, 2011

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16 JEREMY FOGEL
17 United States District Judge
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