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

LAURA MARCHANTE, et al., on behalf of
themselves and all others similarly situated,

Plaintiff,

vs.

SONY CORPORATION OF AMERICA,
INC., SONY ELECTRONICS, INC., and
SONY CORP.,

Defendants.

CASE NO. 10CV795 JLS (RBB)

**ORDER GRANTING
DEFENDANTS' MOTION TO
DISMISS**

(ECF No. 35)

Presently before the Court is Defendants Sony Corporation of America, Sony Electronics, Inc., and Sony Corporations's (collectively, "Defendants" or "Sony") motion to dismiss Plaintiffs' consolidated second amended complaint ("CSAC"). (Mot. to Dismiss, ECF No. 35) Also before the Court are Plaintiffs' opposition, (Resp. in Opp'n, ECF No. 37), and Defendants' reply in support, (Reply in Supp., ECF No. 38). The hearing set for the motion on December 1, 2011, was vacated, and the matter taken under submission on the papers. Having considered the parties' arguments and the law, the court **GRANTS** Defendants' motion to dismiss.

This Order incorporates by reference the background facts as set forth in this Court's July 8, 2011 Order. (Order 1-2, ECF No. 33) In short, Plaintiffs claim that Sony violated several consumer protection statutes and breached express and implied warranties by selling them defective televisions. Plaintiffs' CSAC asserts seven claims: (1) Violation of California Business and Professional Code § 17200, *et seq.* ("Unfair Competition Law" or "UCL"); (2) Violation of California Consumers Legal Remedies Act ("CLRA"), Cal. Civ. Code § 1750, *et seq.*; (3) Strict

1 Liability¹; (4) Breach of Express Warranty; (5) Breach of Implied Warranty; (6) Violation of the
 2 Song Beverly Consumer Warranty Act, Cal. Civ. Code § 1792, *et seq.*; and (7) Violation of
 3 Magnuson-Moss Act, 15 U.S.C. § 2301, *et seq.*

4 LEGAL STANDARD

5 Federal Rule of Civil Procedure 12(b)(6) allows a party to assert by motion the defense that
 6 the complaint “fail[s] to state a claim upon which relief can be granted,” generally known as a
 7 motion to dismiss. The Court evaluates whether a complaint states a cognizable legal theory and
 8 sufficient facts in light of Federal Rule of Civil Procedure 8(a), which requires a “short and plain
 9 statement of the claim” showing that the pleader is entitled to relief. Although Rule 8 “does not
 10 require ‘detailed factual allegations,’ . . . it [does] demand[] more than an unadorned, the-
 11 defendant-unlawfully-harmed-me accusation.” *Ashcroft v. Iqbal*, — U.S.—, 129 S. Ct. 1937,
 12 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). In other words, “a
 13 plaintiff’s obligation to provide the ‘grounds’ for his ‘entitle[ment] to relief’ requires more than
 14 labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.”
 15 *Twombly*, 550 U.S. at 555 (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). “Nor does a
 16 complaint suffice if it tenders ‘naked assertion[s]’ devoid of ‘further factual enhancement.’” *Iqbal*,
 17 129 S. Ct. at 1949 (citing *Twombly*, 550 U.S. at 557).

18 “To survive a motion to dismiss, a complaint must contain sufficient factual matter,
 19 accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Id.* (quoting *Twombly*,
 20 550 U.S. at 570); *see also* Fed. R. Civ. P. 12(b)(6). A claim is facially plausible when the facts
 21 pleaded “allow[] the court to draw the reasonable inference that the defendant is liable for the
 22 misconduct alleged.” *Iqbal*, 129 S. Ct. at 1949 (citing *Twombly*, 550 U.S. at 556). That is not to
 23 say that the claim must be probable, but there must be “more than a sheer possibility that a
 24 defendant has acted unlawfully.” *Id.* Facts “‘merely consistent with’ a defendant’s liability” fall
 25 short of a plausible entitlement to relief. *Id.* (quoting *Twombly*, 550 U.S. at 557). Further, the
 26 Court need not accept as true “legal conclusions” contained in the complaint. *Id.* This review
 27

28 ¹ Plaintiffs withdraw their strict liability claim in their opposition brief. (Resp. in Opp’n 2 n.2,
 ECF No. 37)

1 requires context-specific analysis involving the Court’s “judicial experience and common sense.”
 2 *Id.* at 1950. “[W]here the well-pleaded facts do not permit the court to infer more than the mere
 3 possibility of misconduct, the complaint has alleged— but it has not ‘show[n]’— ‘that the pleader
 4 is entitled to relief.’” *Id.*

5 When a motion to dismiss is granted, “leave to amend should be granted ‘unless the court
 6 determines that the allegation of other facts consistent with the challenged pleading could not
 7 possibly cure the deficiency.’” *DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir.
 8 1992) (quoting *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir.
 9 1986)). In other words, the Court may deny leave to amend if amendment would be futile. *See*
 10 *id.*; *Schreiber Distrib.*, 806 F.2d at 1401.

11 ANALYSIS

12 Plaintiffs’ CSAC again raises claims of alleged violations California’s consumer protection
 13 statutes and breach of implied and express warranties, (CSAC, ECF No. 34), claims which this
 14 Court previously dismissed for failure to state a claim in its July 8, 2011 Order, (Order, ECF No.
 15 33).

16 **1. Violation of California’s Consumer Protection Statutes**

17 The CSAC drops the False Advertising Law claim from the prior complaint, but reasserts
 18 the Unfair Competition Law and CLRA claims.

19 ***A. California Business and Professional Code § 17200***

20 California’s UCL prohibits acts of unfair competition, which includes “any unlawful,
 21 unfair or fraudulent business act or practice.” Cal. Bus. & Prof. Code § 17200; *see also In re*
 22 *Pomona Valley Medical Grp. Inc.*, 476 F.3d 665, 674 (9th Cir. 2007). “Because [the UCL] is
 23 written in the disjunctive, it establishes three varieties of unfair competition—acts or practices
 24 which are unlawful, or unfair, or fraudulent.” *Podolsky v. First Healthcare Corp.*, 58 Cal. Rptr. 2d
 25 89, 98 (Cal. Ct. App. 1996). Here, Plaintiffs again allege that Sony “engaged in ‘unfair’ business
 26 acts or practices” by selling, promoting, and recalling the television models at issue. (CSAC
 27 ¶¶ 45–47, ECF No. 34)

28 //

1 “An act or practice is unfair if the consumer injury is substantial, is not outweighed by any
 2 countervailing benefits to consumers or to competition, and is not an injury the consumers
 3 themselves could reasonably have avoided.” *Daugherty v. Am. Honda Motor Co., Inc.*, 51 Cal.
 4 Rptr. 3d 118, 129 (Cal. Ct. App. 2006). The Court previously dismissed Plaintiffs’ unfair business
 5 act claim because Plaintiffs failed to allege a substantial consumer injury:

6 Plaintiffs here do not allege that the televisions exhibited any problems during the
 7 one-year limited warranty period; every alleged problem surfaced several years
 8 after purchase. Any failure to disclose relates to a defect that arose years after the
 express warranty expired. And any failure to disclose therefore does not
 constitute substantial injury.

9 (Order 4, ECF No. 33) Plaintiffs have amended their complaint to include allegations that the
 10 televisions “fail[ed] to operate properly from the outset,” (CASC ¶ 3, ECF No. 34), given their
 11 tendency to “overheat[] . . . since the Television was first used by the consumer,” (*id.*).

12 Plaintiffs’ amendments do not cure the deficiencies of the prior complaint. Though
 13 Plaintiffs contend that the CSAC now alleges “that the defects manifested themselves within the
 14 warranty periods,” (CASC, ECF No. 34), the fact remains that the defects did not become apparent
 15 to the Plaintiff-consumers until after the warranty expired. Thus, the complaint still falls short of
 16 alleging that the defects caused the televisions to malfunction within the warranty period, as is
 17 required to allege a substantial consumer injury under *Daugherty*.² *See In re Sony Grand WEGA*
 18 *KDF-E A10/A20 Series Rear Projection HDTV TV Litig. (In re Sony)*, 758 F. Supp. 2d 1077, 1091
 19 (S.D. Cal. 2010) (“Plaintiffs have not alleged that the televisions failed to function as warranted
 20 throughout the term of the [warranty]. As a result, Plaintiffs’ claim under the UCL’s unfair prong
 21 fails because they have not alleged a substantial injury.”).

22 //

24 ² Although it may be contended that the televisions did not “function[] precisely as warranted
 25 throughout the term of [the] express warranty,” *Daugherty*, 51 Cal. Rptr. 3d at 130, given that they
 26 allegedly overheated upon first use, Plaintiffs nevertheless concede that they did not discover the
 27 defect until after the warranty period had expired, (*see* CSAC ¶¶ 6–9, ECF No. 34). Thus, it strains
 28 credulity to argue that the consumer injury that occurred as a result of the overheating within the
 warranty period—the only period relevant for purposes of the UCL claim—was “substantial,” given
 that none of the named Plaintiffs even noticed it. Though Plaintiff Phrank Ochoa allegedly “noted a
 burning smell in his home,” the complaint neither alleges that Mr. Ochoa linked the burning smell to
 the television within the warranty period, nor that the burning smell occurred within the warranty
 period. (*See id.* ¶ 7)

1 Accordingly, Plaintiffs' UCL unfairness claim arising from the alleged defect fails.
 2 Because it appears that Plaintiffs are unable to amend their complaint to sufficiently state a UCL
 3 claim, this claim is **DISMISSED WITH PREJUDICE**.

4 ***B. California Consumers Legal Remedies Act, California Civil Code § 1750***

5 The CLRA proscribes "unfair methods of competition and unfair or deceptive acts or
 6 practices" in transactions for the sale or lease of goods to consumers. Cal. Civ. Code § 1770. The
 7 unlawful acts include: (1) "Representing that goods . . . have . . . characteristics . . . which they do
 8 not have," *id.* § 1770(a)(5); and (2) "Representing that goods . . . are of a particular standard,
 9 quality, or grade . . . if they are of another," *id.* § 1770(a)(7).³

10 As a general rule, manufacturers cannot be liable under the CLRA for failures to disclose a
 11 defect that manifests itself after the warranty period has expired. *Daugherty*, 51 Cal. Rptr. 3d at
 12 126–28. An exception exists, however, if the manufacturer fails to disclose information and the
 13 omission is "contrary to a representation actually made by the defendant" or the omission pertains
 14 to "a fact the defendant was obligated to disclose." *Id.* at 126. Here, all of Plaintiffs alleged
 15 CLRA violations pertain to Sony's alleged failures to disclose, (CASC ¶ 52, ECF No. 34); the
 16 question therefore is whether Sony carried any obligation to disclose the alleged defect.

17 "[U]nder the CLRA, a manufacturer's duty to disclose information related to [a] defect that
 18 manifests itself after the expiration of an Express Warranty is limited to issues related to product
 19 safety." *In re Sony*, 758 F. Supp. 2d at 1095 (citing *Oestreicher v. Alienware Corp.*, 544 F. Supp.
 20 2d 964, 969 (N.D. Cal. 2008)). Moreover, in order to have a duty to disclose, the manufacturer
 21 must be "aware of the defect at the time that Plaintiffs purchased," as a manufacturer has "no duty
 22 to disclose facts of which it was unaware." *Id.*

23 In dismissing the prior complaint, the Court held that Plaintiffs failed to invoke the safety
 24 exception because the complaint was devoid of "allegations that anyone or any property—other
 25 than the television itself—was damaged by the allegedly defective televisions." (Order 6, ECF
 26 No. 33) Even assuming Plaintiffs' allegations that the televisions pose a safety risk are sufficient
 27

28 ³ The CSAC drops Plaintiffs' claim under section 1770(a)(9) which prohibits "[a]dvertising goods or services with intent not to sell them as advertised."

1 to invoke the safety exception in that the televisions allegedly “pos[e] a fire hazard due to . . . the
2 internal componentry beginning to melt and degrade as soon as the Television is plugged in and
3 used,” (CSAC ¶ 52, ECF No. 34), Plaintiffs have failed to allege that Sony was aware of this
4 safety hazard at the time Plaintiffs purchased the televisions.

5 First, Plaintiffs allege that “Sony has known about the Safety Defect contained in the
6 Televisions since at least 2008 and possibly even earlier.” (*Id.* ¶ 20) But the Plaintiffs bought
7 their televisions in 2004, 2005, and 2006. (*Id.* ¶¶ 6–9) So under Plaintiffs’ own allegations, Sony
8 may not have been aware of the defect at the time Plaintiffs made their purchases, or even within
9 the respective one-year post-purchase warranty periods.

10 Second, all of Plaintiffs allegations regarding Sony’s knowledge of the alleged defect
11 pertain to Sony’s knowledge that the defect causes excess heat that results in the deterioration of
12 the television display, not that the defect poses any safety hazard. (*See id.* ¶¶ 21–23) Specifically,
13 Plaintiffs point to the “disadvantages” listed in Sony’s patent filings as far back as 1996 as
14 evidence of Sony’s awareness of the alleged defect; but none of those disadvantages acknowledge
15 any risk of fire or other safety hazards. Thus, Plaintiffs have not alleged facts demonstrating that
16 Sony was aware of the alleged safety defect at the time Plaintiffs purchased their televisions in
17 2004, 2005, and 2006. And without awareness of the alleged safety defect, Sony had no duty to
18 disclose. Accordingly, Sony’s motion to dismiss Plaintiffs’ CLRA claim is **GRANTED**; the
19 CLRA claim is **DISMISSED WITHOUT PREJUDICE**.

20 **2. Breach of Warranties**

21 Once again, Plaintiffs raise four warranty claims: (1) Breach of Express Warranty;
22 (2) Breach of Implied Warranty; (3) Violations of the Song Beverly Consumer Warranty Act; and
23 (4) Violation of the Magnuson-Moss Act. (CASC, ECF No. 34)

24 **A. Breach of Express Warranty**

25 Plaintiffs allege breach of the Limited Warranty and the Limited Extended Warranty.
26 (CSAC ¶¶ 72–82, ECF No. 34) The Limited Warranty provides, in relevant part:

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

1. LABOR: For a period of one (1) year from the date of purchase, if this Product

1 is determined to be defective, Sony will repair or replace the Product, at its
 2 option, at no charge, or pay the labor charges to any Sony authorized service
 facility. After the Warranty Period, you must pay for all labor charges.

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

5 (Req. for Judicial Notice (“RJN”), Ex. A, ECF No. 35-4)⁴ The Court previously dismissed
 6 Plaintiffs’ claim for breach of the Limited Warranty because the alleged defects did not manifest
 7 until after the one-year warranty period expired. (Order 8, ECF No. 33) The CSAC is insufficient
 8 for the same reason.

9 The general rule is that an express warranty does not cover repairs made after the
 10 applicable warranty period—here, one year after purchase—has elapsed. *See Daugherty*, 51 Cal.
 11 Rptr. 3d at 122 (citing *Abraham v. Volkswagen of Am., Inc.*, 795 F.2d 238, 250 (2d Cir. 1986)).
 12 None of the plaintiffs here sought repair or replacement of their televisions within the warranty
 13 period.⁵ Thus, Plaintiffs must rely on the Limited Extended Warranty for their breach of express
 14 warranty claims.

15 The Limited Extended Warranty provides:

16 It has come to our attention that a limited number of Grand WEGA rear projection
 17 televisions . . . may exhibit warping to the lamp access door. In rare cases, some
 additional components may also become damaged as a result.

18 Sony would like to assure its customers that this issue has been evaluated
 19 extensively and that there are no product safety concerns caused by this issue.

20 Additionally, through March 31, 2012, Sony will repair the lamp access door and
 21 any other components damaged as a result at no charge for any of the covered
 22 televisions. Customers who experience this issue should contact Sony . . . to
 schedule a repair. Sony will only provide free repair to covered televisions that
 exhibit this specific condition.

23 ⁴ Defendants request the Court take judicial notice of various documents, including the Limited
 24 Warranty and Limited Extended Warranty, pursuant to the “incorporation by reference” doctrine.
 25 (RJN 2, ECF No. 35-4 (citing *Van Buskirk v. Cable News Network, Inc.*, 284 F.3d 977, 980 (9th Cir.
 2002))) Plaintiffs’ CSAC references both warranties extensively, and Plaintiffs have not opposed
 Defendants’ request. Thus, the Court **GRANTS** Defendants’ request.

26 ⁵ Plaintiffs again attempt to persuade the Court that Sony breached the express and implied
 27 warranties at the time of delivery by tendering a product that “contains an inherent defect that is
 28 substantially certain to result in malfunction during the useful life of the product.” (Resp. in Opp’n
 19, ECF No. 37 (citing *Mexia v. Rinker Boat Co.*, 95 Cal. Rptr. 3d 285, 290–91 (Cal. Ct. App. 2009)))
 The Court has already considered and rejected this argument, however: “The Court finds Plaintiff’s
 reliance on *Mexia* unconvincing. The type of defect described by *Mexia* is not alleged in this case,
 and the rule that *Mexia* proposes is contrary to existing law.” (Order 8, 9–11, ECF No. 33)

1 All other terms of the Sony limited warranty continue to apply. Sony utilizes a
 2 network of hundreds of qualified independent third-party servicers to perform in-
 home television warranty service. Sony, through its Authorized Servicer
 Network, will repair your set within 30 days of your initial contact.

3 (RJN, Ex. B, ECF No. 35-4). The parties interpret the Limited Extended Warranty to mean that in
 4 addition to their right to repair, Sony also retains the ability to replace any televisions suffering
 5 from such defect. (*See* Mot. to Dismiss 21, ECF No. 35; Resp. in Opp'n 18, ECF No. 37)

6 Again, Plaintiffs have failed to allege any violation of the Limited Extended Warranty.
 7 None of the four named plaintiffs alleged that Sony either refused to repair any covered defects or
 8 refused to replace any televisions suffering from covered defects. Plaintiffs Marchante and Sefo
 9 both declined Sony's offer of a refurbished television. (CSAC ¶¶ 6, 8, ECF No. 34) Though
 10 Plaintiff Ochoa alleges that Sony refused to repair the television, he still fails to allege that Sony
 11 *refused* to replace the television, alleging only that "Sony did not offer a replacement television."
 12 (*Id.* ¶ 7) The distinction is critical, given that Sony retains this course of action until March 31,
 13 2012. Similarly, Plaintiff Solis has not alleged that Sony has refused to repair or replace her
 14 television, alleging only that, to date, "Sony has never offered Ms. Solis a replacement television
 15 of equal quality and value at no cost to her." (*Id.* ¶ 9)

16 Thus, because Plaintiffs have again failed to allege breach of either the Limited Warranty
 17 or the Limited Extended Warranty, Plaintiffs fourth claim for breach of express warranty is
 18 **DISMISSED WITH PREJUDICE.**⁶

19 ***B. Breach of Implied Warranty and Violations of the Song Beverly Consumer Warranty Act,***
 20 ***Cal. Civ. Code § 1792, et seq.***

21 Plaintiffs' fifth claim is for breach of the implied warranty of merchantability and the
 22 implied warranty of fitness for a particular purpose, and the sixth claim is for violations of the
 23 Song Beverly Consumer Warranty Act, Cal. Civ. Code § 1792, *et seq.* (CASC, ECF No. 34) The
 24 Song Beverly Act claim concerns breach of implied warranty under sections 1791.1, 1792, and
 25 1792.1, and failure to repair or replace defective products during the warranty period under
 26

27 ⁶ Plaintiffs note in a footnote in their opposition that "Plaintiffs also contend the limitations
 28 of Sony's Warranty are void as an unconscionable contract term due to the unequal knowledge and
 bargaining power of the parties. The Court previously rejected this argument; Plaintiffs raise it here
 only to preserve their appellate rights on the issue." (Resp. in Opp'n 23 n.14, ECF No. 37); (*see also*
 Order 11-12, ECF No. 33 (considering and rejecting Plaintiffs's unconscionability argument))

1 sections 1793.2(a)(3) and 1793.2(b).

2 Plaintiffs' implied warranty and Song Beverly Act claims again fail because they are
3 untimely. Subject to a sixty-day minimum and one-year maximum, implied warranties are equal
4 in duration to express warranties. *See* Cal. Civ. Code § 1791.1(c); *Tietsworth v. Sears*, 720 F.
5 Supp. 2d 1123, 1142 (N.D. Cal. 2010). The implied warranty here had a one-year duration to
6 match that of the express warranty. And because Plaintiffs purchased the televisions in 2004,
7 2005, and 2006, the implied warranties would have expired by 2007, at the latest. But the CSAC
8 does not contain allegations that the televisions failed to function as warranted or that Plaintiffs
9 sought warranty coverage during the one-year period following their respective purchases. Thus,
10 Plaintiffs fifth and seventh claims are **DISMISSED WITH PREJUDICE**.

11 ***C. Violations of the Magnuson-Moss Act, 15 U.S.C. § 2301***

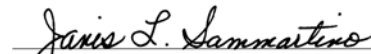
12 “The Magnuson-Moss Act provides a federal cause of action for state law express and
13 implied warranty claims.” *In re Sony*, 758 F. Supp. 2d at 1101. Because Plaintiffs fail to state any
14 valid state warranty claims, their Magnuson-Moss Act claim necessarily fails. This claim is
15 **DISMISSED WITH PREJUDICE**.

16 **CONCLUSION**

17 For the reasons stated above, the Court **GRANTS** Defendants' motion to dismiss
18 Plaintiffs' CSAC. Plaintiffs' CLRA claim is **DISMISSED WITHOUT PREJUDICE**; all other
19 claims are **DISMISSED WITH PREJUDICE**. Plaintiffs, if they wish, **SHALL FILE** any
20 amended complaint within 28 days of this Order being electronically docketed.

21 **IT IS SO ORDERED.**

22 DATED: December 5, 2011

23 
24 Honorable Janis L. Sammartino
25 United States District Judge
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